

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

**AFFIRMATION OF
CHARLES WEINSTOCK**

CHARLES WEINSTOCK, an attorney admitted to practice law before
the courts of the State of New York, affirms under penalty of perjury:

1. I am an attorney for Petitioners-Plaintiffs (“Petitioners”) and am
fully familiar with the facts of the case. I submit this affirmation (1) to recount
those facts and (2) to introduce seven exhibits that supplement the exhibits I filed
with my October 27, 2022 affirmation.

2. This case is a challenge to the General Project Plan (the “GPP”) of
Respondent-Defendant New York State Urban Development Corporation, doing
business as Empire State Development (“ESD”), to override New York City’s
zoning laws and grant 18 million square feet of development rights to the private
owners of eight parcels surrounding Penn Station.

3. 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. According to ESD, the primary purpose of the GPP is to generate “essential revenue” to help fund the Master Plan. Ex. A at 1. And yet ESD failed to supply evidence that the GPP would actually serve this purpose. Indeed, it has disavowed its obligation to do so. Ex. B at A-14.

4. Petitioners now challenge the GPP as arbitrary and capricious and a violation of the State Environmental Quality Review Act (“SEQRA”) and the Urban Development Corporation Act (“UDCA”). Petitioners also challenge the resolution by Respondent-Defendant Public Authorities Control Board (“PACB”), the state panel that oversees ESD, to authorize ESD to enter into a revenue-sharing agreement with the City in connection with the GPP. PACB had no authority under the Public Authorities Law to approve only one component of the project’s financing; the statute expressly limits its jurisdiction to consideration of the adequacy of funding for the GPP as a whole.

Penn Station

5. Penn Station is the busiest transportation hub in North America, serving the National Railroad Passenger Corporation (“Amtrak”), the New Jersey Transit Corporation (“NJ Transit”), and the Metropolitan Transportation Authority (the “MTA”), which owns the Long Island Rail Road. When the Penn

Station Access Project is completed, it will also serve the New Haven line of the MTA's Metro-North Railroad. (Amtrak, NJ Transit, and the MTA are collectively referred to as the "Railroads.")

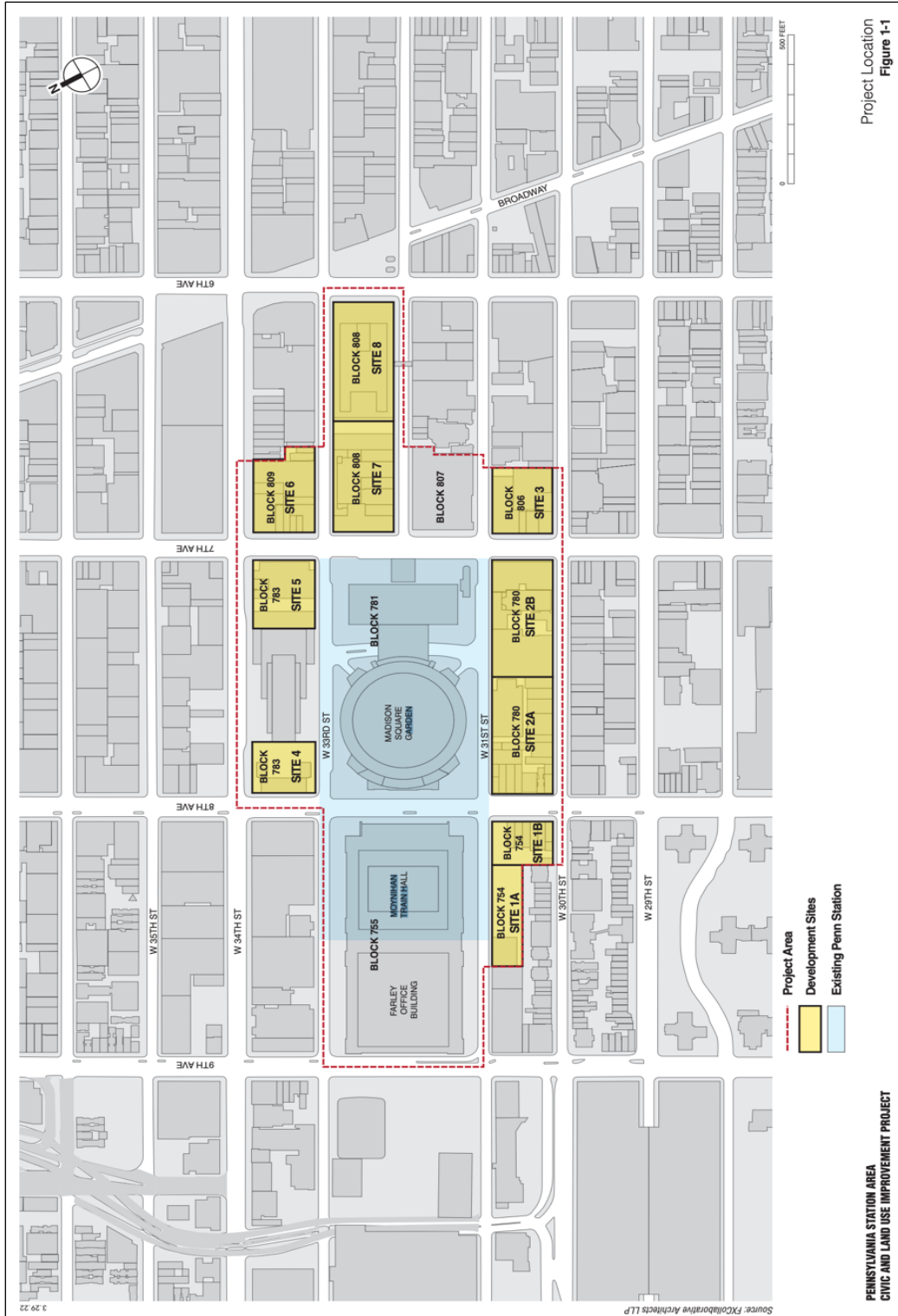
6. Penn Station is part of a larger transportation complex that includes Moynihan Train Hall, three adjoining subway stations, the PATH train, and a web of transit entrances and corridors. Currently, the station has 21 tracks and 11 platforms. Ex. C-2 at S-5 to S-7. Amtrak is the title owner of the land below ground, where it leases space to NJ Transit and the MTA. Above ground, a Madison Square Garden ("MSG") subsidiary is the title owner of the property on the west side of the block, and a Vornado Realty Trust ("Vornado") subsidiary is the title owner of the property on the east side. Ex. CCC at 4.

The GPP

7. The GPP project area (the "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 (the "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 (the "Development Sites"). Ex. A at 2.

8. The dotted red line in the following site plan, taken from the Final Environmental Impact Statement ("FEIS"), 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 Development Sites are in yellow:



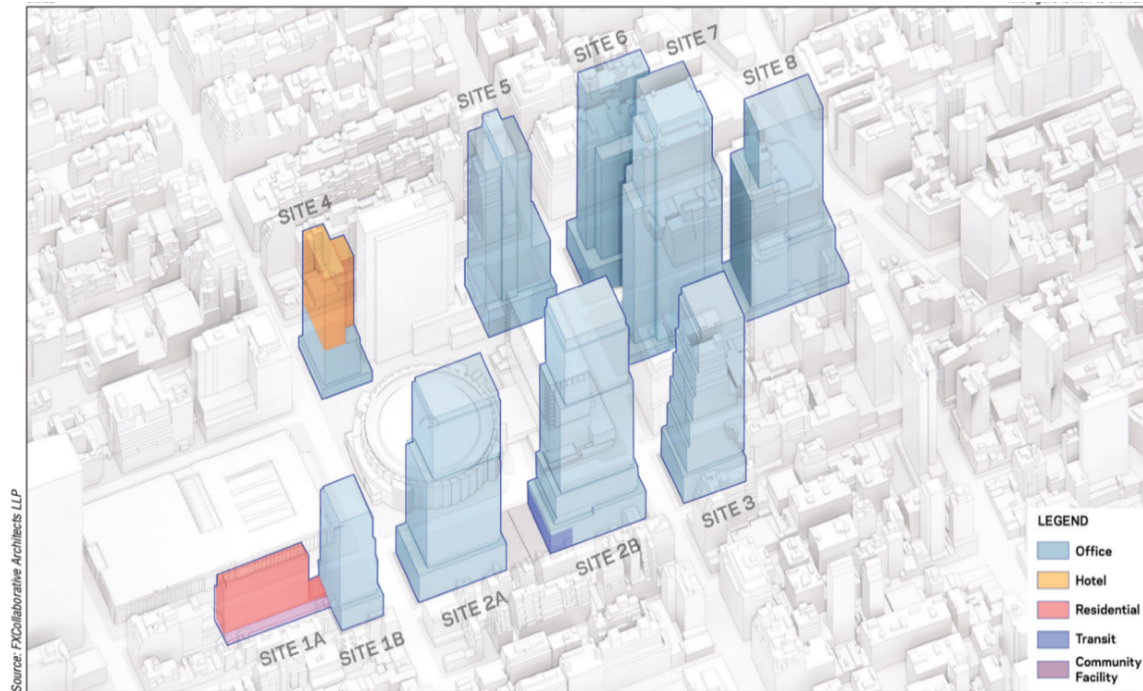
9. According to the GPP, Vornado owns or controls the property designated on the site plan as Sites 4, 5, 7, and 8. It also controls six of the eleven lots on Site 6 and holds a master lease on a seventh lot on Site 6. Ex. J at 44.

The Project Plan

10. The GPP is “a comprehensive mixed-use redevelopment initiative” that would permit roughly 18 million gross square feet of floor area on the Development Sites, an increase of 133 percent above current zoning. Affidavit of George M. Janes, sworn to Oct. 24, 2022 (“Janes Aff.”), ¶ 4. It would include seven towers over 900 feet tall.

11. The sites would consist primarily of Class A commercial space, but would also include some retail, community facility, hotel, and residential space. Ex. A at 1. The following illustrative massing from the FEIS shows the maximum development under one of the two plans under consideration, the “Commercial Scenario.”¹

¹ The other plan, the “Residential Scenario,” has the same general configuration, also with seven towers over 900 feet tall. The essential difference is the amount of residential space. The Commercial would require 542 residential units, of which 163 would have to be affordable. The Residential would allow — but not require — an additional 1,695 residential units (509 affordable).



Ex. C-2, Figure S-3.

12. ESD would acquire Sites 4-8 by either negotiation or eminent domain and then lease Sites 4, 5, 7, and 8 back to Vornado. (It also expects to lease Site 6 to Vornado.) The GPP contemplates that, at some point in the future, Vornado will demolish the buildings on the sites and build the proposed towers.

13. Although the GPP assumes that the Penn Expansion will go forward, its future is, in fact, contingent on a 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 review processes, including an environmental review by

USDOT under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4331 *et seq.*²

14. If the Penn Expansion does go forward, ESD and/or the Railroads will acquire Sites 1-3, by either negotiation or eminent domain; demolish the existing buildings to permit construction of the underground Penn Expansion, adding as many as 12 tracks to the station; and lease the three sites to one or more developers to build the towers.

15. The GPP also contemplates transit improvements to existing subway stations; new entrances on the Development Sites to 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.*

16. ESD still has no architectural plans for Penn Station – only renderings of the Penn Reconstruction, commissioned by the MTA and not endorsed by either Amtrak or NJ Transit. As the following rendering illustrates,

² A proper NEPA review would need to consider reasonable 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 thus eliminate the need to demolish the buildings on Sites 1-3 and displace the people living or working in them). *Id.*

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 has not presented renderings of the potential Penn Expansion.

Funding the Station: The Known Unknowns

17. The GPP states that its primary purpose is to provide “essential revenue” for the improvement and potential expansion of Penn Station. Ex. A at 1. But ESD has steadfastly refused to say just how much revenue is “essential,” or how much the GPP will generate (and when). From the very beginning, ESD has drawn a line in the sand: “Project financing is not part of the [F]EIS scope.” Ex. C-2 at S-28.

A. The First Unknown: The Cost of the Station

18. Nowhere in either the GPP or the FEIS did ESD even attempt to estimate the cost of reconstructing Penn Station – a disqualifying fact (though not a surprising one, since there were no actual plans for the improvements). The FEIS conceded that the 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 means 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. Ex. C-2 at S-15-18.

19. It was not until July 24, 2022 – three days *after* ESD voted to approve the GPP, and three days before a PACB vote that ESD was increasingly worried about – that ESD produced 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. Q at 1. ESD made no attempt to further explain or break down the numbers. And how

could it, given the embryonic state of the planning? ESD's admission that there were still "large cost ranges" eviscerated the \$22 billion estimate.³

B. The Second Unknown: Other Revenue Sources

20. The FEIS and GPP also failed to estimate the amount that ESD's partners had committed to contribute financially. ESD began with the assumption that the split would be the same as the split for the Hudson Tunnels program: 50 percent from USDOT (including Amtrak's contribution), and 25 percent from New York and New Jersey each. Ex. C-9 at 26-12. But the GPP recognized that there was still uncertainty about the split. Regarding the Penn Expansion, for example:

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 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 (emphasis added).

³ 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. Unfortunately, the MTA would oversee the Penn Reconstruction and play an as-yet-undefined but significant role in the development of the Penn Expansion.

21. In declining to approve ESD’s PILOT plan, one PACB member, State Senator Leroy Comrie, said that these continuing uncertainties were dealbreakers for him. In a press release issued on the day of the PACB vote, he said that he would not support any development of the sites “until we have secured necessary federal approvals and the fair share of funding from the federal government and New Jersey.” Ex. GG.

22. The federal grant is by no means a sure thing. Ex. S at 6. To receive money under the particular program that USDOT appears to favor here – the Federal Railroad Administration (“FRA”) Federal-State Partnership for Intercity Passenger Rail program, one of the new programs in this year’s Bipartisan Infrastructure Law – the 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). Thus far, ESD has not done that.

23. A contrary scenario – less likely, but still possible – is that USDOT agrees to cover *more* than 50 percent of the costs. At the MTA board meeting on March 30, 2022, the agency’s senior advisor for federal policy, Naomi Renek, said that it would “pursue” the maximum amount available under the program – 80 percent of the project budget. *Id.* § 24911(f)(2); MTA Board Meeting (Mar. 30, 2022), www.youtube.com/watch?v=1y6Fn8qxQgM, timecode 1:38. Were the MTA to succeed, the amount owed by New York and New Jersey would drop to just 10 percent each, reducing New York’s obligation to \$2.2 billion. The New York Legislature has already authorized ESD and the New York State Dormitory

Authority to issue \$1.3 billion in bonds. FY 2022 Capital Program and Financing Plan, <https://publications.budget.ny.gov/pubs/archive/fy22/ex/cp/fy22cp-ex.pdf>, at 13. That would leave a shortfall of just \$900 million – hardly an adequate justification for gutting the City’s zoning laws. ESD has no idea which of these two scenarios – or others in between – might come to pass.⁴

24. New York State has still not filed a federal grant application, nor has it said when it intends to. Here too its position is absolute: “Details of federal funding are outside the scope of this SEQRA review” (and apparently outside the scope of the GPP review as well). Ex. C-9 at 26-100.⁵

C. The Third Unknown: The GPP Revenue

25. The third omission was a reasonable estimate of the amount of revenue the GPP itself can generate. Over the course of two years, all the way through the final GPP vote in July, the only number ESD proffered – \$2 billion – was a *best-case* scenario (and then only for revenue up to 2030). Ex. S at 19.

26. In considering a project’s adverse impacts, however, agencies are required by SEQRA to assume a “reasonable *worst-case* development scenario” – that is, a scenario in which things go wrong and the adverse impacts are most

⁴ 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, for which this project would qualify. 49 U.S.C § 5309(l)(1)(B)(ii).

⁵ 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 should disclose that now.

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, § 400. ESD did not do that.

27. The \$2 billion figure was pummeled in the public comments on the DEIS, and ESD quickly backed away from 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.

28. 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.

29. ESD supplied no revenue estimates for any of the five categories.

With respect to the payments in lieu of taxes, ESD claimed that “it is premature to project potential PILOT, PILOMRT, or PILOST revenue.” Ex. C-9 at 26-64. Why was it too early for PILOMRT and PILOST estimates? Hudson Yards certainly offered a reasonable model (and made clear that they would constitute only a small fraction of the GPP revenue). As for PILOT money – the critical figure – ESD’s claim of ignorance was even less credible: On July 18, 2022, three days *before* ESD voted to approve the GPP, ESD and the City signed a non-binding “Letter of Mutual Agreement” (the “PILOT Letter”) outlining the terms of a potential PILOT agreement. Ex. T at 2. Regarding land value and additional development rights payments, an appraiser could have prepared estimates in days.

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

31. Critically, the table failed to say whether the PILOT numbers were net of the required payments to New York City. In the PILOT Letter, the State had made an open-ended commitment to make the City whole for lost property taxes, and those payments would have priority over any amount used for the Penn Reconstruction and Expansion. The table’s \$200 million estimate for those

payments — including interest costs — is simply not plausible given the 40-to-80-year time period for the PILOT payments. Ex. T at 2.

32. The PILOT Letter also capped the amount of PILOT revenue that could be used for the Penn Reconstruction and Expansion at 12.5 percent of costs. Further, it gave the State the right to grant PILOT abatements as high as those at Hudson Yards. (This was despite the fact that the justification for those abatements was that owners needed an incentive to develop in a then-desolate neighborhood. By contrast, as ESD said repeatedly, the Development Sites are ideally situated for “transit-oriented” development.)

33. Nor did the table break down the catch-all category of “other development-generated revenue,” making it even more difficult to identify and evaluate the assumptions underlying ESD’s estimates for each source. (ESD conceded that together these sources would provide only \$158 million for the Reconstruction.) *Id.* What, for example, would the eminent domain costs be for acquiring Sites 1-3? After eminent domain, make-whole payments, debt service, and other costs, it is unclear what would be left for the station.

D. The Fourth Unknown: The Timing of the GPP Revenue

34. The question of *when* the GPP revenue will be available is as significant as the question of *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 2044:⁶

[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 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.

35. There would be other, potentially more significant impediments to tower construction. Importantly, the GPP sets no deadline for the owners to build. According to the FEIS, they will 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 (emphasis added); *see* Ex. C-2 at S-34. In other words, Vornado and the other owners, not ESD, will dictate when the revenue comes in.

36. Last month, Vornado’s chairman, Steven Roth, revealed just how long it would be until developers are “satisfied.” At a Q3 earnings call, Roth said that he has no plans to move forward with the development of *any* of his sites in the Project Area. When an analyst asked him when he did expect to go forward, 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*

⁶ The new service building for Penn Station would also be completed by 2033, but it would not produce any revenue for the Penn Reconstruction and Expansion.

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). As Petitioners' memorandum of law explains in greater detail, the "current environment" – the growth of remote work and an ever-increasing oversupply of Midtown office space – could delay construction for decades.

37. That, in turn, would delay *revenue* for decades. PILOT money – the largest of the potential revenue sources – 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. Finally, the land value payments for Sites 1-3 and additional rights payments for Sites 4-8 would be due, *at the earliest*, when the development agreements were signed. And with no plans to build in sight, developers would have no reason to sign agreements.

A Spurious Urgency

38. In the end, ESD is reduced to arguing that, however deficient the GPP may be, there is no time to come up with a better plan. The reason, ESD asserts, is that the competition for federal grants is intense and the money will be gone before ESD and its partners can draw up a comprehensive plan for Penn Station. Ex. C-9 at 26-100 to 26-101.

39. But ESD offers no support for its claim that all the money under this well-funded, five-year program will be gone. Just as important, the argument

is based on a false premise. It is not true that the GPP will improve ESD's prospects for securing a federal grant. As we noted, under the Federal-State Partnership program, the State must demonstrate that it has a firm commitment of funds to pay its share of the station costs. 49 U.S.C. § 24911(d)(1)(B)(ii).⁷

40. ESD attempts futilely to argue that the GPP qualifies 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.

41. This is wrong. Neither Vornado nor any other property owner has committed to fund any part of the Penn Reconstruction or Expansion. Under the terms of the GPP, developers are not required to pay until they go forward with the construction of the new office towers. They have an option, not an

⁷ 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 program 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.

obligation, to build – the obverse of a commitment. Moreover, New Jersey has not yet committed to pay any of the costs.

42. In addition, without PACB approval, ESD does not have the authority to issue bonds, and thus far the Legislature has appropriated only \$1.3 billion for the project – not nearly enough. (Also, the appropriation is not yet bonded.) 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 – which negates the only justification ESD has offered for hurrying ahead with this flawed plan.

PACB and the Current Status of the GPP

43. 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. ESD never presented PACB with a financing plan – it does not have one – and therefore PACB could not make that determination.

44. 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 financing. But PACB had done no such thing. See Ex. X at 1.

The Shadow of Vornado

45. The GPP has been tarnished from the start by New York State's relationship with Vornado. Vornado's chairman (with his family) contributed at least \$384,000 to the political campaigns of former Governor Cuomo. Ex. E at 3. Cuomo set the terms of ESD's partnership with Vornado even before the project was announced. 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).

46. 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. And Governor Hochul has cheered the project with equal fervor.

47. Vornado's largesse extended beyond political contributions. The company actually agreed to share with ESD the cost of the agency's outside advisors on the project: its land use attorneys, real estate attorneys, environmental consultant, architect and planner, and most relevantly, its financial advisors, Ernst & Young Infrastructure Advisors ("Ernst & Young"). Ex. Z.⁸

48. It is clear from the FOIL documents already produced by ESD that Vornado's chair, 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 delphically: "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

⁸ ESD denies that Vornado paid for any Ernst & Young work, but their February 3, 2020 general cost-sharing agreement unambiguously committed Vornado to pay at least 50 percent of the costs of all "financial advisor services," and for certain services, 100 percent. Ex. YY at 1. If, in fact, it did not pay the required amount, ESD must explain why it permitted Vornado to ignore its contractual obligation, and chose instead to saddle taxpayers with those costs.

time off. My Steve nevertheless wants to sit with you again. Can you please share your availability?” Ex. F-2 at 663; see also *id.* at 667.

49. The FOIL documents include more than a thousand emails between senior ESD officials and senior Vornado executives, referring to innumerable calls and more than 200 meetings. Indeed, Vornado executives – including Executive Vice President Langer – were on the invitation lists for the agency’s recurring “team” meetings and “bunker sessions,” which included ESD’s outside attorneys. Ex. F-2 at 399-450.

50. 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.

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, ESD’s former Executive Vice President for Real Estate Development and Planning and the agency’s point person on the project:

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.

52. Vornado seemed to believe that it held veto power over project changes. On February 5, 2021, Ms. Kessler wrote to Ms. Leicht to say that Vornado was unhappy with the proposed Design Guidelines for the new towers:

As expressed briefly to [ESD senior architect Phil Maguire] *we are very concerned (in fact some of the team are apoplectic) about the scope and scale of the design guidelines* that we received late this afternoon and our ability to properly review and vet them especially given the ongoing needs to complete DEIS and GPP over the weekend. They contain many excellent elements but also *many details that we have never had the chance to study* with our architects or that seem super specific. Here are a few suggestions:

- 1. Pull the few key elements from the written guidelines that we need to have now and put them with the figures.*
- 2. Dumb down the elements for now that require further study.*

What is the urgency to put something out in the public that we have not fully vetted together?

Ex. XX at 574 (emphasis added).

53. Three days later, when ESD hesitated to make one change that was particularly important to Vornado, Ms. Kessler wrote a threatening email to Mr. Maguire:

We still don't think you are leaving enough flexibility but more importantly you have *unilaterally decided* that you can take this amount of the most expensive corner in the entire Project Area. You all may not like what that easement does to the project cost and there may be other solutions that are more accretive to both sides once there is more time to study and discuss together.

There are certainly other details to address in the Design Guidelines between now and final but *wanted to make sure you hear us loud and clear on this item before you make the document public.*

Id. at 571 (emphasis added). Four months later, on June 23, 2021, when ESD proposed another change to the Design Guidelines, Ms. Kessler responded: “[I]t is nothing we agreed to as a requirement and is not currently part of the draft design guidelines.” *Id.* at 271. “Agreed to”? It is a measure of how inappropriate this process was that Ms. Kessler assumed the developer would need to agree to the change.

54. There are innumerable other examples. Earlier that year, as ESD considered different plans for an underpass below Seventh Avenue, it proposed the use of the basement of one of Vornado’s buildings. Mr. Langer declared peremptorily that the plan is “really a no go for us.” *Id.* at 531. Similarly, when ESD convened a Public Space Committee, Ms. Kessler demanded to Ms. Leicht that the committee not have the final word on open space: “*Maybe our prior emails were not clear or complete. We do not want the public space committee to decide what counts as public space as you state below.*” *Id.* at 641 (emphasis added).

55. 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.

56. Throughout the process, Ms. Leicht was consistently deferential to the company. When Mr. Langer complained about a plan for "shared streets" — streets in which pedestrians and bicyclists share the right of way with slow-moving motor vehicles — Ms. Leicht responded, "Here's the language I edited — is this what you're looking for?" Ex. XX at 578. Regarding Vornado's review of the developing Design Guidelines — in particular, base heights, building setbacks, and open space requirements — Ms. Leicht wrote to Ms. Kessler and Mr. Langer: "Want to check in on status/proposed new language for these outstanding issues." *Id.* at 655.

57. Perhaps the most troubling exchange concerned ESD's attempts to mollify the public after the uproar over the original plan's failure to provide residential space. Ms. Leicht wrote: "We are thinking of moving the resi option from Penn West to Block 754. Are you ok with that?" *Id.*

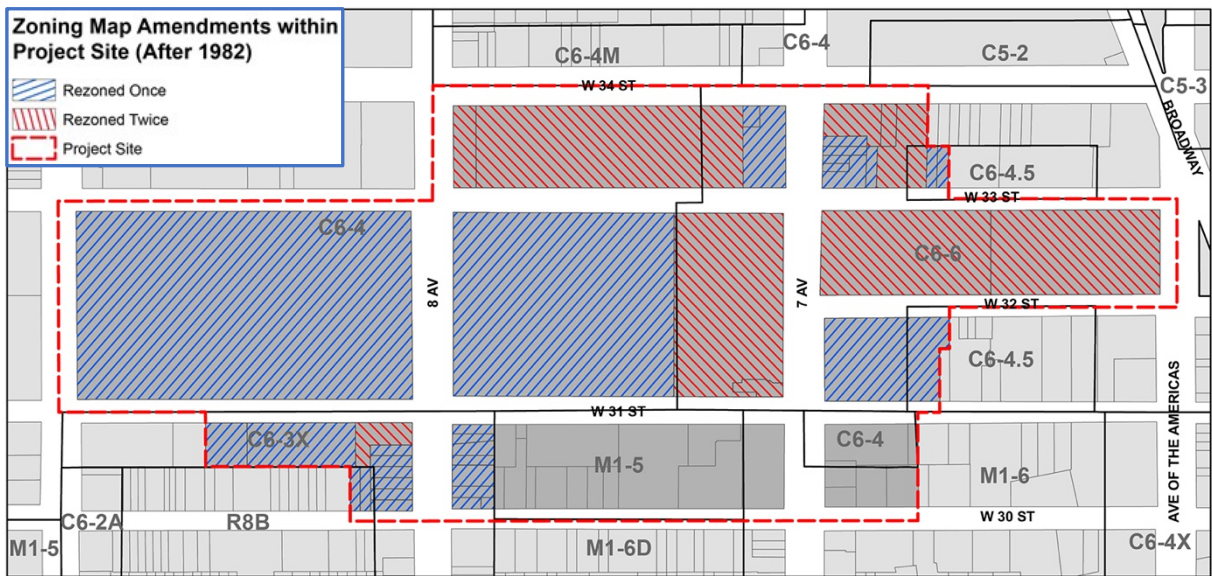
58. In the end, Ms. Leicht seemed to recognize that her agency had been too generous to Vornado, and that it was necessary to contrive a narrative of how this had come about. In an email to Mr. Langer and other Vornado and ESD executives, she wrote: "We need to coordinate and script this meeting to ensure we're cohesive and have a good story to tell about why we landed on these densities" Ex. F-6 at 621.

Overriding the City's Zoning Authority

59. The GPP requires particularly close scrutiny because it trespasses so brazenly on a quintessentially local power – zoning. UDCA allows ESD to override a zoning law only if it would not be “feasible or practicable” to comply with existing law and still achieve the project’s objectives. UDCA § 16(3). ESD did not even attempt to demonstrate that it could not accomplish its stated objectives under current City laws, or with amendments to those laws that were less extreme than the GPP override.

60. This is not a case where the existing laws were 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).⁹

61. 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.

⁹ The history of the City’s efforts is described in detail in Mr. Janes’s affidavit. Janes Aff. ¶¶ 39-62.

62. If that has not, in the end, been enough to fully transform the area, it is hardly the City's failure. The health of this neighborhood depends on the health of Penn Station, which the City has never had the authority or resources to overhaul. ESD and its partners do. But it must do so in a manner that protects the neighborhood's essential character and does not eradicate decades of planning by the City.

Affidavits and Exhibits

63. Attached are true and correct copies of seven new exhibits supplementing the exhibits I filed with my October 27, 2022 Affirmation:

Exhibit XX

Empire State Development Responses to Freedom of Information Requests by Charles Weinstock (Nov. 2, 2022)

Exhibit YY

Cost-Sharing Agreement between ESD and Vornado Realty, L.P. (Feb. 3, 2020)

Exhibit ZZ

Stephen Roth, Vornado Realty Trust, Q3 2022 Earnings Call Transcript (Nov. 1, 2022)

Exhibit AAA

Michael Young, "300 West 30th Street Wraps Up Construction in Chelsea, Manhattan," *New York YIMBY* (June 14, 2022)

Exhibit BBB

Ariel Zilber, "Meta Ditches Office Space at Hudson Yards as Tech Giant Cuts Costs," *New York Post* (Nov. 30, 2022)

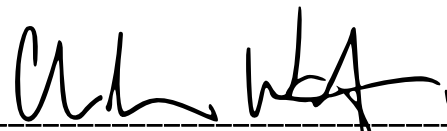
Exhibit CCC

Fidelity National Title Insurance Services, Title Search (Oct. 28, 2022)

Exhibit DDD

Reinvent Albany, "PACB Vote Approving Penn Redevelopment Plan Completely Abnormal" (Dec. 6, 2022)

New York, New York
December 14, 2022

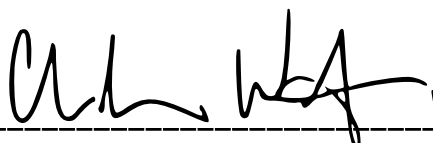
A handwritten signature in black ink, appearing to read 'Charles Weinstock', written over a horizontal dashed line.

CHARLES WEINSTOCK

RULE 202.8-b CERTIFICATION

I hereby certify that the total number of words in this affirmation – including the point headings and footnotes and excluding the case caption, this signature block, and this certification – is 6,541 and therefore 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



CHARLES WEINSTOCK