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

In the Matter of the Application of

EAST HARLEM ALLIANCE OF RESPONSIBLE MERCHANTS, UPTOWN HOLDINGS, LLC, HERON REAL ESTATE CORP., YORY, LLC, and HEE NAM BAE,

Plaintiffs-Petitioners,

For a Judgment Pursuant to CPLR Article 78 and an Action

-against-

CITY OF NEW YORK, CITY COUNCIL OF THE CITY OF NEW YORK, CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY ECONOMIC DEVELOPMENT CORP., and DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,

Defendants-Respondents.

INDEX NOS.

08-117242
08-603829

(J. Lobis)

MEMORANDUM OF LAW OF THE CITY OF NEW YORK IN OPPOSITION TO THE VERIFIED PETITION AND IN SUPPORT OF CITY'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

In essence, Plaintiffs-Petitioners ("Petitioners")[1] challenge the approvals issued by the City of New York ("City"), including several City agencies, the New York City Economic Development Corporation ("NYCEDC"), the City Council and the Mayor's Office (collectively, "City Respondents"), of the 15th Amendment to the Harlem East Harlem Urban Renewal Plan ("Plan" or "Amended Plan"), which will facilitate implementation of the East 125th Street Project ("Project"). The City has determined, in accordance with all applicable laws and procedures, that the Project Site –roughly bounded by Second and Third Avenues and 125th and 127th Streets – is an appropriate area for urban renewal.

The purpose of the Project is to promote local economic growth and job creation, create new affordable housing, encourage private investment, and improve the quality of life for East Harlem residents. The Project will serve as the eastern anchor for the recently rezoned 125th Street corridor and is expected to be a dynamic retail, residential, entertainment, and media destination for Upper Manhattan. City Respondents propose to replace mostly vacant and underutilized land with national, specialty and local retail, new affordable housing, media executive and creative office space, production and post-production space, not-for-profit performing, visual and media arts space, and new community open space.

Petitioners make their frustration eminently clear in their Verified Petition and Verified Complaint ("Petition")[2] that under the Amended Plan, properties they own are part of

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[1] In order to avoid confusion, the Petitioners-Plaintiffs will be referred to as Petitioners even when referring to the plenary action.

[2] As discussed below, Petitioners have filed a Verified Petition and Verified Complaint that are, apart from the caption, identical. For ease of reference, we cite to the Petition, and explain in

Continued...

the Urban Renewal Area and therefore may be acquired by the City. The scattershot claims in the Petition, however, alleging a variety of substantive and procedural violations in the adoption of the Amended Plan and the environmental review of the Project, are all without merit. As explained in detail below and in the accompanying affidavits, City Respondents followed all lawful procedures.

Petitioners' contentions are deficient for a variety of reasons: some are late; some are premature; and others simply reflect misunderstandings of law or process. For instance, Petitioners failed to raise the concerns they now assert concerning the adequacy of the Final Environmental Impact Statement for the Project during the public review process; accordingly, they cannot now bring suit to challenge the environmental review. Conversely, several of Petitioners' claims relate to the process by which the City will dispose of the property constituting the Project Site – including property owned by Petitioners that the City has not yet acquired – although that disposition process will not occur for some time, and the City has not yet decided which of the several lawful mechanisms available for that disposition it will use for this property. Similarly, Petitioners make much of City Respondents' decision not to designate a developer for the Project prior to completion of the Uniform Land Use Review Procedure ("ULURP") process, but nothing in ULURP or any other law requires that sequence.

In addition to the claims relating to the Project and the Amended Plan, Petitioners make several claims relating to the temporary salt pile the City's Department of Sanitation ("DSNY") has located on City-owned property within the Project Site. These, too, fail, for a

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connection with each claim whether it should properly be considered under CPLR Article 78 or in the plenary action.

number of reasons; in any event, however, they are moot because the salt pile will be removed on or before April 30, 2009.

STATEMENT OF FACTS

The pertinent facts are set forth in detail in the accompanying Affirmations of Haley Stein, dated March 30, 2009 and Steven Brautigam, dated March 27, 2009, and in the Affidavits of Carolee Fink, dated March 27, 2009, Rachel Belsky, dated March 30, 2009, and Edwin Marshall, dated March 30, 2009. Facts relevant to the City's legal arguments are set forth below in the context of those arguments. Accordingly, this statement of facts presents only a brief overview of the East 125th Street Project and its context.

The Project will facilitate the replacement of vacant and underutilized land with affordable housing and other mixed uses, fostering economic development and local job creation, increasing private investment in the neighborhood, and improving the quality of life for East Harlem residents. Fink Aff. at ¶ 56. The Project will implement the Amended Urban Renewal Plan, consistent with the New York State Urban Renewal Law, which was enacted with the express purpose of facilitating the redevelopment and rehabilitation of blighted or deteriorated areas. Id. at ¶ 8.

The Project Site is comprised of approximately 5.5 acres within an area generally bounded by East 125th and East 127th Streets, and Second and Third Avenues in Manhattan. The Project Site also includes the southeast corner of Third Avenue and East 125th Street, and abuts the Special 125th Corridor District. Fink Aff. at ¶ 10.

The last major renewal plan for the Project Site prior to the current Project was known as "Uptown New York" and was proposed in 2002 by NYCEDC, also in conjunction with HPD. Fink Aff. at ¶ 16. The Uptown New York proposal was flawed in many respects –

including its failure to provide affordable housing – and, eventually, was abandoned. *Id.* After the Uptown New York Project was abandoned, Community Board 11 ("CB11") created a community-based task force to address the community's major concerns and preferences for the Site, which met regularly with the City Respondents. *Id.* at ¶¶ 17, 19. The guidelines developed by the Task Force were incorporated into the Request for Proposals ("RFP") that NYCEDC issued for the Project in October 2006. *Id.* at ¶ 19, R. at Ex. 28.

Since the Project required certain actions by the City, it was required to undergo a number of public review processes, including review under the City's Uniform Land Use Review Procedure ("ULURP"), Sections 197-c and 197-d of the New York City Charter, and environmental review under the New York State Environmental Quality Review Act ("SEQRA"), 6 NYCRR Part 617, and its City counterpart, the City Environmental Quality Review ("CEQR"), 62 RCNY Chapter 5 and Mayoral Executive Order No. 91 of 1977. Fink Aff. at ¶ 24; Belsky Aff. (which provides a complete description of the Project's environmental review under SEQRA/CEQR).

In particular, the City sought to amend the Harlem East Harlem Urban Renewal Plan to include certain parcels of land within the Project Site that were not yet part of the Urban Renewal Area, because these parcels are required for a comprehensive and uniform redevelopment of the Site. The City also amended the Harlem East Harlem Urban Renewal Plan to define the building form and bulk regulations for the Project, consistent with the guidelines established by the City and the Community Task Force. Fink Aff. at ¶ 26.

As set forth in detail in the Fink Affidavit, City Respondents sought and obtained all requisite reviews and approvals under ULURP, including the advisory recommendations of Community Board 11 and the Manhattan Borough President. Fink Aff. at ¶¶ 27-37.

Following the last of these approvals – the ULURP approvals by the City Council, issued on October 7, 2008, NYCEDC announced its selection of East Harlem M/E/C LLC, a team of six developers, among the entities that had responded to the RFP. Fink Aff. at ¶ 44. While NYCEDC had originally anticipated designating a developer for the Project earlier in the approval process, contrary to Petitioners' contentions and as discussed below, NYCEDC had no legal obligation to do so. *Id.* at ¶¶ 42-43.

The Project Site: Current Status and Intended Disposition

Currently, of the twenty-seven lots comprising the Project Site, twelve are currently owned by HPD, four are currently owned by NYCEDC, and eleven are owned by non-City entities, including the lots owned by Petitioners and one owned by the Metropolitan Transit Authority. Stein Aff. at ¶ 20; Fink Aff. at ¶ 38.

In order to move forward with the Project, HPD will acquire the remaining lots owned by non-City entities, using the condemnation process established under the Eminent Domain Procedure Law ("EDPL"), as permitted under the Urban Renewal Law, if necessary. Stein Aff. at ¶ 21; Fink Aff. at ¶ 39.

HPD will then transfer all lots it owns within the Project Site to NYCEDC pursuant to one of several lawful processes available to it. Stein Aff. at ¶ 22. Contrary to Petitioners' contentions and as discussed below, the City is not limited to the disposition process set forth in Section 383(b)(4) of the City Charter. Once NYCEDC owns all of the lots comprising the Project Site, it will convey the property to the developer pursuant to a contract of sale to be approved by its Board of Directors. *Id.* at ¶ 23.

SEQRA/CEQR Review of Potential Environmental Impacts

The Project was thoroughly reviewed under the New York State Environmental Quality Review Act ("SEQRA") and its City counterpart, CEQR, which require that State and

local agencies assess potential significant adverse environmental impacts of certain discretionary actions before undertaking, funding, or approving such actions, unless they fall within certain statutory or regulatory exemptions from the requirements for review. 6 NYCRR § 617.9. Belsky Aff. at ¶ 5. For purposes of environmental review, NYCEDC was a co-applicant for the Project and the Office of the Deputy Mayor for Economic Development ("ODM") was designated as the lead agency. *Id.* at ¶ 8.

The Final Environmental Impact Statement ("FEIS") for the Project consists of over 1,000 pages and 27 chapters containing detailed text, figures, and technical appendices and analyzes the potential for significant adverse impacts. Belsky Aff. at ¶ 17; *see also*, FEIS, submitted as part of the Record herein.

Among other things, the FEIS includes an analysis of a suite of alternatives to the project as originally proposed. Belsky Aff. at ¶¶ 20-22. Among the alternatives studied was the "As-of-Right" Alternative—limiting the project to what would be allowed under the existing zoning, without acquisition of any non-City-owned land. *Id.* at ¶ 22. This As-of-Right Alternative is substantially similar to the alternative Petitioners complain the City failed to analyze. Pet. at ¶ 249. Contrary to Petitioners' allegations, Pet. at ¶¶ 208-241, the FEIS also fully analyzed the MTA Bus Depot Expansion Alternative which, through the approval process, emerged as the preferred alternative to the Project as originally proposed. Belsky Aff. at ¶¶ 22, 26-32.

Petitioners further allege that the FEIS improperly segmented environmental review of the Project from the Department of City Planning's 125th Street Corridor Rezoning Project ("Corridor Rezoning"), Pet. ¶¶ 71, 242-45. Segmentation is the division of the environmental review of an action such that various activities or stages are addressed as though

they were independent, unrelated activities, needing individual determinations of significance. 6 NYCRR § 617.2(g).

The East 125th Street Project and Corridor Rezoning are, however, separate projects with different goals and objectives, undertaken and approved by different City bodies: the East 125th Street Project by NYCEDC and the Corridor Rezoning by City Planning. Belsky Aff. at ¶¶ 57-58; Marshall Aff. at ¶¶ 16. Moreover, while the two projects involve adjacent land, their physical boundaries do not overlap. Marshall Aff. at ¶¶ 18-22. The environmental reviews of the projects were thus appropriately conducted separately.

In fact, the City could not have treated these two distinct projects as one because the Corridor Rezoning Project was approved before an application was even submitted to City Planning to begin the land use review process for the East 125th Street Project. The 125th Street Corridor Rezoning was approved by the City Council on April 30, 2008. The East 125th Street Project was not submitted to City Planning until August 27, 2008. Marshall Aff. at ¶ 17.

Moreover, the FEIS for the East 125th Street Project included the Corridor Rezoning in all technical analyses for the Project and found that the two projects would complement each other, as both are expected to strengthen retail and commercial areas and serve to continue the pattern of reinvestment in the area. Belsky Aff. at ¶ 59.

DSNY Temporary Salt Storage at 208 East 127th Street

Petitioners assert several claims in connection with a temporary salt pile on a lot owned by HPD within the Project Site. Pet. at ¶¶ 111-117; 252-270. As explained in detail in the Affirmation of Steven Brautigam, the New York City Department of Sanitation ("DSNY") entered into a Memorandum of Understanding with HPD allowing for this temporary salt storage. Brautigam Aff. at ¶ 19. The agreement explicitly requires DSNY to vacate the site by April 30, 2009, and DSNY anticipates vacating the site even earlier, by April 11, 2009. *Id.* at

¶¶ 19, 21, Ex. C. In order to fulfill its obligations to remove ice and snow from City streets during the 2008/2009 winter season, DSNY needed this temporary facility because it had to vacate its previous East Harlem salt storage facility on the East River to accommodate the Willis Avenue Bridge reconstruction. *Id.* at ¶ 10, 15-16. DSNY expects that its permanent East 125th Street Salt Shed will be complete by Fall 2009 so that it will be used starting in the 2009/2010 winter season. *Id.* at ¶ 14.

Petitioners claim that DSNY violated SEQRA by failing to conduct environmental review of the temporary salt pile. Pet. at ¶ 256. DSNY reasonably determined, however, that the use of this site for one season as a temporary salt pile under cover would not have a significant adverse impact to the environment and would be exempt from a formal environmental review as a Type II action as either (or both) "minor temporary use of land having negligible or no permanent impact on the environment" within the meaning of 6 NYCRR § 617.5(c)(15) or "routine or continuing agency administration and management" pursuant to 6 NYCRR § 617.5(c)(20). Brautigam Aff. at ¶ 28.

Moreover, the salt pile does not constitute a nuisance. Rock salt is not hazardous substance. Brautigam Aff. at ¶ 26. Even if, despite protection provided by the tarps, some salt-laden stormwater were to flow off the site to the street and sewers, this would merely be comparable to what happens when DSNY routinely applies salt directly to City streets during snow events, and would not cause a significant impact to the environment. *Id.* at 27.

NATURE OF PETITIONERS' CLAIMS

Petitioners have submitted identical factual allegations and causes of action in both the Verified Complaint and the Verified Petition. The pleadings being identical creates

some confusion, as some of the causes of action are appropriately brought in an Article 78 proceeding and others can only be brought in a plenary action.

Further complicating matters in this proceeding, Petitioners have requested declaratory judgments – typically sought in plenary proceedings – for some of their Article 78 causes of action. Only a limited number of claims may be raised in an Article 78 proceeding, and actions seeking declaratory relief are not appropriately brought in such a proceeding. CPLR § 7803; *Matter of Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 202 (1987). Where, as here, actions seeking relief in both an Article 78 and a plenary action, regardless of Petitioners' characterizations of their claims, the court must perform an examination of "the substance of [the] action ... and the relief sought." *Cloverleaf Realty of New York, Inc. v. Town of Wawayanda*, 843 N.Y.S.2d 335, 336 (2007) (*quoting Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980)).

After such consideration, courts are authorized to convert an Article 78 Petition into a special proceeding or vice versa. CPLR § 103; *Building Contractors Ass'n, Inc. v. Tully*, 65 A.D.2d 199, 201 (3d Dep't 1978) (where relief under Article 78 is inappropriate, but where declaratory relief is appropriate, the court will convert an Article 78 proceeding into a declaratory judgment action). On the other hand, courts have also dismissed causes of action improperly brought in a plenary action that would properly have been included in the Article 78 Petition. *See Villanova Estates, Inc. v. Fieldston Property Owners Ass'n, Inc.*, 23 A.D.3d 160, 162 (1st Dep't 2005) (affirming dismissal of a cause of action alleging breach of contract because the claim, failure of a property owners' association to abide by their bylaws, was more appropriately brought as a claim for mandamus and thus in an Article 78 proceeding rather than in the plenary action).

In an effort to create an organizing framework for the judicial review of Petitioners' allegations, the City has attempted to clarify which pleadings are properly brought in an Article 78 proceeding and which are more appropriately addressed in a plenary action and as such should not have been in the Petition. The City's papers herein answer the Article 78 Petition; once Petitioners respond, that matter will be fully submitted and thus ready for determination on the merits. City Respondents also moves to dismiss those claims properly brought in the plenary action, and respectfully requests that the Court also dismiss those causes of action in the Complaint that are appropriately addressed under Article 78.

Those claims properly brought in an Article 78 proceeding are as follows: the first claim (illegal amendment of the urban renewal plan under GML Article 15); the third claim (illegal circumvention of NYC Charter § 384(b)(4)); the fourth claim (illegal concealment of process); and the sixth through the ninth claims (alleging violations of the environmental review processes).

Those claims properly brought in a plenary action are as follows: the second claim (alleged violation of Article XVIII, Section 6 of the NYS Constitution); the fifth claim (a GML § 51 taxpayer action); and the tenth claim (public nuisance).

Under Section 207(b) of the Eminent Domain Procedure Law ("EDPL"), judicial review by the appellate division of the New York supreme court "shall be exclusive." EDPL § 207(b). As such, the eleventh claim cannot be brought in either an Article 78 proceeding or in a plenary action in New York State supreme court.

For the reasons set forth below, City Respondents respectfully requests that the Court deny those claims properly raised in the Petition and dismiss the claims presented

improperly in the Petition, and further request that the Court dismiss all the claims in the Complaint for failure to state a claim.

Standard for a Motion to Dismiss

It is well settled that in reviewing a motion to dismiss, the pleadings must be liberally construed to determine whether the allegations state a cause of action, *see, e.g., Sidney Roberts Assoc. v. Eichner Enterprises*, 225 A.D.2d 510 (1st Dep't 1996); *Grand Realty Co. v. City of White Plains,* 125 A.D.2d 639, 639 (2d Dep't 1986). It is equally clear that bare legal conclusions and matters that are flatly contradicted by the evidence are not presumed to be true. *See Eastern Consolidated Properties, Inc. v. Lucas*, 285 A.D.2d 421, 421-22 (1st Dep't 2001); *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001). Similarly, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts." *Vanscoy v. Namsic USA Corp.*, 234 A.D.2d 680, 681-82 (3d Dep't 1996), *citing Muka v. Greene County*, 101 A.D.2d 965 (3rd Dep't 1984), *lv. den.* 63 N.Y.2d 610 (1984).

ARGUMENT

POINT I

THE CITY COMPLIED WITH ALL LEGAL AND PROCEDURAL REQUIREMENTS IN APPROVING THE AMENDED PLAN AND THE PROJECT.

Petitioners' dislike of the Project and skepticism about the developer selected by City Respondents are very clear. Petitioners fail, however, to provide any support for their various claims, asserted in their first, third, and fourth causes of action, that City Respondents

violated any law in obtaining approval for the 15th Amendment to the Harlem East Harlem Urban Renewal Plan which facilitated the East 125th Street Project.[3]

Petitioners allege that City Respondents undermined the Community Board's and Manhattan Borough President's advisory reviews and recommendations regarding the Project (Pet. ¶¶ 172-185); that City Respondents illegally delayed, and secretly selected, an allegedly irresponsible developer (Pet. ¶¶ 62, 103-110); and that City Respondents fraudulently characterized the Project as an Urban Renewal Plan in order to avoid the review process established under Section 384(b)(4) of the New York City Charter for disposition of City property (Pet. ¶ 154-170). These allegations of corruption and wrongdoing on the part of City Respondents are completely without basis. The Project is, indeed, an urban renewal project and, as explained below, underwent a comprehensive land use review pursuant to the City Charter, including all public hearing and public approval requirements.

As more fully set forth in the accompanying affidavit of Carolee Fink and affirmation of Haley Stein, the Project underwent a comprehensive land use review from March to October 2008 pursuant to the City's Uniform Land Use Review Procedure ("ULURP"), Sections 197-c and 197-d of the New York City Charter. ULURP applies to a variety of land use actions in New York City and is integrated with the environmental review process required under both the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR") process. *See* New York City Charter §§ 197-c, 197-d, 200. ULURP

[3] As noted above, Petitioners' claims concerning the approval processes are appropriately asserted under CPLR Article 78. City Respondents address Petitioners' eminent domain allegations, which are not ripe and are improperly raised in this action, in Point IV below.

establishes a comprehensive process for public review of zoning map changes, site selection for City facilities, acquisition of real property, and other actions.[4]

The pertinent actions requiring public review in conjunction with ULURP included: (1) an amendment to the Harlem East Harlem Urban Renewal Plan; (2) the designation of an Urban Development Area and Project and disposition of city-owned property;[5] (3) amendment to the Zoning Map of the City of New York (the "Zoning Map") to modify the existing zoning in the Project Site; and (4) additional property designations for the Amended Urban Renewal Area. As discussed in the Fink Affidavit, ULURP applications for the Project were reviewed by Community Board 11, the Manhattan Borough President, the CPC, and the City Council. The Project met all public review requirements under the City Charter. The full City Council approved the rezoning and all other ULURP applications on October 7, 2008. R. at Ex. 26.

A. The 15th Amendment Met All Legal Requirements of the Urban Renewal Law

Petitioners contend that the record does not support HPD's revision of the Urban Renewal Area under the Amended Plan to include properties they own that had not previously been included in the Area. Specifically, Petitioners allege that (i) their properties are not blighted, and (ii) the City failed to make any formal finding that the acquisition of Petitioners'

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[4] The Administrative Record is bound separately (Exs. 1 through 29 with the FEIS and Appendices under separate cover). Citations to pages in the Record which is submitted herewith are indicated throughout as "R. at Ex. __." The FEIS will be referred to as "FEIS."

[5] The term "disposition" in this context does not indicate that the City will use any particular disposition method. Rather, the review and approval pursuant to ULURP concerns only the proposed post-disposition land use. Before it may actually deliver a deed to a purchaser, the City must obtain additional approvals for the disposition terms pursuant to General Municipal Law § 507, General Municipal Law § 695, City Charter § 384(b)(4), or some other statute authorizing such a conveyance.

properties was "necessary" for the purpose of effectuating the Plan. Pet. at ¶¶ 130-131. As HPD appropriately determined, however, the entire Area, including properties owned by Petitioners, meets the standard for designation as an Urban Renewal Area under GML Article 15. R. at Ex. 12.

1. The Inclusion of Petitioners' Properties in the Amended Urban Renewal Area Is Consistent with the Urban Renewal Law.

Under General Municipal Law § 505(4), the City must find, among other things, that the urban renewal 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 development of the municipality." In reviewing a determination that an area is "substandard," courts give government agencies wide latitude. *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478, 483 (1975). A "substandard or insanitary area" is defined as blighted or having blighting influence on the surrounding area, but are not necessarily "in themselves substandard or insanitary, the inclusion of which is deemed necessary for the effective undertaking of one or more urban renewal programs." GML § 502. That is, it is not necessary for the City to demonstrate that each individual property in an urban renewal area is independently "substandard or insanitary." Accordingly, Petitioners' allegations that properties they owned are not blighted are irrelevant to the propriety of the City's designation of the Amended Urban Renewal Area.

Furthermore, Petitioners' claim that all land parcels within an urban renewal area must be blighted is plainly contradicted by the U.S. Supreme Court's decision in *Berman v. Parker*, 348 U.S. 26, 34-35 (1954). In *Berman*, the Supreme Court established that not all the properties contained within a designated renewal area need be deemed blighted, agreeing with experts that:

> ...if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums...

Berman, 348 U.S. at 34; *see also Kelo v. City of New London*, 545 U.S. 469 (2005) (economic redevelopment of a blighted area is a proper public use). Therefore, it is well established that for effective rehabilitation of an area and successful implementation of an urban renewal plan, parcels within a designated renewal area, while not themselves deemed blighted, may be included as part of the Project, and thereby subject to condemnation, if they serve as an integral part of the urban renewal project. *Kaskel v. Impellitteri*, 306 N.Y. 73, 78 (1953) ("clearing and redevelopment will be of an entire area, not of a separate parcel, and, surely, such statutes would not be very useful if limited to areas where every single building is substandard"); *Spadanuta v. Rockville Centre*, 16 A.D.2d 966, 966-967 (2d Dep't 1962).

City government bodies are vested with the discretionary power to determine whether an area in which many, but not all, land parcels are "substandard and insanitary," can be considered as a single area for purposes of redevelopment. *Kaskel*, at 78. Furthermore, where, as here, the City Planning Commission and other City entities have determined an area to be blighted, "their findings cannot be overturned in the absence of proof of corruption or irrationality." *Blumenfeld v. New York*, 44 Misc.2d 475 (1964).

In this case, City Respondents' finding of blight did not violate lawful procedure, and was supported by the evidence. HPD and its consultants conducted a Blight Study, which was completed on January 16, 2008, that documented the blighted conditions in the area as a whole, and each individual property. R. at Ex. 2, at 11. The Study found, among other things,

that 42% of the Project Site was vacant space, and that the Site contained vacant, abandoned, substandard buildings in poor or critical condition characterized by physical deterioration. *Id.* at 4, 11.

Lastly, Petitioners repeatedly allege that HPD's involvement with the Project constituted "fraud". Pet. ¶¶ 202, 203. This claim is not true and demonstrates a misreading of the Urban Renewal Law. The Law does not address the designation of a "lead agency" but specifies that certain actions are to be taken by the local urban renewal agency. General Municipal Law § 502(5). In New York City, HPD is the local urban renewal agency. City Charter § 1802(6)(e).

Petitioners can neither legally nor factually support their claim that City Respondents acted improperly by including the identified parcels Project Site under GML Article 15.

2. There Is No Need for a Formal Finding that Every Property Within an Urban Renewal Area Is "Necessary" for the Plan

Petitioners repeatedly assert that the City should have made a formal finding that the acquisition of each of their properties was "necessary" for the purpose of effectuating the Plan. *See, e.g.*, Pet. at ¶ 123. In doing so, Petitioners essentially ask the court to usurp the role of the Legislature and rewrite the Urban Renewal Law, inserting a new requirement found nowhere in the statute. The Legislature assigned various roles to the participants in the urban renewal process. In doing so, the Legislature mandated specific findings, described in detail in the accompanying Affirmation of Haley Stein, to be made by certain of those participants. Nowhere did it mandate a finding that the acquisition of each property comprising the area is "necessary" for the purpose of effectuating the urban renewal plan.

The Urban Renewal Law states that, after holding a public hearing, the City Council[6] must designate the urban renewal area and find that it is "appropriate for urban renewal." GML § 502(9), § 504. While nothing in the Urban Renewal Law requires a finding that the acquisition of each of the properties comprising the area is "necessary" to effectuate an urban renewal plan, the Amended Plan at issue here speaks for itself. HPD drafted an urban renewal plan that provided for the acquisition of the properties in question. The City Planning Commission, City Council, and Mayor all duly approved the Plan that provides for such acquisition. R. at Ex. 26. The relevant governmental bodies have designated the Area and approved the Plan in accordance with their respective statutory roles and obligations. Petitioners now ask the court to disregard the statute and substitute its own judgment for the judgment of the parties authorized by State law to make such determinations. The Court should reject these claims.

B. City Respondents Did Not Illegally Circumvent NYC Charter Section 384(b)(4) Review of Dispositions of Real Property

Petitioners assert that City Respondents must convey the property constituting the East 125th Street Project Site pursuant to City Charter § 384(b)(4), suggesting that because NYCEDC is a local development corporation, conveyance pursuant to any other statute is improper. Pet. at ¶¶ 154-169. Petitioners go on to argue that the approvals for the Project

[6] The statute specifies that certain actions must be taken and certain findings must be made by the "governing body." GML § 504. In New York City, the City Council acts as the governing body with respect to land use issues and the Mayor acts as the governing body with respect to business issues. General Municipal Law § 502(1), City Charter § 197-d. The designation of an urban renewal area and the approval of an urban renewal plan are both land use determinations with respect to which the Council acts as the governing body. General Municipal Law §§ 504, 505, City Charter § 197-c, 197-d. The conveyance of City-owned property is a business issue with respect to which the Mayor acts as the governing body. General Municipal Law § 507, City Charter § 384(a) (also subject to ULURP 197-c(10)).

pursuant to the Urban Development Action Areas Act ("UDAAP"), GML Article 16, which includes a statutory process for conveyance of property within an approved Urban Development Action Area, constitute an improper attempt to subvert the Charter § 384(b)(4) process. Pet. at ¶¶ 169-170.

As explained in more detail below, both of these assertions are incorrect. First, contrary to Petitioners' arguments regarding disposition, Charter § 384(b)(4) is not the sole or excusive method of conveying property to a local development corporation. Accordingly this argument fails as a matter of law. Second, the conveyance of the property in question has not yet been approved pursuant to any statute, so Petitioners' assumption that the City will ultimately dispose of the property pursuant to UDAAP is factually wrong and premature.[7]

Charter §384(b)(4) authorizes the City of New York ("City") to sell City-owned property to a local development corporation, such as NYCEDC. While the City cannot utilize the authority granted to it under Charter § 384(b)(4) unless it selling or leasing real property to a local development corporation, nothing therein states that Charter § 384(b)(4) is the sole or exclusive mechanism by which the City may make dispositions to such entities. In fact, the City may use any applicable provision of law when disposing of real property to a local development

[7] Plaintiffs also suggest that the City may seek to dispose of the properties pursuant to City Charter § 1802(6)(e). Pet. at ¶ 155. As discussed in the text, the City has not yet disposed of, or selected a method for disposition, of the Project Site. Moreover, City Charter § 1802(6)(e) does not authorize the disposition of City-owned property. Rather, City Charter § 1803(6)(e) designates the Department of Housing Preservation and Development as the City's urban renewal agency. City Charter § 1802(6)(j), not (e), deals with HPD dispositions of City-owned property, but merely describes procedural prerequisites to dispositions without actually authorizing disposition. If the City ultimately seeks approval to convey the property pursuant to a statute administered by HPD (i.e., General Municipal Law § 507 or General Municipal Law § 695), it will do so in compliance with the requirements of City Charter § 1802(6)(j).

corporation, provided that the project in question meets the applicable requirements of the statute and the City complies with the statute's procedural requirements.

For example, General Municipal Law § 507 authorizes the City to convey urban renewal property for redevelopment in accordance with the applicable urban renewal plan and General Municipal Law § 695 authorizes the City to convey UDAAP property for redevelopment in accordance with the applicable UDAAP project. Where a proposed disposition meets the requirements of one of these statutes, the City may utilize that statute (following compliance with the public approval requirements set out in the statute) to convey the property to a proposed purchaser, including a local development corporation.

Petitioners fundamentally misunderstand the UDAAP statute. Where a UDAAP area has been designated and a UDAAP project has been approved, the City may dispose of real property (General Municipal Law § 695), make loans (General Municipal Law §§ 696-a, 696-d), and grant tax exemptions (General Municipal Law § 696) pursuant to the UDAAP statute. None of these powers is exclusive.[8] A UDAAP project may involve property that is sold pursuant to a different statute (e.g., the Urban Renewal Law), receives loans pursuant to a different statute (e.g., Private Housing Finance Law Article 15), and/or receives an abatement of or exemption from real property taxation loans pursuant to a different statute (e.g., Real Property Tax Law § 421-a or § 489). The fact that a UDAAP project has been approved here does not mean that the City will or must convey the property pursuant to UDAAP. It merely means that UDAAP is one possible option pursuant to which the City may seek, in the future, to convey the property.

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[8] As noted in footnote 5 above, the title of the ULURP application relating to the UDAAP designation includes the word "disposition," but neither the application nor the approval binds the City to use the UDAAP disposition process.

Here, the City has not yet obtained the necessary approvals for conveyance of the property. Fink Aff., ¶ 50. While the disposition has been reviewed and approved pursuant to ULURP as required by City Charter § 197-c and § 197-d, such approval only concerns the proposed post-disposition land use. Before it may actually deliver a deed to a purchaser, the City must obtain additional approvals for the disposition terms pursuant to General Municipal Law § 507, General Municipal Law § 695, City Charter § 384(b)(4), or some other statute authorizing such a conveyance. Because the City has not yet sought such approval for disposition pursuant to a particular statute, plaintiff's arguments are premature.[9]

C. The Community Board's and Borough President's Roles Are Strictly Advisory and Were Not Compromised

Petitioners allege that City Respondents intentionally delayed selection of a development team for the East 125th Street Project in order to undermine the Community Board and Borough President's proper review of the Project. Pet. ¶ 172. This delay, Petitioners claim, denied CB11 and Manhattan Borough President Stringer the opportunity to comment on the Project in any meaningful way and undermined the ULURP process. Pet. ¶ 175.

These claims are without merit because CB11 and Manhattan Borough President Stringer properly reviewed and commented on the Project, as required by ULURP. R. at Ex. 12; *see also* Fink Aff., ¶¶ 34-35. The Community Board and the Borough President's roles are

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[9] In an Article 78 Petition, non-final agency actions are regularly denied. *Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998). An agency action is final, or ripe for judicial review, when the decision-maker has come to a "definitive position" that has caused "an actual, concrete injury" to the petitioner. *Id*; *Ward v. Bennett*, 79 N.Y.2d 394, 400 (1992); *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 519 (1986). Finality hinges upon the "completeness of the administrative action." *Essex County*, 91 N.Y.2d at 453. Non-final agency decisions are not, on their face, ripe for review and should be dismissed. *Church of St. Paul & St. Andrew*, 67 N.Y.2d at 519. In this case, there is no final agency decision and, therefore, is not ripe for review.

purely advisory and their recommendations are not binding upon CPC or the City Council. They had exactly the opportunity afforded under the law.

The role of the Community Board in the ULURP process is purely advisory, and non-determinative. *See, e.g., Community Board 7 v. Schaffer,* 84 N.Y.2d 148, 159 (1994) ("community boards' ULURP responsibilities . . . are purely advisory in nature"). As "creatures of the State," Community Boards "ha[ve] no power other than that given it by the Legislature, either explicitly or by necessary implication. . . ." *B.T. Products v. Barr*, 44 N.Y.2d 226, 236 (1978), *citing Pooler v. Pub. Serv. Comm'n*, 58 A.D.2d 940 (3d Dep't), *aff'd* 43 N.Y.2d 750 (1977). The powers of Community Boards are set forth in Section 2800(d) of the City Charter. With respect to land use issues, a community board may "[e]xercise the initial review of applications and proposals . . . including the conduct of a public hearing and the preparation and submission to the city planning commission of a written *recommendation.*" City Charter § 2800(d)(17) (emphasis added).

As explained in City Charter § 197-c(j), "[i]f a community board, borough president or borough board fails or waives its right to act within the time limits for review pursuant to subdivisions e, f and g of this section, the application shall be referred to the next level of review." Thus, ULURP applications can be acted upon by the CPC and City Council without any recommendations having been submitted by a Community Board or Borough President. Similarly, it is entirely permissible for the CPC and/or City Council to ultimately adopt resolutions which differ greatly from what was initially considered by a Community Board and/or Borough President. *See* City Charter §§ 197-c(h), 197-d(c) (decision-making power is vested with the CPC and City Council). As explained by the Court in *Starburst Realty Corp. v. City of New York*, 125 A.D.2d 148, 156 (1st Dep't 1987), *lv. denied*, 70 N.Y.2d 605 (1987), "the

statutory scheme establishing . . . [community] boards and authorizing nonbinding recommendations on the part of those boards does not preclude the ultimate adoption of contracts containing different, even substantially different, terms from those found in the proposals originally considered under ULURP."

In this case, procedures for review by the Community Board and the Borough President's office were properly followed. City Charter § 197-c(e), (g) and Title 62 of the Rules of the City of New York ("RCNY") §§ 2-03, 2-04 require that once an application is certified as complete by City Planning, it is sent to the affected Community Boards for review and recommendation. Here, City Planning certified all of the applications as complete on March 24, 2008, at which time they were referred to Community Board 11 ("CB 11") and the Manhattan Borough President. Fink Aff., ¶ 29. In accordance with ULURP, CB 11 reviewed the applications and, on May 20, 2008, it conducted a public hearing to consider testimony on the Proposed Actions. Fink Aff., ¶ 30. The Community Board voted on May 28, 2008, to adopt a resolution recommending disapproval of the applications. R. at Ex. 12.

On July 2, 2008, Manhattan Borough President Scott Stringer issued his report recommending conditional disapproval of the applications as well. Fink Aff., ¶ 31. Community Board 11 and Borough President apparently recommended disapproval because NYCEDC had not designated a developer for the Project at that point. Although the designation of a developer prior to completion of the ULURP process would apparently have been preferred by the Community Board and Borough President, Pet. ¶¶ 100-101, nothing in ULURP or any other law requires that sequence.

The extensive record of the public approval process for the Project and the related Amended Plan and rezoning belie Petitioners' allegations that City Respondents violated the law.

Despite Petitioners' obvious frustration with NYCEDC's decision to designate a developer only after completion of ULURP review, this decision does not, in any way, violate lawful procedure. The identity of the grantee is neither required for nor relevant to any of the approvals that have been granted to date.

D. Petitioners' Allegations Regarding the Qualifications of the Development Team the City Selected for the Project Are Baseless.

Petitioners further suggest that NYCEDC and HPD conspired to choose a development team based on the alleged political connections of one of the team's alleged members. *See, e.g.*, Pet. ¶ 103. As supported by the record and discussed below, the City Respondents selected the team in good faith based on their assessment of the public interest. There is no evidence of any improper relationship between NYCEDC and the chosen development team existed. Petitioners assert – incorrectly – that the Carey Group, a firm headed by a former president of NYCEDC, is a member of the development team. Pet. ¶ 103. In fact, the Carey Group served as a consultant to the developers, which does not create or reflect an improper relationship between NYCEDC and the developer. Fink Aff. at ¶ 45. NYCEDC selected East Harlem M/E/C LLC because it believed in good faith that its proposal will best fulfill City Respondents' urban renewal goals. *Id.* at ¶ 46.

It is presumed that the City acts in the furtherance of the public interest in carrying out its legal duties. *Broadway Schenectady Entm't Inc. v. County of Schenectady*, 288 A.D.2d 672, 673 (3d Dep't 2001). The Court must presume that government decisions were reached in "the exercise of careful judgments" and cannot impute anything other than "public motives" to these actions. *McCabe v New York*, 213 N.Y. 468, 480-481 (1915); *Alexander's Department Stores v. New York State Thruway Auth.*, 283 A.D. 665 (1954) (petition was

properly dismissed against government respondents where no illegal acts were set forth and petitioners presented nothing to warrant a finding of corrupt motive or bad faith).

Case law illustrates that the mere existence of a prior relationship between the City and a team selected as the result of an RFP process is not enough to establish improper motives. For example, in *Holtzman v. Oliensis*, 91 N.Y.2d 488, 493 (1998), the Court found that a public officer violated the City's conflicts of interest provision where she did not recuse herself from overseeing an RFP process to underwrite city bonds, where the selected management team was financing her re-election campaign. *Id.* The relationship in that case was improper because the selected management team had "personally attended a campaign breakfast meeting" where it "unambiguously voiced its interest" being selected for City's securities sales. *Id.* In contrast, here, there is no evidence of any improper relationship between NYCEDC and the chosen development team. Indeed, the only entity alleged to have an improper relationship with NYCEDC, the Carey Group, is not a member of the selected team. Fink Aff. at ¶ 45.

Furthermore, Courts, in the absence of fraud or a palpable abuse of discretion, have no power to control a municipality's entering into a contract because of the discretionary nature of the action. *See Holly v. New York*, 128 A.D. 499, 502 (1st Dept. 1908); *Borek v. Golder*, 190 Misc. 366, 390 (N.Y. Sup. Ct. 1947) *quoting Hanrahan v. Corrou*, 170 Misc. 922, 925 (Sup. Ct. Oneida Co. 1938) ("In the absence of illegality, fraud, collusion, corruption or bad faith, the court has no power to restrain the city from entering into or carrying out any agreement which it chooses to make...")

In this case, City Respondents acted appropriately and in furtherance of the public interest in selecting the development team. Petitioners allege that since the Carey Group, which as noted above they incorrectly characterize as a member of the development team, Pet. ¶ 103, is

led by a former NYCEDC President, and the son of a former Governor, the group was secretly selected in order to "no doubt profit immensely form takings of the Plaintiffs' private properties." Pet. ¶ 105. Furthermore, they allege that now-defunct Lehman Brothers had some nefarious connection to NYCEDC's selection of the development team. Pet. ¶ 109. However, Petitioners provide no proof that the City acted in bad faith.

NYCEDC awarded the project to East Harlem M/E/C LLC, a team of six developers based upon its assessment of which proposal would best further the interests of the City and its residents. Fink Aff., ¶¶ 44-46. Among other factors, the development team was chosen for its willingness to take risks and bring a significant amount of resources to the project, qualities that were particularly important to the City as the economy and credit market started to falter. Fink Aff., ¶ 46. Thus far, the designated development team has invested approximately three million dollars in the Project. *Id.*

East Harlem M/E/C LLC, consists of Archstone-Smith, General Growth Properties, the Richman Group, Monadnock Construction, and local development partners Hope Community and El Barrio's Operation Fightback. The members of this team collectively bring diverse skills and capabilities to the Project. Fink Aff., ¶ 48. Although New York is experiencing challenging market conditions, the development team remains committed to the Project. Regardless, the potential insolvency of one entity does not in any way affect the solvency or commitment of the others or of the team that has been assembled. By awarding the Project to a team of developers, the City and NYCEDC has ensured that the Project will go forward even if one entity withdraws due to financial difficulties. *Id.*, ¶ 49.

POINT II

THE CITY APPROVALS FOR THE EAST 125TH STREET PROJECT FOR MULTIPLE

USES, INCLUDING MODERATE- AND MIDDLE-INCOME AS WELL AS LOW-INCOME HOUSING, DO NOT VIOLATE ARTICLE XVIII, § 6 OF THE NEW YORK STATE CONSTITUTION

As their second cause of action, Petitioners allege that the City's approvals of the East 125th Street Project violated Article XVIII, § 6 because the "proposed residential occupancy" of the Project is not restricted to low-income housing. Petition, ¶¶ 142-151. The East 125th Street Project is located within the East Harlem Empire Zone. Fink Aff. at ¶ 51. All businesses located within an Empire Zone may apply for a real property tax exemption, a tax credit for qualified investments in the empire zone capital corporation and community development projects, and a refund or credit of state and local sales taxes for purchases of goods or services within the zone. Real Property Tax Law ("RPTL") § 485-2; Tax Law §§ 210(20), 606(i), 606(1), 1456(d), 1511(h), 1119(a), 1210; 5 NYCRR § 11.1(c) (1)-(3).

This claim is meritless for several reasons. In essence, Petitioners seek to invalidate approvals granted by City agencies on the grounds that, because of the location of the project, at some point in the future, a developer (which is not a party to this proceeding) may seek subsidies from the State (which is not a party in the proceeding). Thus, the second cause of action fails both on ripeness grounds and for failure to join necessary parties. In addition, Petitioners' claims are based in an unsupportable interpretation of the State Constitution.

A. The Second Cause of Action is Premature

Petitioners argue that the approvals of the Fifteenth Amendment to the Harlem East Harlem Urban Renewal Plan "violate" Article XVIII, § 6 of the Constitution. Pet. at ¶ 150. Even if their reading of that provision were correct, which it is not as explained below, it cannot be a basis for invalidating the City approvals of the Urban Renewal Plan.

To take advantage of the State aid and subsidies associated with an Empire Zone, a business "which owns or operates a facility in an empire zone, or which plans to do so" must apply for "joint certification," and the application must be approved by, among other entities, the New York State Commissioner of Economic Development, and the New York State Commissioner of Labor. *See* GML §§ 963(a), 969(w). Petitioners do not allege that any such application has been made in connection with the East 125th Street Project, let alone that State aid or subsidies have been granted to the Project developer, East Harlem M/E/C LLC.

It is well settled that "a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." *See, e.g., New York Public Interest Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 531 (1977). Where a claim, such as Petitioners' second cause of action, is not ripe for review, consideration "would require [the] court to render an advisory opinion, a practice not in accord with the settled policy in this State." *N.Y. State Inspection, Security & Law Enforcement Employees v. Cuomo*, 64 N.Y.2d 233, 240 (1984).

Petitioners' claim in this case is obviously premature, as no application under the Empire Zone program has been submitted by any business within the Project Site.

B. Petitioners Failed to Join Necessary Parties

Section 1001 of the CPLR, "Necessary joinder of parties," requires:

> Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.

CPLR § 1001(a). If, as Petitioners request, the court were to find that the City's approvals of the East 125th Street Project were inconsistent with the Project's location within the East Harlem

Empire Zone, the rights of the Project developer, East Harlem M/E/C LLC, which is not a party to this proceeding, would be adversely affected. Fink Aff. at ¶ 44.

Moreover, as explained above, the process for determining whether a business in an Empire Zone is eligible for State subsidies involves two State agencies, the New York State Departments of Economic Development and Labor, which are not party to this case. GML § 963(a). Since the entities best positioned to defend against Petitioners' second cause of action are not parties to this case, this cause of action must be dismissed.

In *Llana v. Town of Pittstown*, 245 A.D.2d 968 (3d Dep't 1997), *appeal denied*, 91 N.Y.2d 812 (1998), for example, the court dismissed a procedural challenge to a municipal subdivision law because the petitioner/plaintiff had failed to join the property owners who had received approvals under the law and whose rights would therefore be adversely affected were the law to be invalidated. 245 A.D.2d at 969. *See also Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals*, 2008 NY Slip Op 2600, 2 (2d Dep't 2008) (Article 78 proceeding dismissed because petitioner failed to join the recipient of the challenged use variance).

For the same reasons, because Petitioners failed to join East Harlem M/E/C LLC, the New York State Commissioner of Labor or the New York State Commissioner of Economic Development as parties, Petitioners' second cause of action should be dismissed.

C. Petitioners' Interpretation of Article XVIII, § 6 Is Incorrect

Finally, even apart from the fatal procedural defects in Petitioners' constitutional claim, Petitioners' theory is not legally sound. The restrictions of Article XVIII, § 6 requiring that occupancy of a State-funded "project" be limited to "persons of low income as defined by law" do not apply to the East 125th Street Project but, rather, apply only to low-rent housing projects and nursing homes receiving State aid. The East 125th Street Project will remediate

blight and create a variety of civic and commercial, as well as residential, facilities. Fink Aff. at ¶¶ 18-21. It is not a low-rent housing project and thus is not subject to these restrictions.

Article XVIII, § 6 provides:

> No loan, or subsidy shall be made by the state to aid any *project* unless such *project* is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a sub-standard and unsanitary area or areas and for recreational and other facilities incidental or appurtenant thereto. The Legislature may provide additional conditions to the making of such loans or subsidies consistent with the purposes of this article. The occupancy of any such *project* shall be restricted to persons of low-income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas.

(Emphasis added.)

The term "project" is not defined in this provision. Petitioners apparently assume, Pet., ¶¶ 142-151, that "project" as used in this provision means the portion of a project that will be used for residential purposes."[10] Petitioners' interpretation is inconsistent with Article XVIII (Housing) read as a whole. Moreover, this interpretation would render unconstitutional the State's affordable housing law, which provides State funding for moderate-income housing in blighted areas.

Read in context, the term "project" in § 6 refers to "low-rent housing project." Thus, the first sentence of § 6 requires that State funding of low-rent housing be given in connection with an urban renewal plan, and the third sentence requires that a State-funded low-

[10] We presume that, consistent with the language in paragraph 146 of the Petition, Petitioners do not mean to suggest that every project of any sort receiving State funding must be limited to low-income residential use. Such a reading would have the absurd consequence of prohibiting State funding of schools, hospitals, libraries, government buildings, parks, or infrastructure that are not occupied exclusively as residences by persons of low income.

rent housing project be restricted to persons of low income. Since the East 125th Street Project is not a low-rent housing project, it is not subject to Article XVIII, § 6.

Because the term "project" is not defined in Article XVIII, § 6, its meaning must be determined by reviewing the structure of the Article as a whole. *See Ginsburg v. Purcell*, 51 N.Y.2d 272, 276 (1980); *Ass'n for Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 238 (1930) ("*Adirondacks*"). As set forth in Article XVIII, § 1, the Housing Article of the New York State Constitution authorizes the State Legislature to address either or both of two issues: (1) low-rent housing and nursing homes to accommodate persons of low income, and (2) blight:

> Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe [1] for low rent housing and nursing home accommodations for persons of low income as defined by law, or [2] for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

(Enumeration supplied.) *See also Murray v. LaGuardia*, 291 N.Y. 320, 327, 331 (1943) (Article XVIII, § 1 confers "two separate grants of power" that are "distinct" and thus allows condemnation of a blighted area to construct market-rate housing). Because the two powers of Section 1 are independent of each other, a project to eliminate blight need not simultaneously provide low rent housing for persons of low income. *Id. See also Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400 (1986) (upholding condemnation of blighted area to construct private commercial buildings); *Tribeca Community Organization, Inc. v. New York State Urban Development Corp.*, 200 A.D.2d 536 (1st Dep't 1994) (upholding condemnation of blighted area to construct commodities exchange and private office building). Additionally, the elimination of blight can be undertaken by private enterprise aided by the State. *See Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 522 (1949) (Article XVIII is imbued with "the theory,

consistent with its two purposes, that low rent housing for persons of low income is to be a function of government and the rehabilitation of substandard areas is to be the function of private enterprise aided by government").

Finally, Section 10 establishes that the purpose of Article XVIII is to broaden, not constrict, the Legislature's authority: "This article shall be construed as *extending powers* which might otherwise be limited by other articles of this constitution and *shall not be construed as imposing additional limitations.*" Article XVIII, § 10 (emphasis added).

When Section 6 is read in the context of the other sections of Article XVIII, it is clear that the "projects" to which the restrictions set forth in § 6 apply are "low rent housing projects." By reading Section 6 in isolation from any other provision in Article XVIII, Petitioners recognize one constitutional purpose (the provision of housing for persons of low income) while frustrating the other (the eradication of blight).[11]

For all these reasons, Petitioners' contention that the eligibility of the 125th Street Project for State funding violates the State Constitution is simply incorrect.

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[11] Petitioners' interpretation of Article XVIII, § 6 would destroy the State's affordable housing program, which provides State funding for the construction of affordable homes for persons of "moderate income" as well as of low income. Private Housing Finance Law ("PHFL") §§ 45-b, 1110-13. For instance, PHFL § 1110 provides, among other things: "The legislature therefore finds that a program should be established to provide monies to make the construction, rehabilitation and improvement of homes for low *and moderate* income persons more affordable." Emphasis added. *See also* 21 NYCRR §§ 2160.1 through 2176.5 (implementing regulations). Since 1985, when the New York State Affordable Housing Corporation was established as a public benefit corporation under PHFL § 45-b to administer this program, the State Legislature has provided tens of millions of dollars of funding for the construction of thousands of affordable housing units for moderate-income New Yorkers. Petitioners' effort to apply Section 6 to all projects with a housing component would nullify this critical housing law because it provides housing for those of moderate income who are not "persons of low-income as defined by law."

POINT III

PETITIONERS CANNOT SUCCEED ON THE MERITS OF THEIR GML § 51 TAXPAYER CLAIM

As their fifth cause of action, Petitioners purport to bring a taxpayer action under Section 51 of the General Municipal Law ("GML"). GML § 51 allows taxpayers, under certain very limited circumstances, to seek judicial intervention to prevent illegal official acts of government officials. *Id.* The acts Petitioners base their GML § 51 claims on are: the alleged violation of Article XVIII, § 6 of the State Constitution (Pet. ¶¶ 188-196); the alleged illegal amendment of the Harlem East Harlem Urban Renewal Plan (Pet. ¶¶ 197-201); the alleged circumvention of the disposition procedures set forth in Section 384(b)(4) of the New York City Charter (Pet. ¶¶ 202-203); and the alleged impropriety of the selection of a developer for the East 125th Street Project (Pet. ¶¶ 204-206). As explained Points I and II above, however, none of these alleged illegal acts has in fact occurred. Accordingly, Petitioners' taxpayer claim must fail.

Even assuming, however, that the allegations in the Petition were correct, Petitioners have not asserted a valid claim under GML § 51, which "requires something more than proof of an illegal act. The [alleged] illegality must tend to the detriment of the city either by the dissipation of its funds or by the threat of other injury so imminent and substantial as to make it proper that the taxpayers be protected by injunction." *Campbell v. City of New York*, 244 N.Y. 317, 330 (1927). To give rise to a taxpayer action, the government's purposes must be "entirely illegal." *Mesivta of Forest Hills v. City of New York*, 58 N.Y.2d 1014, 1016 (1983) (citation omitted). A duly approved urban renewal project such as the East 125th Street Project does not and cannot rise to this level.

Moreover, the injuries to be redressed through a taxpayer action must be to the public. *See, e.g., Murtha v. Incorporated Village of Island Park*, 202 A.D.2d 650, 651 (2d Dep't

1994) (a plaintiff in a GML § 51 lawsuit must prove an "illegal act which imperils the public interest, calculated to work a public injury or will produce public mischief"). At most, Petitioners' allegations, even if true (which they are not), would suggest injuries to their private property interests, not injuries to the public.

Petitioners' claims relate instead to the City's approvals of an urban renewal plan which has been the subject of substantial public review and comment, in accordance with City and State law. Fink Aff. at ¶ 7. In *Starburst Realty Corp.*, 225 A.D.2d at 148, the court specifically criticized the attempted use of a taxpayer action in the context of essentially the same type of routine land use determination at issue here:

> The Board of Estimate regularly considers numerous special permits, land dispositions, leases and zoning amendments which must be reviewed by community boards and the City Planning Commission under ULURP. Thus, to make a taxpayer's suit available to challenge Board of Estimate actions such as the one before us here could severely impede the conduct of public business.

Starburst Realty, 125 A.D.2d at 155. Similarly, to make a taxpayer's suit available to property owners dissatisfied with a duly adopted urban renewal plan would severely impede the operations of City agencies. Accordingly, Petitioners' fifth cause of action should be dismissed.

POINT IV

PETITIONERS' CLAIM UNDER § 207 OF THE EMINENT DOMAIN PROCEDURE LAW IS PROCEDURALLY AND SUBSTANTIVELY DEFECTIVE

Petitioners assert, as their eleventh cause of action, that City Respondents have failed to demonstrate a public use, benefit, or purpose for the East 125th Street Project and therefore that "the purported authorization to take Plaintiffs' properties by the use of eminent

domain" should "be annulled." Pet. ¶¶ 272-286. Quite apart from the merits of Petitioners' claims that the City has "failed to demonstrate a public use, benefit, or purpose" for the Project to justify the use of eminent domain (Pet. ¶ 272), which are addressed in Point I above, this cause of action is procedurally defective in two respects.

In brief, Article 2 of the Eminent Domain Procedure Law establishes a process in which a "condemnor," (an entity vested with the power of eminent domain, EDPL § 103(D)) must, prior to instituting condemnation proceedings, conduct a pre-acquisition public hearing to inform the public about and to review the public use to be served by a proposed project." EDPL § 201. Following the hearing, which must be conducted on the record, EDPL § 203, the condemnor must publish a synopsis of its determination and findings, specifying, among other things, the public use, benefit, or purpose to be served by the proposed project. EDPL § 204. Section 207 of the Eminent Domain Procedure Law provides for judicial review of a condemnor's determination and findings made pursuant to EDPL Section 204 by the appellate division of the supreme court in the county where the proposed facility is located. EDPL § 207(A).

Here, a claim under EDPL § 207 is, at best, premature. No public hearing has yet been held, let alone have determinations or findings been made, pursuant to EDPL Article 2. Fink Aff. at ¶ 50; Stein Aff. at ¶ 25. Accordingly, there is nothing to be reviewed under EDPL § 207 at this point.

Moreover, the jurisdiction of the appellate division "shall be exclusive." EDPL § 207(B). As the Court of Appeals noted in *Pizzuti v. Metropolitan Transit Authority*, 67 N.Y.2d 1039 (1986), compliance with SEQRA is not subject to judicial review in a proceeding brought pursuant to EDPL § 207; conversely, compliance with the requirements for condemnation under

EDPL Article 2 is not subject to judicial review in a proceeding, such as this, challenging environmental review, appropriately brought in supreme court under CLPR Article 78. *E&J Holding Corp. v. Noto*, 123 A.D.2d 693 (2d Dep't 1986).

Thus, a claim under EDPL § 207 must be raised in front of the appellate division, and Petitioners' eleventh cause of action should be dismissed.

POINT V

THE ENVIRONMENTAL REVIEW OF THE EAST 125TH STREET PROJECT COMPLIES WITH SEQRA AND CEQR

In their sixth, seventh, and eighth causes of action, Petitioners allege that the Final Environmental Impact Statement ("FEIS") did not adequately consider the Project's potential significant adverse environmental impacts by failing to adequately consider project alternatives or the impact of the MTA Depot Alternative, and by improperly segmenting the Project's environmental review from other area projects.[12] These claims are without basis.

The purpose of SEQRA/CEQR review is to inform decision-makers and the public about the reasonably likely environmental impacts of certain contemplated government actions. As more fully explained in the accompanying affidavit of Rachel Belsky, the Project's FEIS fully complied with the procedural requirements under SEQRA. The FEIS also met the substantive requirements, as the comprehensive analyses were guided by the *CEQR Technical Manual,* a document that sets forth guidelines for conducting environmental assessments in New

[12] Challenges to the environmental review of a project are appropriately brought under CPLR Article 78. CPLR § 7801; *see also Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 2006 NY Slip Op 6860, 1 (2d Dep't 2006).

York City.[13] Belsky Aff. at ¶¶ 9. Because the FEIS took a "hard look" at the Project's environmental impacts and not only met but exceeded SEQRA/CEQR requirements, Petitioners' claims fail as a matter of law.

A. Standard of Review Under SEQRA and CEQR

SEQRA requires agencies to identify and assess the potential environmental effects of, and alternatives to, certain proposed government actions before the agency funds, approves, or undertakes the action. 6 NYCRR § 617.1. Agencies have considerable latitude in evaluating the potential environmental impacts of a proposed action, since SEQRA does not require an agency to act in a particular manner, or reach a particular result. *Aldrich v. Pattison*, 107 A.D.2d 258, 267 (2d Dep't 1985); *Coalition Against Lincoln West, Inc. v. City of New York*, 94 A.D.2d 483, 492 (1st Dep't 1983) ("While an EIS does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency.")

A court's review of an agency's compliance with SEQRA is limited to whether the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Sryden v. Tompkins County Bd.*, 78 N.Y.2d 331 (1991); *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). In reviewing the agency's determination as to the potential for adverse environmental impacts, a court may not substitute its judgment for that of the agency, weigh the desirability of a proposed action, or choose among alternatives. *Merson v. McNally*, 90 N.Y.2d 742, 751 (1997); *Akpan*, 75 N.Y.2d at 570; *Jackson v. Urban Development Corp.*, 67 N.Y.2d 400, 417 (1986). Rather, a court must

[13] The *CEQR Technical Manual* is available at www.nyc.gov/html/oec/html/ceqr/ceqrpub.shtml.

limit its review to whether the agency's determination was arbitrary, capricious, an abuse of discretion, or affected by an error of law. *Akpan*, 75 N.Y.2d at 570; *Chinese Staff & Workers Ass'n v City of New York,* 68 N.Y.2d 359, 363 (1986); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 776 (2d Dep't 2005).

It is well settled that "an agency's responsibility under SEQRA must be viewed in light of a 'rule of reason'; not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility." *Neville v. Koch*, 79 N.Y.2d 416, 425 (1992); *C/S Twelfth Avenue LLC v. City of New York*, 32 A.D.3d 1, 5 (1st Dep't 2006). In general, an agency meets the hard look requirement if it follows the provisions set forth in SEQRA and CEQR and provides a reasoned explanation for its findings. *See Matter of C/S Twelfth Ave. LLC*, 32 A.D.3d at 5.

B. Petitioners Cannot Assert SEQRA Claims That They Did Not Raise During the SEQRA Process

Petitioners' SEQRA/CEQR claims are barred to the extent that they were not raised at the public hearing on the DEIS or during the comment period thereafter. Petitioners had multiple opportunities to challenge the adequacy of the MTA Depot Alternative, the alternatives analysis in the FEIS, and the alleged segmentation of the Project. Belsky Aff. ¶ 33-34. However, none of these issues was raised during any of the public hearings and Petitioners are now precluded from raising these issues in this litigation. *Id.*

A reviewing court may not disturb an agency's "determination upon a ground not theretofore presented and deprive[] the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Aldrich*, 107 A.D.2d at 268 (*quoting Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978)

("administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more . . . seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented'"); *Sun Co. v. City of Syracuse Industrial Dev. Agency*, 209 A.D. 2d 34, 44 (4th Dep't 1995) (*citing Jackson v. New York State Urban Dev. Corp.*, 67 NY 2d 400 (1986) (explaining that "permitting a party to raise new issues after issuance of the FGEIS or approval of the action has the potential for turning cooperation into an ambush").

With respect to SEQRA claims, the Court of Appeals has noted, "the EIS process is designed as a cooperative venture, the intent being that an agency have the benefit of public comment before issuing an FEIS and approving the project; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush." *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 427 (1986).

Here, none of the claims now brought by Petitioners concerning the environmental review of the East 125th Street Project was raised in the public review process. Petitioners are therefore barred from raising them at this point in time. Moreover, as explained below, Petitioners' SEQRA claims are meritless.

C. The FEIS Properly Considered All Reasonable Project Alternatives

The FEIS evaluated a broad array of alternatives in order to permit the public and the agency decision-makers to compare the environmental impacts of such alternatives with those of the Project, including the MTA Depot Alternative—which, as discussed further below, was ultimately adopted by the CPC and the City Council in October 2008. The alternatives, which set forth a wide range of development possibilities, were each evaluated for their potential

to achieve the goals and objectives of the Project and then assessed at a sufficient level of detail to permit meaningful comparisons of their impacts with those of the Project.

One of Petitioners' claims is that the FEIS failed to adequately consider "all available alternatives"—specifically alleging that the City failed to consider an alternative that does not include Petitioners' properties. Pet. ¶¶ 249, 248. However, consideration of every conceivable configuration of individual properties is not possible, let alone required. Moreover, in its comprehensive examination of reasonable alternatives, the FEIS analyzes essentially the alternative Petitioners claim it failed to analyze – the "As of Right" alternative that examines impacts of the Project without zoning changes or inclusion of the properties added to the Urban Renewal Area under the 15th Amendment to the Plan, including Petitioners' properties.[14]

The *CEQR Technical Manual* sets forth guidelines for identifying and analyzing alternatives that would reduce or eliminate impacts of the proposed action while substantively meeting the project's objectives. *CEQR Technical Manual* 3U-1. Alternatives to be considered include a "no build" alternative (what will occur in the area without the project) or alternatives to project size, design, or configuration. *CEQR Technical Manual* at 3U-1.

The FEIS in this case considered four alternatives: 1) a No Action Alternative as required by 6 NYCRR § 617.9(b)(5)(v); 2) an As-of-Right Alternative—limiting the project to

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[14] As explained above, SEQRA and CEQR require that alternatives to a proposed action be identified and evaluated in an EIS. However, "an agency's responsibility under SEQRA must be viewed in light of a 'rule of reason;' not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility." *Neville v. Koch,* 79 N.Y.2d 416, 425 (1992); see *Jackson*, 67 N.Y.2d at 417 ("Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA"); *Dryden v. Tompkins County Bd. of Representatives,* 78 N.Y.2d 331, 334 (1991) (where "there has been such a reasonable consideration of alternatives, the judicial inquiry is at an end.")

what would be allowed under the existing zoning, without acquisition of any non-City-owned land (which, as noted above, is substantially similar to the alternative Petitioners complain the City failed to analyze); 3) a No Impact Alternative—eliminating those elements of the project that would potentially result in any identified significant adverse impact; and 4) the MTA Bus Depot Expansion Alternative—which is addressed in the accompanying affidavit of Rachel Belsky. Each alternative was analyzed in each technical area identified in the *CEQR Technical Manual*, including impacts to open space, land use, shadows, neighborhood character, visual resource, and traffic.

As stated above, the FEIS evaluated an As-of Right Alternative, which analyzed the impacts associated with a redevelopment under the then-existing zoning, without the properties added to the Urban Renewal Area under the Amended Plan – as requested by Petitioners. However, this analysis concluded that the newly added parcels and the rezoning were necessary for the comprehensive implementation of the Plan and that the As-of-Right Alternative would not meet Project needs. FEIS[15] at 3.21-26. For example, this alternative would preclude development of affordable housing and would not attract the same degree of retail and commercial uses. Belsky Aff., ¶ 24. Therefore, this was not found to be a feasible alternative. *Id.*

The FEIS analysis ultimately concluded that, apart from the MTA Depot Alternative, none of the examined alternatives was able to meet the Project goals and objectives, which include development of the Project Area in a comprehensive and unified manner,

[15] The FEIS is included in the Record under separate cover. For ease of reference and because it is printed as separate volume, we refer to it herein as the FEIS rather than with its Record citation.

increased affordable housing, development of the area as a commercial center, and other benefits to the community.

This analysis of alternatives fully comports with the obligation under SEQRA/CEQR to consider alternatives. *Jackson*, 67 N.Y.2d at 417.

D. The DEIS and the FEIS Thoroughly Evaluated the MTA Depot Alternative, Which Was Ultimately Selected as the Preferred Project Alternative

Petitioners allege that the FEIS failed to examine the potential impacts the Depot Alternative would have on air quality and traffic impacts associated with the concentration of buses in one location, and on historical resources. However, the potential environmental impacts of the MTA Depot Alternative were thoroughly reviewed.[16]

The review, which found that the Depot Alternative would not result in significant adverse environmental impacts, analyzed the impacts that the expanded depot would potentially have on land use (FEIS Chapter 3.21-40); socioeconomic conditions (3.21-42); community facilities and services (3.21-42 to 43); open space and shadow impacts (3.21-43 to 55); historical resources (3.21-55); urban design and visual resources (3.21-56 to 60); and neighborhood character (3.21-60); hazardous materials (3.21-60); natural resources (3.21-61); waterfront impacts (3.21-61 to 76); transit and pedestrians (3.21-77); air quality impacts (3.21-78 to79); noise (3.21-79); construction impacts (3.21-79-80); and public health (3.21-80).

[16] Petitioners also allege that the MTA Bus Depot should be considered part of the Project Area and was improperly segmented for environmental review purposes. Pet. ¶¶ 232-234. These claims are without merit. First, the Project is in no way dependant upon the MTA Depot Alternative being carried out by MTA on its own property. Secondly, MTA has not proposed any plan for the garage. Belsky Aff., ¶ 53-54. Therefore, any challenge to environmental review of the Depot is premature.

The FEIS found that the Depot Alternative would, in fact, be more compatible with the overall mixed-use program for the Project site, as it would allow an additional 19,000 square feet of retail space to be constructed on Parcel A, which would employ an additional 57 workers. Belsky Aff. ¶ 31. Furthermore, the Depot Alternative would not result in any changes to demands on services, traffic amounts, air quality, or noise impacts in comparison with the Project as originally proposed. *Id.*

1. Air Quality Impacts

The FEIS contained a comprehensive air quality analysis conducted pursuant to the *CEQR Technical Manual* for the entire project area with and without the MTA Bus Depot Alternative and found that there would be no significant adverse impacts on air quality. Belsky Aff., ¶ 46. The analysis found that the Depot Alternative would not cause or exacerbate any exceedances of air quality standards or impact criteria and, therefore, would not result in significant adverse air quality impacts. FEIS at 3.21-78. The mobile source emissions of carbon monoxide (CO) and particulates (PM2.5 and PM10), the contaminants most associated with childhood asthma, from project-induced traffic would not result in any exceedances of the National Ambient Air Quality Standards ("NAAQS") or city and state interim guideline impact criteria at current or future air quality receptors. Belsky Aff., ¶ 43.

In addition, since the Depot Alternative would increase aboveground parking spaces, the analysis also considered the air quality impacts of the proposed two level parking structure on the MTA property. Besky Aff., ¶ 45. This analysis found that with the inclusion of two rooftop vents to be located at the far eastern edge of the facility, the increased aboveground parking would not result in any significant air impacts. *Id.* Therefore, the Depot alternative would not result in any significant adverse environmental impacts on air quality. *Id.*, ¶ 46.

2. Traffic

Petitioners also apparently challenge the traffic analysis contained in the FEIS regarding the MTA Bus Depot Alternative. Pet. ¶ 231. However, as the FEIS demonstrates, the environmental review comprehensively evaluated the traffic impacts and found that the Depot Alternative would result in generally similar amounts of traffic as the original Project and would not result in adverse traffic impacts. FEIS at 3.21-74. In fact, the Depot Alternative would greatly reduce the number of bus movements within the immediate vicinity of the Project because all bus activity would be to and from a single facility, whereas under the original proposal, buses would enter the MTA facility for refueling, then travel to Parcel A for parking. Belsky Aff., ¶ 47-49. The reduced bus traffic would also allow the M15 bus to start its route at 126th Street and Second Avenue—instead of having to circle around the block, as is currently required. *Id.*

3. Historical Resources

Lastly, Petitioners raise the unfounded allegation that the FEIS ignored potential impacts to an African-American Burial ground located on the MTA site. Pet. at ¶ 231. This allegation is without merit, as the City of New York Landmarks Preservation Commission ("LPC") approved the Project based on review of an independent study prepared for the site by Historical Perspectives, upon LPC's request. See FEIS Appendix A, Environmental Review approval by LPC; Belsky Aff., ¶ 51. The FEIS also found that a larger structure on MTA property, while bulkier, would be within the range of existing building heights in the area. FEIS at 1-30.

In conclusion, based on City Respondents' comprehensive review of the Depot Alternative, none of Petitioners' objections to the environmental review carries any weight.

E. The Project's Environmental Review Appropriately Considered the Potential Cumulative Impacts of the Corridor Rezoning

Petitioners claim that the City improperly segmented the environmental review of the East 125th Street Project and the environmental review of the Corridor Rezoning Project, and that the Project's environmental review failed to consider the cumulative impacts of the two projects. Pet. ¶¶ 243-44. As the two projects are separate initiatives undertaken and approved by different City agencies, the environmental reviews of the projects were appropriately conducted separately. For the same reasons, there was no legal obligation to analyze the cumulative impacts of the two projects. Contrary to Petitioners' allegations, however, the projected impacts from the Corridor Rezoning (the first of the two projects to be reviewed under SEQRA/CEQR) were in fact considered in the environmental review for the East 125th Street Project; accordingly, the cumulative impacts were in fact assessed and disclosed.

The Corridor Rezoning Project was proposed by DCP and, after undergoing ULURP and SEQRA/CEQR review, was approved by the City Council on April 30, 2008. The Corridor Rezoning area does not include any parcels in the East 125th Street Project area, and encompasses 24 blocks in East, Central, and West Harlem, generally bounded by 124th Street, 126th Street, Broadway, and Second Avenue, but did not include any land parcels that are included in the Project Site. Marshall Aff., ¶ 22. This rezoning was part of a comprehensive City initiative to support the ongoing revitalization of Harlem—but was separate and distinct from the East 125th Street Project, which was not proposed to City Planning until after the Corridor Rezoning Project was approved. *Id.* at ¶ 17. The East 125th Street Project and the Corridor Rezoning, while distinct, both contribute to the ongoing revitalization of Harlem.

1. The Environmental Review of the Project Was Not Improperly Segmented from the Environmental Review of the Corridor Rezoning

Segmentation is the division of the environmental review of an action such that various activities or stages are addressed as though they were independent, unrelated activities, needing individual determinations of significance. 6 NYCRR § 617.2(g). However, when an agency action is independent of other activities, even if those activities are somehow related, a separate environmental review of the action does not constitute segmented review. *See, e.g., Matter of Residents for a More Beautiful Port Washington, Inc. v. Town of North Hempstead*, 149 A.D.2d 266 (2d Dep't 1989).

The separate environmental reviews of the Corridor Rezoning and the East 125th Street Project were entirely appropriate. First, the area subject to the Corridor Rezoning is not located on the lots at issue in this litigation, and it was separately granted all necessary approvals. Marshall Aff. at ¶ 18. Second, to the extent that Petitioners claim that the environmental review of the Corridor Rezoning Project was improperly segmented from the environmental review of the East 125th Street Project, Petitioners' challenge (which essentially concerns the Corridor Rezoning FEIS) is barred by the applicable statute of limitations and by the doctrine of res judicata. *See Voice of the Everyday People v. City of New York, et al*, Supreme Court of New York County, Index No. 106025/08, Decision by J. Figueroa, dated November 20, 2008 (dismissing Article 78 challenge to Corridor Rezoning approval on substantive and procedural grounds, finding statute of limitations to challenge the Corridor Rezoning expired on April 10, 2008), attached as Ex. A to the Stein Affirmation.

2. Petitioners' Cumulative Impact Claim is Without Merit

Petitioners' claim that the East 125th Street Project FEIS failed to consider the cumulative impacts of the Corridor Rezoning and the East 125th Street Project also fails. Pet.

¶ 244. Cumulative impact refers to "changes in two or more elements of the environment, no one of which has a significant effect on the environment, but [which] when considered together result in a substantial adverse impact on the environment." 6 NYCRR § 617.7(c)(1)(xi).

The Court of Appeals, in declining to require cumulative review of development projects in a localized area, held that "the existence of a broadly conceived policy regarding land use in a particular locale is simply not a sufficient unifying ground for tying otherwise unrelated projects together and requiring them to be considered in tandem as 'related' proposals." *Long Island Pine Barrens Soc'y v. Planning Bd. of the Town of Brookhaven*, 80 N.Y.2d 500, 513 (1992); *Stewart Park and Reserve Coalition v. New York State Dep't of Transp.*, 157 A.D.2d 1, 11 (3d Dep't 1990), *aff'd without op.*, 77 N.Y.2d 970 (1991) ("[b]eing part of the same over-all master plan...is not in and of itself conclusive" for cumulative impact analysis).

Here, the DCP-sponsored Corridor Rezoning and NYCEDC's East 125th Street Project are distinct actions which share only a general, broad purpose of redeveloping the Harlem area to provide, among other things, affordable housing and increased economic opportunities. *See* Marshall Aff., ¶¶ 23. As such, this common purpose is insufficient under SEQRA/CEQR for requiring the cumulative review of both projects together.

Regardless, the East 125th Street Project FEIS did not fail to consider cumulative impacts because the Corridor Rezoning was included in all technical analyses for the Project. In considering the impacts of the East 125th Street Project, the FEIS took into account the effects the Corridor Rezoning Project would have on, among other things, land use, commercial and retail space, and affordable housing. FEIS at 3.1-36; 3.1-49; 3.2-84 to 91; 3.8-8. These analyses found that, in fact, the two projects would complement each other, as both are expected to strengthen retail and commercial areas and serve to continue the pattern of reinvestment in the

area and, thus considered, would not result in adverse environmental impacts. See FEIS 3.1-36. Belsky Aff., ¶ 59.

For the reasons stated above, Petitioners' challenges to the environmental review for the Project are improperly raised in this proceeding and, regardless, do not have any merit. Thus the sixth, seventh, and eight causes of action in the Petition should be denied.

POINT VI

DSNY DID NOT VIOLATE SEQRA/CEQR IN SITING A TEMPORARY SALT PILE

Petitioners allege as their ninth cause of action that DSNY was required, but failed, to conduct a complete environmental review under SEQRA/CEQR prior to temporarily locating a winter emergency salt pile at 208 East 127th Street, Manhattan, Block 1791, Lot 1 ("DSNY Site"). Pet. ¶¶ 253-258.[17] However, as set forth in the Affidavit of Steven Brautigam ("Brautigam Aff.") DSNY met all of its legal obligations under SEQRA/CEQR, as the temporary placement of the salt pile is a Type II action under SEQRA, which does not require a lead agency to issue any written determination.

The temporary relocation of a winter salt pile by DSNY is appropriately considered a "routine or continuing agency administration and management," 6 NYCRR § 617.5(c)(20), and a "minor temporary use[] of land having negligible or no permanent impact on the environment," 6 NYCRR § 617.5(c)(15), and, therefore, presumptively not subject to an environmental review. SEQRA regulations set forth 37 separate categories of actions that are considered Type II activities, not subject to SEQRA review. 6 NYCRR §§ 617.5(c)(1) – (37).

[17] As with the SEQRA claims relating to the East 125th Street Project, this claim is appropriately brought under Article 78.

See also 6 NYCRR § 617.6(a)(1)(iv). Actions categorized as Type II are presumed not require preparation of an environmental assessment or an EIS because they have "been determined not to have a significant impact on the environment." 6 NYCRR § 617.3(a), (f) ("[n]o SEQR determination of significance, EIS or findings statement is required for actions which are Type II").

Indeed, despite Petitioners' claims to the contrary, there exists no requirement for an agency to issue any written determination that an action is subject to a Type II exemption. *See Civic Association of Utopia Estates, Inc., v. City of New York*, 175 Misc. 2d 779, 781 (Sup. Ct. Queens Co. 1998) *aff'd* 258 A.D.2d 650 (2d Dep't 1999) ("...case law does not compel the conclusion that a formal declaration of action Type is required in cases where, as here, the action is clearly a Type II action and not subject to SEQRA review.") Moreover, SEQRA regulations provide that if an action is a Type II activity, "the agency has no further responsibilities under this Part," 6 NYCRR § 617.6(a)(1)(i). The regulations do not compel, or even suggest, that each determination needs to be reduced to writing.

In this case, as discussed in the Brautigam Affidavit, DSNY's temporary placement of the salt pile at the Site constitutes a "routine or continuing agency administration...." that is exempt from SEQRA/CEQR review. 6 NYCRR § 617.5(20). DSNY has an affirmative obligation under the New York City Charter to remove ice and snow from NYC streets immediately after a snowfall. NYC Charter § 753. *See also* NYC Administrative Code § 16-124, "The commissioner [of DSNY], immediately after every snowfall or the formation of ice on the streets, shall forthwith cause the removal of the same, and shall keep all streets clean and free from obstruction." Furthermore, the temporary storage is a "minor temporary uses of land having negligible or no permanent impact on the environment," 6

NYCRR § 617.5(c)(15). The temporary salt pile is required to be removed by April 30, 2009 and DSNY determined that during the limited period it would be in place, it would not result in adverse environmental impacts. Brautigam Aff., ¶¶ 26-27.

In general, every winter season, DSNY locates a number of relatively small temporary salt storage piles under tarps on paved surfaces in various locations in New York City in order to support DSNY operations to adequately clear ice and snow from city streets during winter emergencies. Brautigam Aff., ¶ 7. DSNY would not be able to meet its obligations under the City Charter to immediately remove ice and snow from city streets without these temporary storage sites, and their placement is a recurring, routine agency activity. DSNY does not typically conduct environmental reviews for these seasonal minor uses of land.[18]

In this case, DSNY determined, among other things, that the air and noise impacts from storage, delivery and loading of salt for the season would be trivial and/or below applicable CEQR review screening thresholds. Brautigam Aff., ¶ 27. The storage would be short-term, and any potential leaching and stormwater runoff of salt would be avoided and minimized, respectively, through storage on an impervious surface and covering of the pile. Brautigam Aff,. ¶ 27. Even if, despite protection provided by the tarps, some salt-laden stormwater were to flow off the site to the street and sewers, this would merely be comparable to what happens when DSNY routinely applies salt directly to City streets during snow events, and would not cause a significant impact to the environment. Brautigam Aff., ¶ 27. The temporary use of the paved site

[18] In contrast, more comprehensive environmental reviews are required for the siting of permanent salt sheds because such actions qualify as a Type I action under SEQRA. For instance, DSNY completed an Environmental Assessment Form and ultimately issued a negative declaration for the permanent salt pile at Block 1791, Lot 1 that will replace the temporary facility on the Project Site. Brautigam Aff. at ¶ 13.

for salt storage would have negligible or no permanent environmental impact and would not constitute a public nuisance. Brautigam Aff., ¶ 29.

Therefore, the temporary location of the salt pile is a routine and continuing agency action that does not require an environmental review.

POINT VII

PETITIONERS CANNOT SUSTAIN THEIR PUBLIC NUISANCE CLAIM

Petitioners' tenth cause of action, a public nuisance claim, is based on allegations of vague injuries that, for the most part, Petitioners acknowledge have not yet occurred.[19] They claim, for instance, that DSNY's temporary placement of the salt pile, "gives rise to a significant *potential* environmental hazard." Pet. ¶ 262. This claim fails as a matter of law because the temporary salt pile is not a public nuisance and, even if it were – assuming the allegations as set forth in the Complaint were true, Petitioners have not established any injury, and certainly not the specialized injury required for them to assert a public nuisance claim. Thus the City respectfully requests that this claim be dismissed.

It is well established that a private action alleging public nuisance must show injury in fact that is unique to the private party. The harm must be different in degree and different in kind from the injury to the public at large. Courts have regularly dismissed private actions for public nuisance where the harms are not different in kind from those that affect the public. *See, e.g., 532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d 280, 293 (2001). As a general rule, only "one who suffers damage or injury, beyond that of the general inconvenience

[19] A public nuisance claim is properly made in a plenary action and should not be asserted in an Article 78 Petition.

to the public at large, may recover for such nuisance in damages or obtain [an] injunction to prevent its continuance." *Wall St. Garage Parking v. New York Stock Exch.*, 10 A.D.3d 223 (1st Dep't 2004), *citing Graceland v. Consolidated Laundries,* 7 A.D.2d 89, 91 (1st Dep't 1958), *aff'd* 6 N.Y.2d 900 (1959). Thus, a private right of action for nuisance is barred where the alleged injury is "common to the entire community..." *Wheeler v. Leb. Valley Auto Racing Corp.*, 303 A.D.2d 791 (3d Dep't 2003); *532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 292, (finding that the street closures on Madison Avenue and 55th Street affected the public as a whole and were not actionable in nuisance); *Wall St. Parking Garage Corp.*, 10 A.D.2d 223 (closure of streets for security purposes in New York City's financial district did not result in a special injury to the plaintiff, a parking garage); *Marcy Housing Tenants Assoc.*, 2004 N.Y. Misc. LEXIS 2159 (Sup. Ct. Kings Co. 2004) (community group members would not suffer a special injury as a result of traffic and other impacts from a proposed sanitation garage).

Furthermore, common urban ills cannot form the basis of a claim for nuisance. *Blair v. 305-313 East 47th Street Assoc.*, 23 Misc. 2d 612, 615-16 (Sup. Ct. N.Y. Co. 1983) (court rejected a claim that noise from air conditioning units, ubiquitous in New York City, was an adequate basis for nuisance); *see also 169 East 69th St. Corp. v. Leland,* 156 Misc. 2d 669 (Civ. Ct. of N.Y.C. 1992) (stating that a resident who lived above a commercial street could not claim that excessive light from signage constituted a nuisance); *Celebrity Studios Inc. v. Civetta Excavating Inc.,* 72 Misc. 2d 1077, 1080-86 (Sup. Ct. N.Y. Co. 1973) (the court noted that traffic noise and air pollution were ills common to urban life.); *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 40 (4th Dept 1932) ("One who chooses to live in the large centers of population cannot expect the quiet of the country...A person who prefers the advantages of community life must

expect to experience some of the resulting inconveniences...Such inconvenience is of minor importance compared with the general good of the community.")

Petitioners cannot show that the temporary salt pile constitutes a public nuisance because they have not alleged that they suffer a particularized injury, nor that they suffer immediate injury. Moreover, as explained below and in more detail in the accompanying Brautigam Affidavit, the temporary salt pile does not in fact cause the injuries Petitioners foresee, and in any event the salt pile will be removed on or before April 30, 2009, at which point Petitioners' nuisance claim will be moot. Therefore, their public nuisance claim must be dismissed.

A. Petitioners Do Not and Cannot Allege a Specialized Injury

Petitioners all but admit that they have not met the "special injury" requirement. Petitioners vaguely describe an alleged injury resulting from saltwater runoff being diverted onto "Plaintiff's property and the surrounding area, including into the environment, water, and nearby ecological resources." Pet. ¶ 261. In fact, they allege that the salt pile is dangerous to the public at large, including nearby residents and passers-by in addition to Petitioners. Pet. ¶ 266. Their sole support for their allegation that Petitioner YORY suffers a harm different from that suffered by community because of the location of his property. Pet. ¶ 267. Proximity is not enough to establish harm different from the public. *169 East 69th St. Corp.,* 156 Misc. 2d 669.

Furthermore, DSNY temporarily locates a number of relatively small temporary salt storage piles covered with tarps on paved surfaces in various locations in NYC, this placement is not unique to Petitioners neighborhood. Brautigam Aff. ¶ 25. Without more, these generalized claims are not unique and cannot be distinguished from harm that would be suffered by the community as a whole. *Blair v. 305-313 East 47th Street Assoc.*, 23 Misc. 2d at 615-16.

B. Petitioners Do Not and Cannot Allege Injury in Fact

Nor do Petitioners establish an injury in fact, as their claims are based on speculative harms lacking immediacy. A plaintiff must show that the harm constituting the alleged nuisance will *necessarily* occur and cannot base a nuisance claim on "speculation, surmise and conjecture." *Blair*, 123 Misc. 2d at 616. Where the pleadings for a public nuisance action are unduly speculative, dismissal for failure to state a cause of action is warranted. *See id.*; *Marcy Housing Tenants Assoc.*, 2004 N.Y. Slip Op. 51375U; *Celebrity Studios Inc. v. Civetta Excavating Inc.*, 72 Misc. 2d 1077, 1080-86 (Sup. Ct. N.Y. Co. 1973); *City of Yonkers v. Dyl & Dyl Dev. Corp.*, 67 Misc. 2d 704, 706 (Sup. Ct. Westchester Co. 1971), *aff'd*, 38 A.D.2d 691 (2d Dep't 1971). The alleged injury cannot be "fanciful, slight or theoretical, [must instead be] certain and substantial." *Nalley v. General Elec. Co.*, 165 Misc. 2d 803, 807 (Sup. Ct. Rensselaer Co. 1995).

Petitioners fail to identify any non-speculative harm. They use words such as "potential" and "future" to describe their alleged injuries. Pet. ¶¶ 261, 262. They speculate that "if and when" the salt pile settles and collapses the land, Petitioner YORY "will have been irreparably damaged." Pet. ¶ 267. None of these alleged injuries has yet occurred, and there is no indication that they will ever occur—they are nothing more than theoretical events. Indeed, any danger of their occurring will be eliminated on or before April 30, 2009, when DSNY is obliged to remove the salt pile. Brautigam Aff. at ¶ 3. Since Petitioners cannot establish harm, their public nuisance claim must fail.

CONCLUSION

For the foregoing reasons, City Respondents respectfully request that their motion to dismiss Petitioners' Verified Complaint be granted and that the Petition be dismissed in its entirety, and that any request Petitioners have made for injunctive relief, be denied, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 30, 2009

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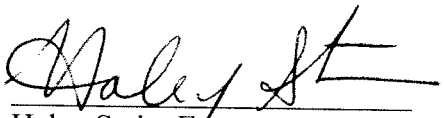
By: 

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