SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

In the Matter of VELMANETTE MONTGOMERY, JAMES F. BRENNAN, JOAN L. MILLMAN, LETITIA JAMES, NEW YORK PUBLIC INTEREST RESEARCH GROUP STRAPHANGERS CAMPAIGN, and DEVELOP DON'T DESTROY (BROOKLYN), INC., Petitioners, For a Judgment Pursuant to Article 78 -against- METROPOLITAN TRANSPORTATION AUTHORITY and FOREST CITY RATNER COMPANIES, LLC, Respondents.	Index No. 09/114304

PETITIONERS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF THEIR VERIFIED PETITION

BARTON BARTON & PLOTKIN LLP
420 Lexington Avenue, 18th Floor
New York, NY 10170
(212) 687-6262

YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

LEGAL ARGUMENT 4

POINT I: MTA PLAINLY VIOLATED THE PAAA'S PROCEDURAL REQUIREMENTS IN APPROVING THE DISPOSITION OF THE VANDERBILT YARD TO FCR ON JUNE 24, 2009 4

POINT II: THIS COURT SHOULD GRANT PETITIONERS STANDING TO CHALLENGE MTA'S VIOLATION OF THE PAAA 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Albert Elia Bldg. Co., Inc. v. New York State Urban Dev. Corp., 45 A.D.2d 337, 388 N.Y.S.2d 462 (4th Dep't 1976) 9, 10

Community Board 7 v. Schaffer, 84 N.Y.2d 148, 615 N.Y.S.2d 644 (1994) 12

HHM Assocs. v. Appleton, 157 Misc. 2d 759, 597 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1993) 10

Matter of Abrams v. New York City Transit Auth., 39 N.Y.2d 990, 991, 387 N.Y.S.2d 235, 236 (1976) 7

Matter of Amdahl Corp. v. New York State Higher Edu. Serv. Corp., 203 A.D.2d 792 (3d Dep't 1994) 9

Matter of Amdahl Corp. v. New York State Higher Edu. Serv. Corp., 208 A.D.2d 792, 794, 611 N.Y.S.2d 50, 53 (3d Dep't 1994) 9

Matter of Jerkens Truck & Equip. v. City of Yonkers, 174 A.D.2d 127, 132-133, 579 N.Y.S.2d 417, 421 (2d Dep't 1992) 10

Matter of Madison Square Garden, L.P. v. New York Metro. Transp. Auth., 2005 N.Y. Misc. LEXIS 1094 (Sup. Ct. N.Y. Co. Jun. 2, 2005), *aff'd*, 19 A.D.3d 284 (1st Dep't 2005) 13

Matter of Madison Square Garden, L.P. v. New York Metro. Transp. Auth., 2005 N.Y. Misc. LEXIS 1094, *12, 233 N.Y.L.J. 109 (Sup. Ct. N.Y. Co. Jun. 2, 2005), *aff'd*, 19 A.D.3d 284, 799 N.Y.S2d 186 (1st Dep't 2005) 9

Matter of New York Public Interest Group Straphangers Campaign, Inc. v. Metro. Transp. Auth., 196 Misc. 2d 502 (Sup. Ct. N.Y. Co. 2003), *modified*, 309 A.D.2d 127 (1st Dep't 2003) 13

Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 814, 766 N.Y.S.2d 654661 (2003) 7

Transactive Corp. v. N.Y.S. Dep't of Social Services, 92 N.Y.2d 579, 684 N.Y.S.2d 156 (1998)11

Statutes

General Association Law § 12 12

Public Authorities Law § 2897(3) 4

Public Authorities Law § 2897(6)(c) 5

Other Authorities

N.Y.S. Auth. Budget Office Press Release, "Governor Signs Public Authorities Accountability Act", dated Jan. 15, 2006 ..... 3, 4

Sponsor Memo., 2005 N.Y. S.B. 5927, L. 2005 ch. 766 3

PRELIMINARY STATEMENT

Petitioners Velmanette Montgomery, James F. Brennan, Joan L. Millman, Letitia James, New York Public Interest Group/Straphangers Campaign, and Develop Don't Destroy (Brooklyn), Inc., hereby reply to the respective answers and memoranda of law of respondents Metropolitan Transportation Authority ("MTA") and Forest City Ratner Companies, LLC ("FCR") in opposition to petitioners' CPLR Article 78 petition.

Both FCR and MTA have chosen to emphasize in their opposition papers the perceived public benefits of the Atlantic Yards project and some of petitioners' public opposition to that project, rather than focus on the narrow procedural issues arising under the Public Authorities Accountability Act of 2005 ("PAAA")[1] which are the only issues addressed by petitioners in this proceeding. MTA acknowledges as much, opening its opposition brief by mischaracterizing this proceeding as "only the latest in a long line of misguided attempts to use litigation to derail the Atlantic Yards development project", and then conceding in the next breath that petitioners' claims herein "do[] not in any way implicate the merits of the Atlantic Yards project." Memorandum of Law of Respondent Metropolitan Transportation Authority in Opposition to the Petition ("MTA Brf.") at 2.

To be clear, the only issues raised by petitioners herein concern whether MTA's Board's approval of the disposition of the Vanderbilt Yard to FCR violated the strict procedural requirements of the PAAA, and the only relief sought by petitioners herein is annulment of the MTA Board's approval of that transaction on that ground. As alleged in the Verified Petition, MTA, in its rush to meet its predetermined goal of transferring the Yard to FCR in order to facilitate FCR's State-supported Atlantic Yards project, failed to obtain the statutorily mandated

[1] Defined terms and abbreviations used herein have the same meanings as in petitioners initial memorandum of law.

appraisal of the Yard before its Board approved that transaction as required under PAL § 2897(3), and failed to approve that transaction "subject to obtaining such competition as is feasible under the circumstances" as required under PAL § 2987(6)(c). Regardless of whether MTA might ultimately lawfully dispose of the Vanderbilt Yard to FCR, the transaction which its Board approved on June 24, 2009, was unlawful and therefore must be annulled.

Respondents attempt to avoid that result by raising various argument, none of which are valid. For one, respondents argue that the appraisal of the Vanderbilt Yard which MTA obtained in 2005 was still valid in 2009, even though MTA's Chief Financial Officer ("CFO") publicly acknowledged on June 22, 2009, that the economy had substantially worsened and the real estate market in Brooklyn had substantially deteriorated since 2005, so as to warrant FCR's withdrawal of its 2005 proposal and MTA's negotiation of a new transaction with FCR. *See* Verified Petition ("Petition") ¶¶56, 63; Verified Answer of Respondent Metropolitan Transportation Authority ("MTA Answ.") ¶¶56, 63 (at pp. 11, 13).

Respondents also argue that the transaction which MTA's Board approved on June 24, 2009, should be deemed to relate back to the proposal from FCR which MTA's Board formally selected nearly four years earlier, on September 14, 2005, and which FCR subsequently withdrew. Thus, respondents contend that both transactions were really just part of an unprecedented four-year-long disposition of authority property, so that the MTA should be permitted to rely on the RFP which it issued and the appraisal of the Vanderbilt Yard which it obtained in 2005, before the PAAA was enacted, to meet the new procedural requirements of the PAAA in 2009. But that strained argument undermines the explicit remedial purpose of the PAAA, which is to reform the State's public authorities by, among other things, "ensur[ing] greater efficiency, openness and accountability" in the disposition of authority property. *See*

Sponsor Memo. (Affirmation of Randall L. Rasey in Support of Verified Petition ("Pet. Attorney Affirm."), Exh. J thereto); ABO Press Release (Pet. Attorney Affirm., Exh. I thereto).

FCR alone argues further that the PAAA does not apply to the June 24, 2009 transaction at all. That argument is directly undermined by MTA's own implicit admission that the PAAA does in fact apply to the June 24, 2009 transaction, as evidenced in and by MTA's "explanatory statement" to designated State officials and legislators dated July 27, 2009, which MTA issued in express compliance with PAL § 2897(6)(d)(i) and (ii), which are part of the PAAA. *See* Pet. Attorney Affirm., Exh. C. Moreover, FCR's argument is really just another variation of the strained argument that the June 24, 2009, transaction is an indistinct part of a four-year-long disposition process which began in May 2005, so as to exempt the latter transaction from the PAAA under a sort of implied "grandfather clause" which does not actually exist in the PAAA.

Both respondents attempt to preclude this Court's review of the June 24, 2009 transaction altogether, by arguing that none of petitioners should be granted standing to challenge that transaction. As discussed in detail at Point II below, there is no party other than petitioners in a position to challenge MTA's violation of the procedural requirements of the PAAA in this case, and a matter of such acknowledged public interest as the disposition of the Vanderbilt Yard should not be insulated from judicial review by denying standing. Moreover, under well established case law, DDDB has standing herein as a potential bidder for the Vanderbilt Yard.

The facts and circumstances of DDDB's proposal for the Vanderbilt Yard are set forth in detail in the accompanying Reply Affidavit of Eric Reschke in Further Support of the Verified Petition ("Reschke Affidavit" or "Reschke Affid."), and the Court is respectfully directed thereto for a full recitation thereof. While respondents seek to misrepresent DDDB's proposal as a "sham" and a "publicity stunt", neither of respondents claims to have made any genuine effort

either to understand DDDB's proposal or to determine whether it is viable, and MTA has simply precluded consideration of any proposal that might compete with its planned disposition of the Vanderbilt Yard to FCR. Petitioners' claims herein arising under the PAAA appear to be issues of first impression in the courts of New York State, and should be determined by this Court on the merits.

LEGAL ARGUMENT

POINT I: MTA PLAINLY VIOLATED THE PAAA'S PROCEDURAL REQUIREMENTS IN APPROVING THE DISPOSITION OF THE VANDERBILT YARD TO FCR ON JUNE 24, 2009

The legislative history of the PAAA confirms that it was enacted in 2006 as a "comprehensive reform measure that will help ensure that public authorities in New York State follow the highest standards of accountability, transparency and professionalism." ABO Press Release (Pet. Attorney Affirm., Exh. I). Thus, as a remedial measure, the PAAA "should be interpreted broadly and should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible." *Matter of New York Public Interest Research Group Straphangers Campaign v. Reuter*, 293 A.D.2d 160, 166, 739 N.Y.S.2d 127, 131 (1st Dep't 2002).

The PAAA expressly and unambiguously requires that where a public authority's property "because of its unique nature is not subject to fair market pricing", in order for the authority to be able to dispose of the property, the authority must obtain an independent appraisal of the property and include the appraisal in the record of the transaction, even if the authority properly decides to sell the property for less than its fair market value. PAL § 2897(3). This requirement is sensible and logical, because even if the authority reasonably determines that the anticipated public benefits from the disposition warrant selling the property for less than its fair market value, the authority must still know and record the property's actual value in order to

ensure that it obtains the best possible value for the property under the circumstances and does not undervalue the property as part of a sweetheart deal with a well-connected purchaser.

In the volatile New York City real estate market, it should go without saying that MTA could not rationally rely on a four-year-old real estate appraisal, particularly where MTA's own CFO has conceded as much. It appears clear that when MTA's Board approved the disposition of the Vanderbilt Yard to FCR on June 24, 2009, they did not know the Yard's fair market value, and thereby violated both the letter and the spirit of the PAAA.

The PAAA also expressly requires that where MTA is permitted to dispose of property by negotiation rather than by issuing a request for proposals, it must still do so "subject to obtaining such competition as is feasible under the circumstances". PAL § 2897(6)(c). Although FCR argues vociferously that the PAAA did not require MTA to solicit new bids for the Vanderbilt Yard in 2009 (*see* FCR Brf. at 14-16), petitioners do not argue or allege that MTA was specifically required to do so. The record makes clear, however, that MTA's Board approved the disposition of the Yard to FCR in 2009 without permitting any competition at all, which violates the express language of section 2897(6)(c).

MTA argues that petitioners have not produced any evidence that anyone else would have come forward with a proposal for the Vanderbilt Yard had MTA provided the opportunity. *See* MTA Brf. at 25. In particular, MTA's Chief Financial Officer, Gary Dellaverson, asserts there are "no facts even remotely suggesting that" Extell "would have been receptive to a solicitation asking it to improve upon the terms it offered back in July of 2005", and that if Extell wanted to be considered, "it knew how to contact MTA to do so." Affidavit of Gary J. Dellaverson "Dellaverson Affid." ¶28. Thus, according to Dellaverson, because Extell, which in 2005 expended time and resources to put together a detailed, viable development proposal on 43

days' notice only to have MTA use its proposal as a stalking horse to improve FCR's offer, did not come knocking on MTA's door in 2009, MTA was entitled to assume Extell would not be responsive to a genuine expression of interest from MTA, and, therefore, MTA could simply disregard the express requirements of the PAAA.

Dellaverson's argument is both cynical and absurd. Extell, as a private, for-profit developer, presumably is motivated to expend its time and resources pursuing development projects that might actually happen. Given MTA's failure to solicit any proposals at all in 2009 other than from FCR, its prior refusal to work with Extell on its proposal in 2005, and its clear, repeatedly stated preference for FCR since before 2005 up through 2009, it would be illogical to assume that Extell would proactively approach MTA in 2009 without an express indication from MTA that it might genuinely consider a proposal from Extell.

Respondents' contentions that the June 24, 2009 transaction was the culmination of a publicly advertised, competitive process that MTA began more than four years earlier by issuing its RFP in May 2005 is simply not plausible. The submission period for that RFP closed on July 6, 2005, and MTA's Board formally closed that RFP process with its formal selection of FCR's proposal by resolution dated September 14, 2005. Neither MTA nor FCR cites any case or statute to support their proposition that a single process for the solicitation of bids or request for proposals may be deemed to be continuing for more than four years, and more than three years and nine months after the a bid or proposal was formally accepted.

As stated above, respondents seek to imply a sort of "grandfather clause" in the PAAA, which not only does not exist anywhere in the PAAA, but would undermine the PAAA's remedial purpose of ensuring "the highest standards of accountability, transparency and professionalism." Even if MTA were permitted to rely on its pre-PAAA conduct in 2005 to

exempt it from the PAAA's requirements in 2009, it can hardly contend that the transaction which its Board approved in September 2005 met such high standards. MTA does not, and cannot, deny that it had already agreed in principle to sell the Yard to FCR several months before it issued the RFP in 2005. *See* MTA Answ. ¶11 (at 21). Nor does it deny that it gave potential bidders a 43-day deadline to prepare and submit proposals for the Yard, while FCR had been working on its proposed project for more than two years.[2]

Simply put, respondents' arguments do not comport with the remedial purpose of the PAAA to reform the standards by which the State's public authorities dispose of authority property. This Court should interpret and enforce the PAAA as the Legislature intended, and annul the MTA Board's June 24, 2009 approval of the disposition of the Vanderbilt Yard to FCR.

POINT II: THIS COURT SHOULD GRANT PETITIONERS STANDING TO CHALLENGE MTA'S VIOLATION OF THE PAAA

MTA and FCR contend that this Court should deny all of the petitioners standing to challenge MTA's violations of the PAAA herein, in contradiction to New York courts' obligation to facilitate judicial review of unlawful acts by governmental officials and agencies. *See Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 814, 766 N.Y.S.2d 654661 (2003) ("our duty is to open rather than close the door of the courthouse"); *Matter of Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 991, 387 N.Y.S.2d 235, 236 (1976) (standing should be extended wherever necessary "to prevent the erection of an impenetrable

[2] Further, we note that MTA's contention that the questionable valuation of FCR's 2005 proposal at $379.4 million establishes that it actually got more than the $214.5 million value at which the Vanderbilt Yard was appraised is belied by the fact that MTA persuaded FCR to sweeten its proposal by adding $50 million in cash. According to MTA's own valuations, FCR's original proposal was already worth $329.4 million, which was around $95 million more than the value of Extell's proposal, and around $115 more than the appraised value of the Yard. Neither MTA nor FCR even attempts to explain why, if those valuations were accurate, FCR then agreed to increase its $50 million in cash to its proposal, purportedly increasing the proposal's value to around $165 million more than the Yard's appraised value.

barrier to judicial review of unlawful official action"). Although respondents pretend otherwise, it is clear that for this Court to so rule would effectively preclude any judicial review of MTA's unlawful disposition of the Vanderbilt Yard.

Ironically, while FCR argues that this proceeding is time barred because petitioners failed to assert their claims under CPLR Article 78 within four months of MTA's first attempt to dispose of the Vanderbilt Yard to FCR in September 2005 – even though the PAAA was not yet in effect at that time – MTA argues that a denial of standing to petitioners would not raise an impenetrable barrier to judicial review because Extell would have standing as an actual, disappointed bidder – even though the time for Extell to raise a challenged under CPLR Article 78 to MTA's formal selection of FCR's proposal over Extell's in September 2005 has obviously expired. Respondents cannot have it both ways.

Extell was not a bidder (or "proposer") for the Yard in 2009 and has not challenged MTA's Board's approval of the disposition of the Yard to FCR in June 2009, there has been no other bidder for the Yard, and no potential bidder other than DDDB has come forward. These facts distinguish this case from those of *Madison Square Garden, L.P. v. New York Metro. Transp. Auth.*, 2005 N.Y. Misc. LEXIS 1094, *12, 233 N.Y.L.J. 109 (Sup. Ct. N.Y. Co. Jun. 2, 2005), *aff'd*, 19 A.D.3d 284, 799 N.Y.S2d 186 (1st Dep't 2005), in which Madison Square Garden L.P. was a frustrated bidder for MTA's West Side Yard and had, in fact, raised a CPLR Article 78 challenge to MTA's disposition of the rail yard.

As the long-running public controversy over the Atlantic Yards project itself demonstrates, the disposition of the Vanderbilt Yard is a matter of public interest, and warrants recognition of petitioners' standing so as to subject MTA's lack of compliance with the PAAA's procedural requirements to judicial review. For example, New York courts have found that "the

preparation of specifications, advertising of bids and awarding contracts for a public project is a matter of acknowledged public interest which relieves the petitioner of the obligation to show that it is an aggrieved party or that it has any special interest." *Albert Elia Bldg. Co., Inc. v. New York State Urban Dev. Corp.*, 45 A.D.2d 337, 342, 388 N.Y.S.2d 462, 466 (4th Dep't 1976). Thus, "the award of contracts for a public project 'is a matter of acknowledged public interest which relieves the petitioner of the obligation to show that it is an aggrieved party or that it has any special interest'". *Matter of Amdahl Corp. v. New York State Higher Edu. Serv. Corp.*, 203 A.D.2d 792, 794, 611 N.Y.S.2d 50, 52 (3d Dep't 1994), quoting *Albert Elia Bldg.*, 54 A.D.2d at 342. Here, to the extent the Court may find that the special interest of any of petitioners in MTA's disposition of the Vanderbilt Yard insufficient to warrant standing under other circumstances, the acknowledged public interest at issue militates against denial of standing here.

In addition, DDDB has standing herein as a potential bidder for the Vanderbilt Yard, because MTA's violations of the PAAA's procedural requirements denied it, as well as other potential bidders, the opportunity to submit proposals for the Yard and have MTA consider them. It is beyond dispute that a potential bidder for the Vanderbilt Yard has standing to challenge MTA's anticipated disposition of the Yard to FCR in violation of the PAAA. *See Matter of Madison Square Garden, L.P. v. New York Metro. Transp. Auth.*, 2005 N.Y. Misc. LEXIS 1094, *12, 233 N.Y.L.J. 109 (Sup. Ct. N.Y. Co. Jun. 2, 2005), *aff'd*, 19 A.D.3d 284, 799 N.Y.S2d 186 (1st Dep't 2005). *See also Matter of Amdahl Corp. v. New York State Higher Edu. Serv. Corp.*, 208 A.D.2d 792, 794, 611 N.Y.S.2d 50, 53 (3d Dep't 1994) ("it would be illogical to deny standing to one who claims that the violation of the statute prevented him from entering a bid at all" (internal quotation marks and citation omitted)); *Matter of Jerkens Truck & Equip. v. City of Yonkers*, 174 A.D.2d 127, 132-133, 579 N.Y.S.2d 417, 421 (2d Dep't 1992) ("competition for

public contracts may be promoted only by fostering a sense of confidence in potential bidders that their bids will be fairly considered and that they will not be deprived of any substantial benefit afforded to their competitors" (internal quotation marks and citation omitted)); *Albert Elia Bldg. Co., Inc. v. New York State Urban Dev. Corp.*, 45 A.D.2d 337, 342, 388 N.Y.S.2d 462, 466 (4th Dep't 1976) ("Inasmuch as unsuccessful bidders have standing, it would be illogical to deny standing to one who claims that the violation of the statute prevented him from entering any bid at all" (internal quotation marks and citations omitted)).

While MTA appears to suggest that DDDB proposal was not valid because it was presented to MTA for the first time at the MTA Board meeting on June 24, 2009, DDDB's express allegations that MTA's violations of the PAAA deprived it of the opportunity to submit a fully developed bid are sufficient to confer standing. *See, e.g.*, *HHM Assocs. v. Appleton*, 157 Misc. 2d 759, 763-64, 597 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1993) (potential bidder had standing without having "unequivocally indicated an intention to bid"). Moreover, MTA can hardly claim to have been ignorant of the Unity Plan, since the Unity Plan was explicitly addressed in ESDC's Final Environmental Impact Statement for the Atlantic Yards Project dated November 27, 2006, which MTA's Real Estate Department purportedly reviewed in December 2006. *See* MTA Answ. ¶19 (at pp. 26-27).

Nevertheless, MTA argues that DDDB should not have standing as a potential bidder because it did not respond in 2009 to the RFP which MTA issued in May 2005, even though the submission deadline expressly stated in the RFP was July 6, 2005, and MTA never purported to extend the deadline or revive the RFP after FCR withdrew its proposal. (MTA Brf. at 7-8) Significantly, MTA does not actually state that it would have considered a response submitted in 2009 to its 2005 RFP. Indeed, at the meeting of MTA's Finance Committee on June 22, 2009,

MTA's CFO could not even state whether MTA would have considered an amended proposal from Extell. *See* Petition ¶55; MTA Answ. ¶55 (at p. 11).

FCR asserts a similar argument that DDDB cannot be deemed a potential bidder because it could not have met the requirements stated in MTA's 2005 RFP, which is both untrue and irrelevant. Like MTA, FCR does not explain why it would have made sense to submit a formal proposal in 2009 in response to MTA's expired, four-year-old RFP, and does not contend that MTA would even have considered any such proposal. And FCR misconstrues *Transactive Corp. v. New York State Dep't of Social Serv.*, 92 N.Y.2d 579, 684 N.Y.S.2d 156 (1998), as holding that a non-bidder cannot challenged an award of a public contract unless it can meet the criteria in an RFP (FCR Brf. at 7), whereas the Court of Appeals in that case actually held that a subcontractor of an unsuccessful bidder lacked standing to challenge the award of the contract, and said nothing about standing as a potential bidder. *See Transactive Corp.*, 92 N.Y.2d at 587, 684 N.Y.S.2d at 159.

In any event, contrary to FCR's facetiously disingenuous suggestion that DDDB hoped to finance the development of the Vanderbilt Yard with money raised through "walkathons, dance parties and concerts" (FCR Brf. at 7), DDDB had (and still has) a viable, vetted plan for financing the development of the Vanderbilt Yard and could, if so required, could meet the funding and asset requirements of the RFP or another reasonable request for proposals. *See* Reschke Affid. ¶¶29-32. Indeed, DDDB's successful solicitation of Extell's proposal to MTA in 2005 proves its ability to interest an indisputably responsible developer in committing its resources to develop the Yard within the framework of the Unity Plan – even on extremely short notice. *See* Reschke Affid. ¶¶16-17; Petition, Exh. F.

Moreover, to the extent either FCR or MTA now pretends that MTA required strict compliance with the RFP in 2005, that position is undermined by MTA's acceptance of FCR's bid despite FCR's unexplained failure (or refusal) to submit the 20-year pro forma profit-loss statement which the RFP expressly required as part of each proposal, and rejected Extell's proposal which included the purportedly required profit-loss statement. *See* Reschke Affid. ¶¶19, 20; RFP at 15 (Exh. 3 of MTA's Certified Administrative Record).

In fact, while the developer's projected profits should be crucial to MTA's determination of whether it will obtain appropriate value from its disposition of the Vanderbilt Yard, it appears that FCR has never, at any time, provided MTA or any other governmental agency with any statement, projection, or estimate of the profits it expects to make from the development of the Vanderbilt Yard or from the Atlantic Yards project generally. *See* Reschke Affid. ¶ 20. For some reason, MTA apparently decided it did not need that information when its Board approved the disposition of the Yard to FCR on June 24, 2009, and when it chose FCR's proposal over Extell's in 2005.

FCR also attempts to argue that Straphangers is an unincorporated association with no capacity to sue except through its president or treasurer, even while FCR admits that the Petition expressly alleges that Straphangers is simply part of NYPIRG, which, as a New York non-profit corporation, FCR concedes has capacity to sue. *See* FCR Brf. at 9-10; *Community Board 7 v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644 (1994); General Association Law § 12. FCR's unsupported assertion that NYPIRG itself is "conspicuously not named as a petitioner" is contradicted by the caption of this proceeding, which clearly identifies "New York Public Interest Research Group/Straphangers Campaign" as a petitioner. NYPIRG has repeatedly asserted claims against MTA in New York courts in the name of both itself and its Straphangers

Campaign without being deemed to have lost capacity to sue by reason of including the Straphangers Campaign, and FCR's attempt to deny NYPIRG the ability to sue herein on purported nomenclature grounds has no merit. *See, e.g.*, *Matter of New York Public Interest Group Straphangers Campaign v. Reuter*, 293 A.D.2d 160 (1st Dep't 2002); *Matter of Madison Square Garden, L.P. v. New York Metro. Transp. Auth.*, 2005 N.Y. Misc. LEXIS 1094 (Sup. Ct. N.Y. Co. Jun. 2, 2005), *aff'd*, 19 A.D.3d 284 (1st Dep't 2005); *Matter of New York Public Interest Group Straphangers Campaign, Inc. v. Metro. Transp. Auth.*, 196 Misc. 2d 502 (Sup. Ct. N.Y. Co. 2003), *modified*, 309 A.D.2d 127 (1st Dep't 2003).

CONCLUSION

For the foregoing reasons, and for the reasons alleged in accompanying Reschke Affidavit and in the Verified Petition and accompanying papers, this Court should annul and vacate the June 24, 2009 resolution of the Board of MTA approving the disposition of the Vanderbilt Yard to FCR.

Dated: November 16, 2009

BARTON BARTON & PLOTKIN LLP

By: /s/
Randall L. Rasey

420 Lexington Avenue, 18th Floor
New York, NY 10170
(212) 687-6262
rrasey@bartonesq.com
ccolligan@bartonesq.com

YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC
By: Jeffrey S. Baker
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907
jbaker@youngsommer.com

Attorneys for Petitioners