

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

**REPLY AFFIDAVIT OF
ERIC RESCHKE IN
FURTHER SUPPORT OF
VERIFIED PETITION**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Eric Reschke, being duly sworn, deposes and says:

1. I am the Executive Director of petitioner Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), one of the petitioners in the above-captioned proceeding. I respectfully submit this affidavit in reply to the papers served by respondents Metropolitan Transportation Authority ("MTA") and Forest City Ratner Companies LLC ("FCR") in opposition to the above-captioned petition of DDDB and its co-petitioners under Article 78 of the New York Civil Practice Law and Rules.

2. In this proceeding, DDDB and its co-petitioners seek annulment of the MTA Board's June 24, 2009 approval of the sale of the development and associated property rights to the MTA-owned Vanderbilt Rail Yard ("Vanderbilt Yard" or "Yard") located in Prospect

Heights, Brooklyn, New York, on the ground that the MTA Board's approval of that transaction violated the Public Authorities Accountability Act of 2005.

3. By this affidavit, I state and explain the terms, facts, and circumstances of the proposal for the Vanderbilt Yard which DDDB's spokesman Daniel Goldstein presented to the MTA Board at the meeting held on June 24, 2009, as alleged in the Verified Petition herein.

4. DDDB's proposal was initially suggested to DDDB by me. The proposal is bona fide, and if at some point MTA indicates it is willing to seriously consider it, DDDB is prepared to submit a fully developed proposal and bid consistent with whatever reasonable requirements MTA finds it appropriate to impose. Further, I believe that if MTA were to truly give fair, objective consideration to DDDB's proposal, they would conclude that it would provide greater value to MTA and greater public benefits than would the transaction with FCR which MTA's Board approved in June 2009.

5. Although I understand that FCR now accuses DDDB of making the proposal simply as a means to gain "standing" in this case, when we first conceived of the proposal and presented it on June 24, 2009, I had no idea that the proposal would have anything to do with whether or not DDDB could sue anyone.

Background

6. DDDB was founded in February 2004 as a non-profit umbrella organization for community organizations, individuals, and businesses concerned about development of the Vanderbilt Yard and the negative impacts on our communities of FCR's proposed Atlantic Yards Arena and Redevelopment Project, which would be built over the Yard and adjacent, privately-owned properties to be seized through the State's power of eminent domain. The Atlantic Yards project, if fully realized, would include 16 skyscrapers and a professional basketball arena, which we believe would overwhelm and irrevocably damage our low-rise communities, and was

created and designed without any significant consideration or input from the residents of adjacent communities who will be most directly affected by the development of the Yard.

7. While DDDDB and its constituents are opposed to FCR's Atlantic Yards project, we support responsible, community-based development of the Vanderbilt Yard that takes into account the needs of local residents, businesses, and neighborhoods. Annexed hereto as Exhibit A is a true copy of DDDDB's formal Position Statement which was first published in March 2004.

8. As alleged in the Verified Petition herein, in 2004, shortly after DDDDB was founded, DDDDB and a number of other organizations, elected officials, and individuals convened a community charrette with local architects and urban planning specialists to develop an alternative development plan for the Vanderbilt Yard. The resulting development plan became known as the Unity Plan, and was presented and considered at scores of meetings held by local community organizations. In 2007 and 2008, additional workshops and sessions were held to further develop the Unity Plan as a viable development plan and alternative to FCR's Atlantic Yards project.

9. The Unity Plan provides a framework for a sustainable level of urban density to be constructed entirely over the Vanderbilt Yard and on adjacent publicly owned property, thereby foregoing any exercise of the State's condemnation power to seize private property. The development envisioned under the Unity Plan would provide substantial numbers of affordable housing units and other public benefits without displacing existing residents and businesses, and would knit our communities together with newly opened streets and contextual building heights and densities, rather than separate our communities by closing streets and erecting a dividing wall of skyscrapers as would FCR's project.

10. A presentation of the Unity Plan is annexed as part of Exhibit D to the Verified Petition, as it was presented to the Board of MTA on behalf of DDDDB on June 24, 2009.

11. The Unity Plan is a viable, practical development plan created with the active, ongoing leadership and involvement of qualified, respected urban planning professionals and architects, including, Tom Angotti, who is Professor in the Department of Urban Affairs and Planning of Hunter College of the City University of New York, former Professor and Chair of the Graduate Center for Planning and the Environment at Pratt Institute, former city planner with the New York City Department of City Planning, author of numerous books and published articles, and a well known expert on urban planning and community development; Ronald Shiffman, who is Professor at Pratt Institute's Graduate Center for Planning and the Environment, former director of the Pratt Center for Community Development (which he co-founded in 1964), author of a number of articles on urban planning, social justice, and community economic development, a member of the American Institute of Architects, and a Fellow of the American Institute of Certified Planners; and Marshall Brown, who is currently Assistant Professor of architecture at the Illinois Institute of Technology and a member of the American Institute of Architects, and a former Assistant Professor of architecture at the University of Cincinnati. Mr. Brown previously practiced with the award-winning design firm Davis Brody Bond Architects and Planners and in New York, and holds graduate degrees in both architecture and urban design from Harvard University.

12. The Unity Plan has benefited from the participation and support of the Hunter College Center of Community Planning and Redevelopment, and the University of Cincinnati School of Architecture and Interior Design, and of local and city-wide civic organizations, such as the Council of Brooklyn Neighborhoods and the Municipal Art Society of New York.

13. As the "Develop" portion of DDDDB's name indicates, DDDDB is every bit as committed to beneficial development of the Vanderbilt Yard as it is to opposing developer-driven projects the negative impacts of which would outweigh any benefit, such as the Atlantic

Yards project. In the event the Atlantic Yards project is not built, or, as has increasingly become a possibility, is only partially developed around the planned professional sports arena, DDDDB anticipates playing a significant role in facilitating community-based development of the Vanderbilt Yard.

MTA's Request for Proposals in 2005

14. As alleged in the Verified Petition, several months after MTA had already signed a memorandum of understanding with FCR to convey the Vanderbilt Yard development rights to FCR, MTA issued a Request for Proposals ("RFP") dated May 24, 2005, ostensibly to assess the interest of other parties in developing the Yard. MTA has submitted a copy of the RFP as Exhibit 3 of its Certified Administrative Record.

15. The timing and circumstances of MTA's RFP indicated to us that MTA viewed the RFP merely as a necessary formality prior to making a deal with FCR to transfer the Vanderbilt Yard development rights to FCR for the Atlantic Yards project, and that MTA had no intention of seriously soliciting alternative proposals for the Yard.

16. Although FCR presumably had been working on the Atlantic Yards project since long before the project was formally announced by State and City officials in December 2003, MTA's RFP required potential "proposers" to submit any responding proposals to MTA no later than 43 days after the RFP date, by July 6, 2005. Further, to the best of our knowledge, MTA's public advertising of the RFP was limited to the approximately 3" by 4" printed notice reproduced on the last page of MTA's Exhibit 3, which MTA published in two newspapers. MTA also sent the RFP to five developers, including FCR. Otherwise, it appeared that MTA made no effort to advertise the RFP or any other effort on MTA's part to attract potential developers who might be interested in submitting a proposal to compete with FCR's.

17. Therefore, DDDDB took it upon ourselves to send copies of the RFP, with additional materials and information about the Unity Plan, to more than 100 private developers to encourage them to submit proposals to MTA for the Vanderbilt Yard. Despite the short submission deadline and the publicly announced support of State and City officials for FCR's Atlantic Yards project, a respected developer with a proven track record in New York City, Extell Development Company ("Extell"), responded by submitting a proposal to MTA based substantially on the Unity Plan. A true copy of Extell's proposal is annexed as Exhibit F to the attorney affirmation accompanying the Verified Petition.

18. FCR also submitted a proposal to MTA to develop the Vanderbilt Yard as part of the Atlantic Yards project. FCR has submitted a copy of its proposal as Exhibit D to its Verified Answer, and MTA has submitted its "Staff Summary" of both FCR's and Extell's proposals as Exhibit 7 of its Certified Administrative Record.

19. Extell's proposal complied with the requirements set forth in the RFP, including the 20-year pro forma profit-loss statement which the RFP expressly required as part of each proposal. *See* RFP at 15 (Exh. 3 of MTA's Certified Administrative Record); Section 4 of Extell's proposal (Petitioners' Exh. F).

20. In contrast, FCR's proposal omitted the purportedly required profit-loss statement entirely, and, to our knowledge, FCR has never provided MTA or any other authority or governmental entity with any statement of the profits it expects to make from the Atlantic Yards project.

21. As alleged in the Verified Petition, Extell's proposal included a \$150 million cash payment to MTA for the Vanderbilt Yard, the appraised value of which was \$214.5 million, while FCR's proposal included a payment of only \$50 million.

22. Although MTA rejected Extell's proposal in favor of FCR's, Extell's proposal – which it submitted within an attenuated RFP timeframe and despite the State's and City's publicly announced support for FCR's proposed development – established two important facts:

(a) MTA could generate serious interest from established, qualified developers other than FCR in acquiring and developing the Vanderbilt Yard, provided MTA gave developers a reasonable opportunity to submit proposals and committed itself to giving genuine consideration to their proposals, and

(b) The Unity Plan was a viable development plan for the Vanderbilt Yard which was attractive to, and could be adapted and implemented by, an established, qualified developer.

DDDB's Proposal for the Vanderbilt Yard

23. As alleged in the Verified Petition, MTA and FCR never closed the transaction that MTA approved based on the proposal which FCR submitted in response to MTA's RFP in 2005. Rather, in or before 2009, FCR substantially altered the design and goals of the Atlantic Yards project and withdrew its 2005 proposal to MTA for the Vanderbilt Yard, and we learned from published news reports that FCR was no longer willing to provide as much to MTA for the Vanderbilt Yard as it would have under the withdrawn proposal.

24. While this turn of events seemed to present a new opportunity for consideration of alternative development proposals for the Vanderbilt Yard, we learned that MTA intended to negotiate exclusively with FCR on the terms of a new sale of the Yard to FCR on a non-competitive basis, and would not issue any formal or informal request for proposals. Given these circumstances, it was extremely improbable that any private developer would invest the time and resources necessary to submit any development proposal for the Yard to MTA.

25. Therefore, we realized that DDDDB would have to step in with a counter proposal for development of the Vanderbilt Yard, and we formulated a proposal for acquiring and developing the Yard based on the Unity Plan. The proposal which we formulated has been reviewed by a number of finance professionals and real estate development experts, who have determined not only that it is extremely viable, but also that it would provide a better and more secure deal for MTA than would FCR's new proposal.

26. Because MTA did not issue a request for proposals, did not encourage any new proposals, and did not provide any formal mechanism to anyone other than FCR for submitting a proposal, DDDDB spokesman Daniel Goldstein presented the proposal in outline form to MTA's Board at the meeting held on June 24, 2009, within the three minutes allotted to each public speaker at that meeting, and provided a written outline of the proposal and the Unity Plan to MTA at the same time. Petitioners have submitted a copy of DDDDB's written proposal, as submitted to MTA on that date, as Exhibit D to the Verified Petition.

27. DDDDB proposed to pay MTA \$120 million (discounted at the same 6.5 percent rate which MTA's Board approved for the transaction with FCR) for the rights to develop the Vanderbilt Yard as a mixed-use development based on the framework of the Unity Plan. In addition, MTA would build its own new rail yard to its own specifications, with costs to be reimbursed to MTA. DDDDB estimates the costs of the new rail yard as \$86 million, based on the amount of the letter of credit to be posted by FCR to secure the new rail yard under the terms of FCR's transaction.

28. Moreover, DDDDB proposed to pay MTA more the total amount of over \$200 million (at a 6.5 percent discount rate) over 12 years, as opposed to the 22-year timeframe under FCR's new proposal. DDDDB's 12-year timeline is based on comparable efforts elsewhere and

extrapolations from MTA's 2005 Vanderbilt Yard appraisal and rail yard construction cost projections.

29. As MTA and FCR have taken pains to point out in their papers, and as I and others at DDDDB are painfully aware, DDDDB is funded entirely by individual donations from the community at large and through various fundraising events. Obviously, DDDDB does not anticipate funding development of the Vanderbilt Yard through its current operating budget.

30. Rather, the payments would come from (i) legitimate tax-free financing obtained to build affordable housing, (ii) \$5 million of working capital already secured from community sources, and (iii) payments from parcels sold over a period of time to developers. The payments would be fully collateralized by the development rights over the yards, so there would be no risk of default on the project.

31. To complete the transaction, the Vanderbilt Yard would be placed into a trust for the purposes of financing and managing the development over the yards, to be known as the Unity Trust. As envisioned, the Unity Trust would be administered by local community organizations, a subsidiary of the Empire State Development Corporation, and local elected officials, and would offer the Yard for bidding in six to eight smaller, manageable parcels, to both for-profit and non-profit developers and/or development teams. Under the Unity proposal, the Yard would be developed and paid for over a far shorter timeline than the 22-year timeline under the transaction with FCR with MTA's Board approved.

32. The Unity Trust is modeled after the successful Hudson River Trust, which was established in 1999 under the Hudson River Park Act to manage the planning, design, construction, and operation of the Hudson River Park. The Hudson River Trust is run by a board appointed by the State and City, and, while development of the park has been paid for with a combination of City, State, and other funds, the Trust funds the park's operations and

maintenance entirely from revenue generated from commercial development within the park itself. The Hudson River Trust is a proven model for sustainable management of a large-scale, multi-faceted development project, and provides a logical, viable mode for the planning and development of the Vanderbilt Yard.

33. We believe DDDDB's proposal is better for MTA than FCR's, as it is larger in total payments, its benefits accrue faster, and it is less risky than a single-developer solution.

34. Among other things, the aggregate payments to the MTA would be over \$200 million, and the net present value of the payments will be nearly \$120 million. Both of those amounts exceed the equivalent amounts in the transaction between MTA and FCR.

35. Under DDDDB's proposal, MTA would directly control the newly built, permanent rail yard under the development, and would be able to construct it to its capacity needs. There would be no need to waste money on a temporary rail yard, because FCR's urgency to build its proposed arena – which is the only reason why FCR's proposal requires construction of a temporary rail yard – would not be an issue.

36. The Unity Trust would not be forced into an immediate disposition of development rights in an uncertain economy, which undervalues them, but would be able to coordinate the sales and construction over time in order to obtain the best value for the Trust.

37. DDDDB's proposal – unlike the for-profit, developer-driven Atlantic Yards project – would not abuse eminent domain, and would result in true public benefits and would be better for MTA. Specifically, among other things:

- Streets would not be removed so as to create a wall of buildings dividing the adjacent neighborhoods – instead, new neighborhood connecting streets would be constructed;
- There would be true affordable housing for low and moderate incomes delivered in the early phases of the project;

- The project would create truly public open space designed to be accessible to and used by the broader community, rather than semi-enclosed “open spaces” intended for project residents;
- The project would create 10,000 construction job years;
- A legally binding, city and state-guaranteed Community Benefits Agreement would be negotiated, involving all community stakeholders in the project’s impact radius;
- It would present less risk by including multiple developers and the financial resources that each would bring to the Unity framework;
- The project would be financed, in part, with tax-free municipal funding in a legitimate fashion (rather than the murky use of PILOTS contemplated by FCR), reducing overall costs;
- Community organizations in central Brooklyn have already signed on to the Unity framework which they strongly support, and therefore would not challenge it or litigate against it; and
- DDDDB’s proposal would provide MTA with a more attractive financial return than FCR’s offer.

Conclusion

38. In sum, DDDDB’s proposal to MTA is a viable plan for developing the Vanderbilt Yard in a manner that truly benefits the communities of central Brooklyn and provides a better and more secure return to MTA for the disposition of its property than would the transaction with FCR which MTA’s Board approved on June 24, 2009. Further, DDDDB’s proposal is based on the Unity Plan, a meritorious, well-credentialed development plan with broad community support which at least one successful private developer in New York City has already found viable. I believe that if the MTA and its Board would give DDDDB an opportunity to prepare and submit a formal proposal for the Yard, and, further, if they would truly commit themselves to giving DDDDB’s proposal genuine, objective consideration, then they would have to recognize it as an attractive, viable, and responsible alternative to the transaction with FCR.

/s/
Eric Reschke

Sworn to before me this
16th day of November, 2009

/s/
NOTARY PUBLIC