

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

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DEVELOP DON'T DESTROY BROOKLYN, et al.,	:	Index No. 100686/06
	:	
Petitioners – Plaintiffs	:	IAS Part 35
	:	
- against -	:	Justice Edmead
	:	
EMPIRE STATE DEVELOPMENT CORPORATION and	:	
FOREST CITY RATNER COMPANIES,	:	
	:	
Respondents – Defendants.	:	
	:	

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**RESPONDENT EMPIRE STATE DEVELOPMENT CORPORATION'S  
MEMORANDUM OF LAW IN OPPOSITION TO  
PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION  
AND IN SUPPORT OF ITS CROSS-MOTION TO DISMISS**

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## **PRELIMINARY STATEMENT**

Respondent Empire State Development Corporation ("ESDC") submits this memorandum in opposition to petitioners' motion for a preliminary injunction enjoining the demolition of five buildings within the "footprint" of the proposed Atlantic Yards Arena and Redevelopment Project ("Atlantic Yards") in Brooklyn, and in support of ESDC's cross-motion to dismiss the petition in this Article 78 proceeding.

\* \* \*

Petitioners seek to enjoin the demolition of five vacant and dilapidated buildings within the Atlantic Yards redevelopment project owned by respondent Forest City Ratner Companies ("Forest City"). Their petition asserts only two causes of action against ESDC. In their first cause of action, petitioners challenge the validity of a December 15, 2005 Declaration of Emergency issued by ESDC, which authorized Forest City to demolish the buildings in question on the ground that they constitute an imminent threat to public health and safety. In their third cause of action, petitioners seek an order disqualifying ESDC's environmental counsel, David Paget, Esq. of the firm of Sive, Paget & Riesel P.C. ("Sive Paget"), on the ground that, at an earlier stage of the Atlantic Yards project, Mr. Paget and his firm provided advice to Forest City concerning environmental issues respecting the project.

For the reasons set forth below, petitioners' request for an injunction blocking the demolition of the buildings should be denied, and their causes of action against ESDC should be dismissed as a matter of law.

## **SUMMARY OF ARGUMENT**

Petitioners' request for a preliminary injunction should be denied in all respects because they cannot meet the minimum standards for the grant of such relief – including, most

fundamentally, a showing of irreparable harm, which is the *sine qua non* of any request for injunctive relief. Even petitioners do not dispute that the buildings in question are vacant, boarded-up, dilapidated structures with no landmark protection or historical value, and their own expert appears to concede that they are in need of some form of remedial attention lest they fall down of their own accord. But petitioners – who steadfastly oppose the Atlantic Yards project – assert that, if the buildings are demolished, they will suffer irreparable harm because there will be a public "perception" that approval of the project is a *fait accompli*, and the residents of Brooklyn will thereafter be deterred from expressing their views in opposition to the project at public hearings in the future.

This argument constitutes precisely the sort of speculative claim of harm that courts have long held to be insufficient to support the granting of an injunction. Petitioners offer no support for their contention that the public will be deterred from participating in the ongoing review process if these decrepit buildings are demolished, and in fact their claim of injury is belied by their very presence in court in this action. Petitioners – 12 community organizations and four individuals – appear to have had no trouble organizing themselves and retaining experienced counsel to assist them in opposing the Atlantic Yards project. Such counsel have surely advised them that the lengthy process of preparing an environmental impact statement under the State Environmental Quality Review Act ("SEQRA") has only just begun, and will not be affected in the slightest respect by the proposed demolition. Indeed, as explained in the accompanying affidavit of Rachel Shatz, ESDC's Director of Planning and Environmental Review, some 500 interested persons attended the first SEQRA hearing concerning the project on October 18, 2005. With so many people displaying interest in the project, and petitioners and their counsel to advise them, it is simply inconceivable that members of the public would

mistake the demolition of these crumbling buildings for final approval of the project, as petitioners contend.

On the other hand, an injunction barring the demolition would risk real harm to the very members of the public on whose behalf petitioners profess to speak. As explained in Ms. Shatz's affidavit, vacant and deteriorated buildings such as these have been known to collapse. In fact, shortly before Forest City requested permission to demolish these buildings, a vacant building in the Fort Greene section of Brooklyn collapsed, crushing a woman to death in a nearby bodega and injuring six others, including a firefighter. The risk to such buildings is especially great in the winter months, when the weight of snow and ice, and alternate freezing and thawing, can further degrade already deteriorated structures. Moreover, vacant buildings such as those at issue here often attract children and teenagers, as well as homeless persons seeking shelter. Such individuals may be injured if struck by falling debris or by the collapse of weakened flooring. In addition, they sometimes start fires, either as acts of vandalism or simply to keep warm, which can spread out of control, risking harm to themselves and others in the neighborhood, as well as to those who must respond to such emergencies. In short, the real threat of irreparable harm in this case lies not in denying the requested injunction, but in granting it.

More fundamentally, petitioners' claim that the ESDC improperly issued the Declaration of Emergency authorizing the demolition of the buildings fails as matter of law, and should be dismissed, because they allege no facts demonstrating that such issuance was "irrational, arbitrary or capricious" – the governing standard in this Article 78 proceeding. It was plainly the prudent and sensible thing to do, given the risk of harm posed by these deteriorated buildings. The "hard look" analysis advocated by petitioners applies only in the context of

"Type I" actions, as defined in the rules and regulations implementing SEQRA. It has no applicability here because the issuance of the Declaration of Emergency was a "Type II" action undertaken pursuant to ESDC's express authority under 6 NYCRR § 617.5(c)(33) to address emergency situations posing a risk of harm to the public. As such, it was exempt from SEQRA and the "hard look" standard required in Type I actions.

Finally, petitioners' remaining cause of action against ESDC, which seeks to disqualify its long-time outside environmental counsel David Paget and his firm from representing ESDC in connection with the Atlantic Yards project, is wholly without basis in law or fact. As a threshold matter, petitioners have no standing to seek disqualification of counsel with whom they do not have, and have never had, any attorney-client relationship. Furthermore, there is simply no conflict here – Forest City's interest in developing Atlantic Yards is hardly "adverse" to that of ESDC, which was created by the Legislature and is charged explicitly with the mission of promoting projects, such as Atlantic Yards, that seek to reinvigorate blighted areas and foster economic development, employment and prosperity in New York State. Certainly, there is a strong public interest in assuring compliance with the requirements of SEQRA, but that interest is not furthered by depriving ESDC of its counsel of choice in this matter. Rather, to the extent that petitioners believe that SEQRA has not been complied with, they can obtain review – and complete relief, where appropriate – by means of an Article 78 proceeding. Finally, if there is any conflict in this case, it has been waived, since ESDC was at all times aware of Mr. Paget's prior retention by Forest City and determined to retain him anyway, and Forest City does not object to such representation.

Petitioners' request for a preliminary injunction should therefore be denied, and their claims against ESDC should be dismissed.

## **STATEMENT OF FACTS**

### **The Empire State Development Corporation**

ESDC is New York State's lead economic development agency. Its primary mission is to encourage economic investment and prosperity in the state. To this end, ESDC offers a wide range of development programs, and helps promote large-scale real estate projects that create and retain jobs and/or re-invigorate distressed areas. See [http://www.empire.state.ny.us/Contacts\\_and\\_About\\_Us/default.asp](http://www.empire.state.ny.us/Contacts_and_About_Us/default.asp). As a state-wide agency, ESDC has the power to override local zoning ordinances and exercise condemnation power in furtherance of its mission. (Affirmation of Anita W. Laremont, Esq. dated Feb. 8, 2006 ("Laremont Aff.") ¶ 8)

ESDC's role in a development project is principally a collaborative one. Where ESDC decides that a project has merit and should be pursued, it becomes a proponent of that project and seeks to get the project completed, just as the developer does. Of course, it also seeks to ensure that the project fully complies with SEQRA and all other applicable laws and regulations. But even here, its role with respect to the developer is not an adversarial one, since the developer also presumably seeks to comply with all applicable laws and regulations, if only to avoid legal challenge. (Laremont Aff. ¶¶ 8, 9; Affirmation of David Paget, Esq. dated Feb. 8, 2004 ("Paget Aff.") ¶ 12)

### **The Atlantic Yards Project**

The Atlantic Yards project is a major community redevelopment project proposed by Forest City to be built near the Atlantic Terminal in Brooklyn. It includes a sports and convention center, extensive commercial office space and retail space, new residential space, including affordable middle-income and market-rate housing, and parking. (Affidavit of Rachel Shatz dated February 8, 2006 ("Shatz Aff.") ¶ 6 and Ex. A) The project is expected to eliminate

blighted conditions and thereby re-energize downtown Brooklyn and improve the overall quality of life by providing housing for a wide range of incomes, living wage jobs with career ladders and public amenities.

**ESDC's Review of the Atlantic Yards Project under SEQRA**

On September 16, 2005, ESDC issued a "Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement" for the Atlantic Yards project. (Shatz Aff. ¶ 6 and Ex. A) This document, more commonly known as a "Positive Declaration," announced that ESDC had determined that the proposed project was a "Type I" action within the meaning of the SEQRA regulations, and that it would be acting as the lead agency in connection with the preparation of the Environmental Impact Statement ("EIS") for the project required under SEQRA. (Id.)<sup>1</sup>

Together with the Positive Declaration, ESDC disseminated to the public a 41-page Draft Scope of Analysis for an Environmental Impact Statement (the "Draft Scoping Document"). ESDC held a public hearing on October 18, 2005 to obtain comments on the Draft Scoping Document. Approximately 500 persons attended. (Shatz Aff. ¶ 7)

After considering the comments from the public, ESDC will revise the Draft Scoping Agreement and issue a Final Scope of Analysis for an Environmental Impact Statement (the "Final Scoping Document"), which will determine the issues, as well as the methodologies for analyzing those issues, that will be addressed in the EIS. (Shatz Aff. ¶ 7) The issuance of a

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<sup>1</sup> As discussed below, SEQRA governs whether the lead agency charged with evaluating a large economic redevelopment project must engage in an environmental impact review. An agency's SEQRA review starts with a determination of whether a project "may have a significant effect" on the environment. If it might, an EIS is required by SEQRA. See Rules and Regulations of the New York State Department of Environmental Conservation implementing SEQRA, 6 NYCRR §§ 617.1 et seq.

Final Scoping Document, which ESDC expects to take place in the next 30 days, is still a preliminary event in what ultimately will be a detailed and exhaustive analysis of the potential environmental impacts of the Atlantic Yards project. After issuing the Final Scoping Document, ESDC will make available to the public a draft EIS, and will hold one or more public hearings to obtain comments on the draft. (*Id.* ¶ 8) The hearings provide an opportunity for the public to present their views on whether the draft EIS is adequate in its examination of potential environmental impacts and its proposals for mitigation of those potential impacts. Thereafter, a final EIS will be issued, which will of course be subject to review by the Court.

### **ESDC's Declaration of Emergency**

In the summer of 2005, representatives of Forest City expressed to Rachel Shatz, ESDC's Director of Planning and Environmental Review, their concern that a number of the vacant buildings within the footprint of the proposed Atlantic Yards project were in very poor condition and potentially posed a serious risk of harm to public health and safety. (Shatz Aff. ¶ 9) They referred specifically to a recent collapse of a vacant building in the Fort Greene section of Brooklyn that crushed a woman to death and injured six other persons, and stated that they did not want to have a recurrence of that tragic incident. (*Id.* ¶ 15; *see* D. Kahn and J. Burdi, "Killer Collapse in B'klyn; Wall of Vacant Building Falls onto Bodega, Leaving a Woman Dead and Several Others Injured," *Newsday*, May 3, 2005, page A-7)

Although property owners in New York City ordinarily have the right to demolish buildings on their property as of right, SEQRA generally prohibits anyone from making any physical alteration related to a project until SEQRA's requirements have been complied with. 6 NYCRR § 617.3(a). Accordingly, ESDC advised Forest City that because the buildings were located on the site of the Atlantic Yards project and the SEQRA process had already begun for the project, it would have to obtain ESDC's approval before demolishing the buildings.

On November 2, 2005, Forest City and LZA Technology ("LZA"), a highly respected engineering firm retained by Forest City, gave a detailed presentation to ESDC personnel and others, including Ms. Shatz, ESDC's EIS consultant AKRF, ESDC's outside environmental counsel Sive Paget, and counsel for the Metropolitan Transportation Authority, an agency that also owns property on the project site. (Shatz Aff. ¶ 11) The presentation concerned six buildings that LZA believed posed an immediate threat to public health and safety and therefore should be taken down.<sup>2</sup> (Id.) The presentation included photographs of the interiors of each of the buildings showing in detail, among other things, cracked bearing walls, deteriorated roofs and flooring, and degraded floor joists and timbers. (Id. ¶ 17 and Ex. B) There was also a question-and-answer session. (Id. ¶ 11)

On November 8, 2005, at the request of Ms. Shatz, Forest City submitted to ESDC a written report prepared by LZA, which addressed the condition of five of the six buildings discussed at the earlier presentation by LZA.<sup>3</sup> The report reiterated LZA's request for permission to take the buildings down immediately "to avoid injury to property or persons." (Shatz Aff. ¶ 13)

Ms. Shatz was well aware that vacant and deteriorated buildings have been known to collapse suddenly and without warning. She believed that the risk of collapse could be heightened during the coming winter months because of the added stress on the buildings that may be caused by accumulations of snow and ice and the degradation that can be caused by freezing and thawing. (Id. ¶ 16) In deciding whether to approve demolition of the buildings, Ms.

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<sup>2</sup> The buildings are located at 608-620 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street, 620 Pacific Street, and 622 Pacific Street. (Shatz Aff. ¶ 2 and Ex. B)

<sup>3</sup> 622 Pacific Street was not included in the LZR Report. (Shatz Aff. ¶ 13)

Shatz also considered the dangers posed to children and teenagers looking for a place to play or gather, as well as homeless persons who may enter the buildings in search of shelter. Ms. Shatz believed that such persons could be injured by loose or falling debris or weakened floors that may give way under their weight. Also, homeless persons and teenagers have been known to start fires, either to keep warm or as acts of vandalism and these fires could quickly get out of control and cause serious injury, if not death. (Id. ¶ 16)

After reviewing the LZA report, Ms. Shatz consulted with other senior personnel at ESDC and Sive Paget, ESDC's outside environmental counsel, and everyone concurred that the buildings posed a threat to public health and safety and should be taken down. (Shatz Aff. ¶¶ 14, 18) Accordingly, on December 15, 2005, Ms. Shatz, on behalf of ESDC, issued a Declaration of Emergency authorizing the demolition of the buildings as a Type II action not subject to the environmental review requirements of SEQRA. (Id.) The Declaration of Emergency explicitly directs Forest City "to cause the least change or disturbance to the environment that is practicable under the circumstances while performing the demolition." (Id. Ex. B at 2)

### **The ESDC's Outside Environmental Counsel**

David Paget is a member of Sive Paget firm and is considered to be one of the leading environmental lawyers in the United States. (Laremont Aff. ¶¶ 3, 12) He has special expertise in the preparation of EIS's required for large complex projects pursuant to the National Environmental Policy Act and its New York State and New York City counterparts, SEQRA and the City Environmental Quality Review. (Paget Aff. ¶ 3) For nearly 30 years, he has represented ESDC on a wide variety of major projects. (Id. ¶ 5)

In December 2003, Forest City contacted Mr. Paget seeking to retain him for the limited purpose of providing advice regarding the nature, scope and preparation of the environ-

mental studies, reports and other submissions that would likely be required by ESDC in its review of the Atlantic Yards project. (Paget Aff. ¶ 6) ESDC was aware of this retention and did not object. (Laremont Aff. ¶ 5)

At the time Forest City retained Mr. Paget and his law firm, it was represented by the firm of Fried Frank Harris Shriver & Jacobson LLP as its counsel in connection with the Atlantic Yards project. (Paget Aff. ¶ 6) Moreover, Mr. Paget expected that ESDC was likely to seek to retain him in connection with the preparation of the EIS in the event ESDC became the lead agency for the Atlantic Yards project, and said so at a meeting in February 2004 with representatives of Forest City and Fried Frank. (*Id.* ¶ 8) ESDC shared this expectation. (Laremont Aff. ¶ 7) Accordingly, it was understood by all relevant parties – Sive Paget, Forest City, Fried Frank, and ESDC – that Mr. Paget's representation of Forest City would be of limited duration and that his ultimate client would be ESDC. (*Id.*; Paget Aff. ¶ 8)

In September 2005, ESDC advised Mr. Paget that it wished to retain him to represent ESDC in connection with the Atlantic Yards project beginning on October 1, 2005. Shortly thereafter, a formal retainer agreement was executed. Since October 1, 2005, Mr. Paget and his firm have advised only ESDC with respect to the project. (Paget Aff. ¶ 11)

### **The Article 78 Proceeding**

Petitioners include individuals who claim to live in or near the footprint of the Atlantic Yards project and various non-profit neighborhood organizations – all of whom have announced their opposition to the project. (Petition ¶¶ 6-21) Petitioners all claim to be "concerned that the SEQRA review process . . . be conducted in an objective and transparent manner that assures the integrity of the review." (*Id.*) They brought this proceeding by Order to Show Cause pursuant to Article 78 of the CPLR against both ESDC and Forest City, seeking, *inter alia*, a preliminary injunction to enjoin them from "undertaking or authorizing any other

party to demolish" the five buildings listed in ESDC's Declaration of Emergency dated December 15, 2005. (Order to Show Cause at 2)<sup>4</sup>

Petitioners assert only two causes of action against ESDC. The first is for an alleged violation of SEQRA and seeks the annulment of the Declaration of Emergency as a remedy. (Petition ¶¶ 59, 62) The second alleges a conflict of interest in Sive Paget's representation of ESDC, and seeks to disqualify Sive Paget from representing ESDC on the Atlantic Yards project. (Id. ¶¶ 79-81) It also asks the Court to direct ESDC to refrain from issuing a Final Scoping Document until it retains new counsel. (Id. ¶ 82)

## ARGUMENT

### I.

#### **THIS COURT SHOULD DENY PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION**

"Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers." Koultukis v. Phillips, 285 A.D.2d 433, 435, 728 N.Y.S.2d 440, 442 (1st Dep't 2001). Thus, "[a] movant's burden of proof on a motion for a preliminary injunction is particularly high." Council of New York v. Giuliani, 248 A.D.2d 1, 4, 679 N.Y.S.2d 14, 16 (1st Dep't 1998). Moreover, it is well-settled that "[p]reliminary injunctions which in effect determine the litigation and give the same relief which is expected to be obtained by the final judgment, if granted at

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<sup>4</sup> Petitioners' Order to Show Cause seeks to enjoin ESDC from authorizing the demolition of the five buildings, but ESDC has already granted Forest City that authorization -- it did so when it issued the Declaration of Emergency on December 15, 2005. Perhaps in Recognition of this fact, the relief sought by petitioners against ESDC in their Verified Petition is the annulment of ESDC's Declaration of Emergency. (Petition ¶ 62) There is no need for ESDC to be enjoined in order for petitioners to block the demolition of the buildings. The Verified Petition also recognizes this, in that the only party it seeks to enjoin from demolishing the buildings is Forest City. (Id. ¶ 69)

all, are granted with great caution and only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile." Xerox Corp. v. Neises, 31 A.D.2d 195, 197, 295 N.Y.S.2d 717, 719 (1st Dep't 1968) (citation omitted).

To obtain a preliminary injunction, a movant must establish: (1) irreparable injury absent the granting of the preliminary injunction, (2) a likelihood of ultimate success on the merits, and (3) that a balancing of equities favors the movant's position. See Koultukis, 285 A.D.2d at 435, 728 N.Y.S.2d at 442; Silver v. Koch, 137 A.D.2d 467, 467-68, 525 N.Y.S.2d 186, 187 (1st Dep't 1988). Failure of the movant to satisfy *any* of these requirements requires denial of the preliminary injunction. See, e.g., N.Y. State Inspection, Sec. & Law Enforcement Employees, Dist. Council 82 v. Cuomo, 103 A.D.2d 312, 480 N.Y.S.2d 1 (2d Dep't) (reversing preliminary injunction in SEQRA action due to failure to show likelihood of success on the merits), aff'd, 64 N.Y.2d 233, 485 N.Y.S.2d 719 (1984). Here, petitioners fall woefully short of satisfying any of these requirements.

**A. Petitioners Have Failed to Establish Any Irreparable Harm**

Irreparable harm, the *sine qua non* for obtaining injunctive relief, must be a *likelihood*, not a mere possibility. The moving party must show that the injury it will suffer is immediate, specific, non-speculative, and non-conclusory. See McGann v. Inc. Vill. of Old Westbury, 170 Misc. 2d 314, 316, 647 N.Y.S.2d 934, 935 (Sup. Ct. Nassau Co. 1996). "Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." N.Y. State Inspection, Sec. & Law Enforcement Employees, Dist. Council 82 v. Cuomo, 64 N.Y.2d 233, 240, 485 N.Y.S.2d 719, 723 (1984).

Here, petitioners' attempt to demonstrate irreparable harm rests solely on their allegation that the demolition of the buildings "will lead to public perception that the project has been or will be approved and that the public review process is a sham and biased." (Pet. Mem. at 16) This is pure speculation and does not constitute any cognizable harm at all, much less irreparable harm. See Valentine v. Schembri, 212 A.D.2d 371, 372, 622 N.Y.S.2d 257, 258 (1st Dep't 1995) (denying petitioner's motion to enjoin administrative agency from initiating proceedings where claim of irreparable harm was based on speculation that proceedings would result in denial of benefits to petitioner); cf. Kaplan v. Bd. of Educ. of the City Sch. Dist. of New York, 759 F.2d 256, 259 (2d Cir. 1985) (upholding denial of preliminary injunction in action challenging new regulation where plaintiffs failed to show that they were "in a position accurately to predict what course others may take if the injunction is denied" and because plaintiffs' "predictions of havoc and unrest [were] too speculative to constitute . . . irreparable harm," particularly since predictions were based on assumption that others would not comply with regulation).<sup>5</sup>

In any event, the very opposition of petitioners to the Atlantic Yards project, together with their retention of experienced counsel to commence this action on their behalf, belies their claimed irreparable harm. Surely, petitioners' counsel have advised them that the SEQRA review process is in its early stages and will not be affected in any way by the demolition of the buildings. With so many local organizations and individuals vocally opposing the project, and petitioners and their counsel to lead them, it simply is not conceivable that the

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<sup>5</sup> Although petitioners also argue in their brief that demolition of the buildings will lead to "permanent injury to those residents who will be forced from their homes in order to facilitate demolition" (Pet. Mem. at 17), this allegation is devoid of any specifics and is nowhere to be found in the Verified Petition.

public could assume that the demolition of the buildings means that the project has been approved by the ESDC.<sup>6</sup>

Moreover, ESDC's review of the Atlantic Yards project is still in the preliminary stages, thereby precluding any showing of irreparable harm by petitioners. Administrative procedures will be available for members of the public to voice objections to the draft EIS to be issued by ESDC, and there is no reason to believe that ESDC will not consider those objections. See Hell's Kitchen Neighborhood Ass'n v. New York City Dep't of City Planning, 6 Misc. 3d 1031(A), 800 N.Y.S. 2d 347 (Sup. Ct. N.Y. County 2004) (Table) (text available at 2004 WL 3218419, at \*5-7) (holding that availability of administrative remedies to review draft EIS challenged by petitioners precluded showing of irreparable harm required to grant preliminary injunction sought by petitioners to enjoin public hearings on draft EIS); cf. Center for Law and Educ. v. U.S. Dep't of Educ., 209 F. Supp. 2d 102, 117 (D.D.C. 2002) (holding that plaintiffs' assertion that they would be harmed by a final agency rule was premature as there was no final agency rule, there would be an opportunity for plaintiffs to voice objections to the rulemaking process and there was no certainty that these objections would not be addressed), aff'd, 396 F.3d 1152 (D.C. Cir. 2005). Certainly, nothing in the demolition of the buildings in itself would make approval of the Atlantic Yards project more likely than not, and the demolition will in no way

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<sup>6</sup> But even if homeowners were to jump to the wrong conclusion as a result of the demolitions, such public perceptions have been held not to constitute irreparable harm. See, e.g., W. Pittsburgh P'ship ex rel. WEHAV Governing Comm'n v. McNeilly, 840 A.2d 498, 506 (Pa. Commw. Ct 2004) (in lawsuit challenging closing of police station, denial of preliminary injunction upheld because public perception of a "decreased 'police presence'" in the areas did not constitute irreparable harm); Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 877 (6th Cir. 1972) (in lawsuit by union against newspaper, denial of preliminary injunction upheld because "appearance to its members that the Union is helpless to discharge its obligations" and the corresponding "loss of confidence" were not irreparable harm).

impair or impede petitioners' right to be heard concerning the project. See Bd. of Visitors – Marcy Psychiatric Ctr. v. Coughlin, 60 N.Y.2d 14, 21, 466 N.Y.S.2d 668, 672 (1983) (in upholding state official's decision to convert unused portion of mental institution into correctional facility as valid emergency action exempt from SEQRA, court noted that "[n]o action will be taken irrevocably referable to the conversion of the buildings for correctional uses").

Finally, if the Atlantic Yards project is ultimately approved by ESDC without complying with the SEQRA process, petitioners will have an adequate remedy at law through the judicial process. See Malik v. Higgins, 173 A.D.2d 791, 792, 570 N.Y.S.2d 652, 653 (2d Dep't 1991) (noting that "since the plaintiff has an adequate remedy at law in a CPLR article 78 proceeding to review the determination of [the agency], he has failed to establish the need for either preliminary or permanent injunctive relief"); Koultukis, 285 A.D.2d at 436, 728 N.Y.S.2d at 443 (finding no irreparable harm and denying preliminary injunction against agency action that was not final because, *inter alia*, even in the event of an adverse agency decision "plaintiff would have the right to file an Article 78 proceeding"); Hell's Kitchen, 2004 WL 3218419, at \*7 (holding that petitioners failed to demonstrate irreparable harm based on challenged draft EIS because even if final approval is granted, they may seek judicial relief).

Given that the buildings are abandoned, deteriorating, and of no historical value, petitioners cannot show any irreparable harm that would result from their demolition. See Vine St. Concerned Citizens, Inc. v. Dole, 604 F. Supp. 509, 513 (E.D. Pa. 1985) (denying preliminary injunction to prevent proposed preconstruction activities pending preparation of EIS because of plaintiff's failure to show irreparable harm and noting that "[d]emolition of vacant buildings

owned by the state is not even harmful"). Their request for preliminary injunctive relief should therefore be denied.

**B. Petitioners Have Failed to Establish Any Likelihood of Success on the Merits**

**1. The Standard of Review in this Article 78 Proceeding Is Whether ESDC's Actions Were "Arbitrary and Capricious"**

Even if petitioners could demonstrate irreparable harm – which they cannot – their request for a preliminary injunction must still be denied because they have also failed to establish a likelihood of success on the merits. In an Article 78 proceeding, the Court is "limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 688, 642 N.Y.S.2d 164, 176 (N.Y. 1996). As this Court has recognized, this standard is highly deferential:

A determination is arbitrary and capricious if it is without sound basis in reason, and in disregard of the facts. Thus, if there is a rational basis for the administrative determination, there can be no judicial interference.

It is also well established that an agency is to be accorded wide deference in its interpretation of its own regulations and, to a lesser extent, in its construction of the governing statutory law, provided that such interpretation is not irrational or unreasonable. . . . So long as its interpretation is "neither irrational, unreasonable nor inconsistent with the governing statutes," and supported by substantial evidence, it will be upheld; the court may not substitute its judgment for that of the [agency], "even if the court might have decided the matter differently."

Lee v. Chin, 1 Misc. 3d 901(A), 781 N.Y.S.2d 625 (Sup. Ct. N.Y. County 2003) (Table) (text available at 2003 WL 22888395, at \*13) (Edmead, J.) (citation omitted).

Moreover, this Court must restrict its review to the facts and the record adduced before the agency when the agency made its determination. See 475 Ninth Ave. Assocs. LLC v.

Bloomberg, 2 Misc. 3d 597, 601, 773 N.Y.S.2d 790, 796 (Sup. Ct. N.Y. County 2003). "The court cannot substitute its own discretion for that of the Commissioner and decide, on the basis of its own research, or findings after testimony, that there is no emergency." Silver, 137 A.D.2d at 470, 525 N.Y.S.2d at 189.

Petitioners offer no evidence whatsoever to suggest that ESDC's decision to issue the Emergency Declaration was arbitrary, capricious or irrational in any respect. To the contrary, ESDC had more than sufficient information to support its determination that the demolition of the buildings was a Type II emergency action exempt from the environmental review requirements of SEQRA. Ms. Shatz, the Director of Planning and Environmental Review at ESDC, carefully considered a number of factors, including: her knowledge, reinforced by recent news reports, that vacant and deteriorated buildings are subject to collapse without warning; her concern that children, teenagers, or homeless persons might enter the buildings and be injured from falling debris or start fires that could cause harm to themselves or others; the absence of historical significance in any of the buildings; the pictures of the interiors of the buildings in the LZA presentation and subsequent report; and LZA's analysis of the buildings' defects. (Shatz Aff. ¶¶ 15-17) Under the circumstances, this Court should not substitute its judgment for that of ESDC.

**2. ESDC Was Not Required to Take a "Hard Look" in Determining Whether to Issue the Declaration of Emergency**

Petitioners assert a purely legal challenge to ESDC's decision to issue the Emergency Declaration, arguing that ESDC violated SEQRA because it failed to take a "hard look" at the issue before issuing the Declaration of Emergency, including getting an "independent assessment of the extent of the emergency." (Pet. Mem. at 5) This argument is simply wrong as a matter of law.

SEQRA requires the preparation of an environmental impact statement when a proposed construction or other activity may have a significant effect on the environment. See N.Y. City Coal. for the Preservation of Gardens v. Giuliani, 175 Misc. 2d 644, 651-52, 670 N.Y.S.2d 654, 660 (Sup. Ct. N.Y. County 1997), aff'd, 246 A.D.2d 399, 666 N.Y.S.2d 918 (1st Dep't 1998). Actions set forth in 6 NYCRR § 617.4 – called "Type I" actions – are presumed to have a significant effect on the environment and require the preparation of an EIS. In preparing an EIS for a Type I action, an agency is required to take a "hard look" at areas of environmental concern. See Town of Dryden v. Tompkins County Bd. of Representatives, 78 N.Y.2d 331, 333, 574 N.Y.S.2d 930, 931 (N.Y. 1991) ("In undertaking an assessment of a project's environmental impact, an agency must take a hard look at areas of environmental concern and make a reasoned elaboration of the bases for its determination.").

By contrast, "Type II" actions, listed in 6 NYCRR § 617.5, have been pre-determined under SEQRA to have *no* significant effect on the environment. See Giuliani, 175 Misc. 2d at 653, 670 N.Y.S.2d at 660-61. Therefore, Type II actions require neither an EIS nor environmental impact review. See Hazan v. Howe, 214 A.D.2d 797, 799, 625 N.Y.S.2d 670, 672 (3d Dep't 1994) ("[R]egulations implementing SEQRA declare that type II actions 'do not require environmental impact statements *or any other determination or procedure*' under SEQRA"). Because no EIS is required for a Type II action, the "hard look" standard has absolutely no applicability to an agency's determination of an issue that qualifies as a Type II action. See Bd. of Visitors, 60 N.Y.2d at 19-20, 466 N.Y.S.2d at 671-72 (holding that in Article 78 proceeding, arbitrary or capricious standard applied to review of Commissioner's determination that project represented emergency action exempt from SEQRA's requirement of environmental impact statement); Vinnie Montes Waste Sys., Inc. v. Town of Oyster Bay, 150

Misc. 2d 109, 112, 567 N.Y.S.2d 335, 337 (Sup. Ct. Nassau County 1991) (noting that while issue under SEQRA is whether agency took a "hard look" at areas of environmental concerns, "when the issue is whether an exemption applies, the 'standard of review' is less demanding": whether action was "irrational or arbitrary or capricious") (citation omitted), aff'd, 199 A.D.2d 493, 606 N.Y.S.2d 41 (2d Dep't 1993).

Equally unavailing is petitioners' suggestion that an independent assessment was required to determine whether "less drastic measures" were available to preserve the buildings short of demolition. (Pet. Mem. at 7) In this Article 78 proceeding, the relevant inquiry is whether ESDC's determination was rational, not whether other potentially preferable alternatives exist. See New York State Thruway Auth. v. Dufel, 129 A.D.2d 44, 47, 516 N.Y.S.2d 981, 984 (3d Dep't 1987) (holding that State's emergency action under SEQRA of appropriating appellants' farm for use in a detour route after collapse of bridge was not irrational even if preferable alternatives were available); Marcy Hous. Tenants Ass'n v. City of New York, 5 Misc. 3d 1014(A), 798 N.Y.S.2d 708 (Sup. Ct. Kings County 2004) (Table) (text available at 2004 WL 2590582, at \*15) ("[S]ince the City defendants determined that an EIS was not needed, even if they did not consider alternative sites for the sanitation garage, their alleged failure would not serve to invalidate the approval process").

Here, the buildings serve no useful purpose and will eventually be demolished by Forest City *regardless* of whether the ESDC ultimately approves the Atlantic Yards project. (Shatz Aff. ¶ 21)<sup>7</sup> If the project is approved, they will be demolished to make way for the new

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<sup>7</sup> Petitioners attempt to shoehorn their cause of action for disqualification of Sive Paget into their application for a preliminary injunction by alleging that "the only person outside the agency that ESDC consulted with respect to [Forest City's] request to demolish the buildings was Mr. Paget." (Pet. Mem. at 21) As discussed in section II.B below, however, Mr. Paget  
(cont'd)

construction; if the project is not approved, Forest City, like any other property owner, will be free to demolish them for any reason, or for no reason at all, and it has indicated its intention to do just that. (Shatz. Aff. ¶ 20) Under these circumstances, repairing the buildings as petitioners suggest would be a waste of time and resources.

Because ESDC had no obligation to consider alternatives to demolition, the affidavit submitted by petitioners from an engineer, Jay Butler, for the proposition that the buildings can be "safely stabilized with commonly-used repair measures" is irrelevant. (Affirmation of Jay Butler dated January 17, 2006 ("Butler Aff.") ¶ 4) In any event, this Court should disregard Mr. Butler's affidavit because it was not before ESDC at the time it decided to issue the Emergency Declaration. See Silver, 137 A.D.2d at 470, 525 N.Y.S.2d at 189.<sup>8</sup>

None of the cases cited by petitioners supports their assertion that ESDC had to undertake an independent assessment of the buildings. In Historic Albany Foundation v. Breslin, 296 A.D.2d 813, 745 N.Y.S.2d 331 (3rd Dep't 2002), the building at issue was a County-owned historic structure that the local historic preservation society sought to protect. Although the County ordered its demolition pursuant to its own powers, the City issued its own order directing the County to immediately stabilize the building's façade. Id. at 814, 745 N.Y.S.2d at 331. It was in the specific context of these two competing orders that the court, exercising its power to review the record and make factual findings, determined that stabilizing the façade of the

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had no conflict of interest, and in any case, any alleged conflict was waived by ESDC. Thus, even if petitioners' allegation were true, there was nothing inappropriate about ESDC consulting with Mr. Paget, its long-time outside environmental counsel.

<sup>8</sup> Also, contrary to petitioners' assertion, Mr. Butler does not conclude in his affidavit that the buildings are "not in imminent threat of collapse." (Pet. Mem. at 4) Rather, Mr. Butler opined that, due to his inability to have access to the interior of the buildings, he "[could]not conclude that the buildings pose[d] an imminent threat to public safety." (Butler Aff. ¶ 5)

building was the appropriate emergency action for the County to take. Id. at 815, 745 N.Y.S.2d at 331. The case has no applicability here, where the buildings in question have no historical value and only one agency determination is at issue.

Similarly inapposite is Historic Albany Foundation, Inc. v. Fisher, 209 A.D.2d 135, 625 N.Y.S.2d 349 (3d Dep't 1995). There, the court upheld a demolition order not because, as petitioners contend, the City had conducted an independent assessment of the building at issue. (Pet. Mem. at 7) Rather, the court expressly found that the evidence there established "a rational basis for the [City's] determination to invoke the emergency powers authorized by the City ordinance." Id. at 137, 625 N.Y.S.2d at 351. Nothing in Fisher suggests that the court would not have found a rational basis for the City's determination if the City had relied solely on the report submitted by the building owner.

Petitioners fare no better with their contention that there should have been an assessment of whether Forest City "has any culpability for the condition of the buildings that it allowed to deteriorate during its ownership." (Pet. Mem. at 7) It would not be less of an emergency under SEQRA if Forest City was somehow "responsible" for the deterioration of the buildings. As stated by the Court of Appeals: "That this emergency might have been foreseen and that municipal officials may have been derelict in not earlier having made appropriate provision for its resolution . . . does not negate the existence of the present crisis . . . the calendar cannot be turned back. It would serve no appropriate or useful purpose now to fashion relief as a sanction for action and inaction beyond recall." Gerges v. Koch, 62 N.Y.2d 84, 95, 476 N.Y.S.2d 73, 78 (N.Y. 1984); see also Silver, 137 A.D.2d at 470, 525 N.Y.S.2d at 188-89 ("Neither can it be said that the decision to take immediate action at this time is unreasonable because [the] problem [is] of long standing. . . . Emergencies are often precipitated by the failure

to take needed action in the past despite adequate warning.") (quoting Bd . of Visitors, 60 N.Y.2d at 20, 466 N.Y.S.2d at 671-72).

Given the highly deferential standard of review applicable here, petitioners have failed to demonstrate a likelihood of success on the merits. This failure, standing alone, is sufficient to warrant denial of their request for a preliminary injunction.

**C. Balancing the Equities Requires Denial of an Injunction**

Because both the irreparable harm and merits inquiries weigh overwhelmingly against a preliminary injunction, this Court need not determine which way the balance of equities tips. Nevertheless, the balance of equities in this case also counsels strongly against issuing an injunction.

To prevail on this point, the moving party must show that the harm it would suffer absent the injunction is substantially greater than the harm the opposing party would suffer if the injunction were granted. See Fischer v. Deitsch, 168 A.D.2d 599, 601, 563 N.Y.S.2d 836, 838 (2d Dep't 1990). "The court is required to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." City of New York v. Andrews, 186 Misc. 2d 533, 543, 719 N.Y.S.2d 442, 450 (Sup. Ct. Queens County 2000) (citation omitted). Petitioners here have again failed to make the required showing.

Petitioners themselves have no interest in any of the five buildings. Their claimed irreparable harm – that the demolition of the buildings will lead to an alleged public perception that approval of the Atlantic Yards project is a foregone conclusion – is clearly not applicable to themselves since they have all declared their steadfast opposition to the project and have retained experienced counsel who have surely advised them that this is not the case. (Petition ¶¶ 6-21) The SEQRA process is just beginning, and will provide them with ample opportunity to voice their concerns over the project. Moreover, petitioners have an adequate remedy at law in the

event ESDC ultimately approves the project without taking into account all relevant environmental concerns.

If, on the other hand, the demolition of the buildings is enjoined, the buildings would continue to pose a hazard to the public. See McGuinn v. City of New York, 219 A.D.2d 489, 490, 645 N.Y.S.2d 770, 771 (1st Dep't 1995) (considering public safety as a factor in assessing balance of equities). The buildings have no historical significance and do not otherwise serve a useful purpose. Such vacant and decrepit buildings have been known to collapse without warning. The risk they pose is especially high in the winter months when the weight of snow and ice, and alternate freezing and thawing, can add further stress to the already degraded structures. Moreover, the buildings are virtually certain to be demolished, whether or not the Atlantic Yards project is ultimately approved.

Under the circumstances, the equities favoring demolishing the buildings weigh strongly against an injunction. Cf. Spring-Gar Cmty. Civic Ass'n, Inc. v. Homes for the Homeless, Inc., 149 A.D.2d 581, 582, 540 N.Y.S.2d 453, 454 (2d Dep't 1989) (describing with approval lower court's finding that plaintiffs' "entirely speculative" fears were "clearly" outweighed by "life threatening" harm to homeless if injunction were granted). Accordingly, for this additional reason, petitioners' request for an injunction should be denied.

## II.

### **THIS COURT SHOULD DISMISS THE TWO CAUSES OF ACTION AGAINST ESDC AS A MATTER OF LAW**

When a motion to dismiss for failure to state a claim is brought pursuant to CPLR 7804(f), the court "must accept the facts as alleged in the [petition] as true, accord [petitioners] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Niagara Mohawk Power Corp. v. State of New York,

300 A.D.2d 949, 952, 753 N.Y.S.2d 541, 545 (3d Dep't 2002) (internal citations and quotations omitted) (alterations in original); see also 211 West 56<sup>th</sup> Street Assocs. v. Dep't of Hous. Pres. and Dev. of the City of New York, 78 A.D.2d 793, 794, 433 N.Y.S.2d 9, 10 (1st Dep't 1980). However, "wholly conclusory allegation[s], unsupported by any factual contentions" are "insufficient to overcome the presumption of regularity and honest motivation which attaches to official acts." Altamore v. Barrios-Paoli, 90 N.Y.2d 378, 386, 660 N.Y.S.2d 834, 838 (1997) (internal citations and quotations omitted); see also Morales v. Patel, 232 A.D.2d 319, 320, 648 N.Y.S.2d 574, 574 (1st Dep't 1996) (Article 78 proceeding properly dismissed where petition failed to allege facts in support of conclusory claim); Niagara Mohawk, 300 A.D.2d at 952, 753 N.Y.S.2d at 545 (holding that "factual allegations which are conclusory, vague or inherently incredible" are insufficient to state a claim). Moreover, "wholly speculative assertions[s] of anticipated illegal action, without any factual basis" are properly dismissed. See Altamore, 90 N.Y.2d at 388, 660 N.Y.S.2d at 839.

Application of the foregoing standards to this case mandates dismissal of the two causes of action asserted by petitioners against ESDC.

**A. Petitioners Fail to State a Cause of Action Under SEQRA**

As discussed in section I.B above, petitioners have alleged no facts that would support a finding that ESDC's decision to issue the Declaration of Emergency was in any way irrational, arbitrary or capricious. Indeed, their entire argument is premised on the assertion that ESDC was required to apply a "hard look" standard in deciding whether to issue the Declaration of Emergency. But this argument is wrong as a matter of law. (Pet. Mem. at 5)

The "hard look" analysis applies only in the context of an environmental review required in a Type I action. The issuance of the Declaration of Emergency here was plainly a Type II action exempt from the review requirements of SEQRA. Accordingly, petitioners'

argument fails as a matter of law, and this Court should dismiss the first cause of action which seeks annulment of the Declaration of Emergency. See Manhattan Valley Neighbors for Permanent Hous. for the Homeless v. Koch, 168 A.D.2d 262, 263, 562 N.Y.S.2d 621, 622-23 (1st Dep't 1990) (holding that agency's determination that project was "Type II" action exempt from environmental impact review was not arbitrary or capricious or abuse of discretion, and therefore affirming dismissal of petition).

**B. This Court Should Reject Petitioners' Request to Disqualify ESDC's Long-Time Counsel of Choice**

Petitioners only other cause of action against ESDC seeks to (i) disqualify David Paget and his firm, Sive Paget, from representing ESDC on the Atlantic Yards project on grounds that they previously represented Forest City on the same project and Sive Paget is continuing to represent Forest City in other unrelated matters (Petition ¶¶ 72-72), and (ii) enjoin ESDC from issuing a Final Scoping Document until it retains new counsel (*id.* ¶ 82). This cause of action should be summarily rejected.

**1. Petitioners Lack Standing to Seek Disqualification of ESDC's Counsel**

As a threshold matter, petitioners lack standing to seek to disqualify Mr. Paget and Sive Paget from representing ESDC as they have never had an attorney-client relationship with either of them. It is well-settled that a party has no standing to move to disqualify another party's counsel with whom it has never had an attorney-client relationship. As stated by the Appellate Division, First Department, "When [counsel] sought to be disqualified never represented the moving party, that [counsel] owe[s] no duty to that party"; thus it follows that 'if there is no duty owed, there can be no duty breached.'" See Stathis v. N.Y. City Hous. Auth., 12/20/93 N.Y.L.J. 29 (1993) (citation omitted) (alterations in original); see also Promanagement Assocs., Inc. v. DeMott, 284 A.D.2d 124, 124, 725 N.Y.S.2d 338, 339 (1st Dep't 2001) (holding

that plaintiff, which apparently asserted no current or former attorney-relationship with defendants' counsel, lacked standing to seek to disqualify said counsel); Singh v. Friedson, 10 A.D.3d 721, 722, 783 N.Y.S.2d 46, 47 (2d Dep't 2004) ("Since the plaintiff was neither a former nor present client of the law firm . . . , he did not have standing to seek its disqualification from dual representation of the two defendants").

Here, neither Mr. Paget nor his firm has ever represented any of the petitioners. Thus, petitioners lack standing to seek to disqualify them from representing ESDC in connection with the Atlantic Yards project. If, as they claim, they are interested in protecting the integrity of the SEQRA review process (Pet. Mem. at 9), they have other avenues for doing so. SEQRA has procedures in place for public participation, and if the Atlantic Yards project is ultimately approved by ESDC without proper compliance with SEQRA, petitioners can challenge the approval through the judicial process.

**2. There Is No Conflict in Sive Paget's Representation of ESDC -- and If There Was a Conflict, It Has Been Waived**

Even if petitioners had standing to seek disqualification of Mr. Paget and his firm, they fail to make the required showing for disqualification. Although not absolute, the right to counsel of choice "is a valued right and any restrictions must be carefully scrutinized." S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 738 (N.Y. 1987). This is especially so given that "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client." See Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 310, 610 N.Y.S. 2d 128, 131 (N.Y. 1994); see also Olmoz v. Town of Fishkill, 258 A.D.2d 447, 447, 684 N.Y.S.2d 611, 611 (2d Dep't 1999) ("A party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion.")

(citation omitted); First Hudson Fin. Group, Inc. v. Martinos, --N.Y.S.2d--, 2005 WL 3700724, at \*2 (Sup. Ct. N.Y. County Dec. 6, 2005) ("[D]isqualification interferes with a party's right to retain counsel of his choice, and in the current reality of litigation, disqualification motions are often utilized as a tactical tool. Therefore, motions to disqualify an attorney are subject to a high burden of proof.").

The New York Code of Professional Responsibility governs the inquiry into whether Mr. Paget has a conflict in his representation of ESDC. See N.Y. Eth. Op. 629 (N.Y. St. Bar Assn. Comm. Prof. Eth. Mar. 23, 1992).

**a. Disciplinary Rule 5-108**

Petitioners' attempt to disqualify Mr. Paget from representing ESDC based on his prior representation of Forest City is unavailing. DR 5-108(A)(1) provides that an attorney "who has represented a client in a matter . . . shall not, without the consent of the former client after full disclosure . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Accordingly, a party seeking disqualification of its adversary's lawyer pursuant to DR 5-108(A)(1) must demonstrate that (i) there was an attorney-client relationship between the moving party and opposing counsel, (ii) the matters involved in both representations are substantially related, and (iii) the interests of the present client and former client are materially adverse. See Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 684 N.Y.S.2d 459 (N.Y. 1998). Only when the movant satisfies all three requirements does an irrebuttable presumption of disqualification arise. Id.

As discussed above, petitioners have never had an attorney-client relationship with Mr. Paget or his law firm. Thus, they fail to satisfy the first inquiry.

Petitioners also fail to satisfy the third inquiry because the relationship between ESDC and Forest City in the SEQRA process is not adversarial. Where ESDC decides, as it has in the case of the Atlantic Yards project, that a project has merit and should be undertaken to eliminate blight and to promote economic development on behalf of the State, it becomes a proponent of that project. (Laremont Aff. ¶ 8; Paget Aff. ¶ 12) Both ESDC and Forest City share the same objectives of observing all the procedural requirements of SEQRA so as to withstand any legal challenge if the project is ultimately approved. (Laremont Aff. ¶ 9; Paget Aff. ¶ 13)

Finally, even if petitioners could satisfy the prerequisites of DR 5-108, Forest City, Mr. Paget's former client and the only party whose interests DR 5-108(A)(1) seeks to protect, consented to Mr. Paget's representation of ESDC on the Atlantic Yards project. (Laremont Aff. ¶ 7) Thus, as a matter of law, Mr. Paget's prior representation of Forest City on the Atlantic Yards project does not provide a basis for disqualifying him and his firm from representing ESDC on that project.

**b. Disciplinary Rule 5-105**

Similarly without merit is petitioners' request to disqualify Mr. Paget based on his firm's current representation of Forest City on completely unrelated matters. DR 5-105 states in pertinent part:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the

lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

C. In the situations covered by DR 5-105 [1200.24] (A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Neither subparagraph A nor B is applicable here because, as discussed above, the relationship between ESDC and Forest City in the SEQRA review process is not adversarial. Moreover, the matters in which other Sive Paget attorneys are currently representing Forest City are completely unrelated to the Atlantic Yards project, as to which Mr. Paget is representing ESDC, and ESDC has no involvement in those other matters. Thus, Mr. Paget's exercise of his independent professional judgment on behalf of ESDC is not likely to be adversely affected by his firm's representation of Forest City on the other unrelated matters. See Asset Alliance Corp. v. Ervine, 279 A.D.2d 365, 365-66, 719 N.Y.S.2d 247, 248 (2d Dep't 2001) (holding that law firm's representation of petitioner's officers in unrelated lawsuit involving unrelated issues did not create conflict warranting disqualification). Cf. EC 5-15 ("Simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not by itself require consent of the respective clients.").

Moreover, both ESDC and Forest City have consented to their concurrent representation by Sive Paget on different matters (Laremont Aff. ¶ 11; Affidavit of James Stuckey sworn to on Feb. 8, 2006, ¶¶ 16, 17), thereby making Mr. Paget's continued representation of ESDC permissible under DR 5-105(C). See In re Metropolitan Transit Auth., 222 A.D.2d 340, 342, 635 N.Y.S.2d 604, 605 (1st Dep't 1995) (affirming denial of application to

disqualify counsel where counsel satisfied DR 5-105(C) by obtaining informed consent of all parties they were simultaneously representing); see also Conflicts of Interest; Waivers; Imputation of Conflicts, 2001 WL 1870202, at \*3 (N.Y.C. Assn. B. Comm. Prof. Jud. Eth. Apr. 17, 2001) ("[T]here are many situations in transactional practice involving the simultaneous representation of clients with 'differing interests' where the 'disinterested lawyer' test of DR 5-105(C) may be satisfied."). As petitioners themselves concede (Pet. Mem. at 13), a governmental entity may waive an attorney's potential conflict of interest in the same way as a private party. See N.Y. Eth. Op. 629.<sup>9</sup>

Given the circumstances of this case, disqualifying Mr. Paget from representing ESDC would be highly prejudicial to ESDC. Mr. Paget is considered by ESDC to be one of the preeminent environmental lawyers in the United States, with special expertise in preparing EIS's for large, complex projects, and has represented ESDC in numerous major projects for nearly 30 years. (Laremont Aff. ¶¶ 3, 12; Paget Aff. ¶ 5) When Mr. Paget was retained by Forest City on the Atlantic Yards project, it was with the knowledge and approval of ESDC, and Forest City understood that ESDC might later be retaining Mr. Paget and his firm for the same project.

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<sup>9</sup> Petitioners' reliance on section 74 of the Public Officers Law and General Municipal Law governing municipal officers or employees is misplaced because those statutes apply only to public officers and employees of a public agency, and Mr. Paget is neither. (Pet. Mem. at 8-13) The only Municipal Law opinion cited by petitioners that addresses the obligations of an attorney representing a government agency is an "informal and unofficial" opinion of the New York Attorney General's office that relies on common law conflict of interest rules. See 1990 N.Y. Op. Atty. Gen. (Inf.) 1060, 1990 WL 514517 (N.Y.A.G. May 17, 1990). The issue there was whether an outside attorney for a planning board could represent private clients before that same board. Thus, unlike in this case, the issue there concerned simultaneous representation of two clients with adverse interests. Moreover, in finding that such dual representation was not permissible, the opinion specifically noted that the planning board could not waive conflicts of interests because its responsibilities are performed for the benefit of the public. Two years after that opinion, the State Bar issued its Opinion 629, which reversed the rule that a public agency could not waive a conflict.

Finally, throughout the time that Mr. Paget advised Forest City, Fried Frank served as Forest City's lead counsel on the Atlantic Yards project. (Paget Aff. ¶ 6) See Solow, 83 N.Y.2d at 313, 610 N.Y.S.2d at 131 (noting that disqualification inquiry "should consider the circumstances of the prior representation").<sup>10</sup>

Petitioners here do not, and cannot, allege that Mr. Paget has in any way compromised the interests of ESDC or the review process under SEQRA. Instead, they seek his disqualification only on grounds of an "appearance of a conflict." (Pet. Mem. at 9) It is well-settled, however, that "[t]he appearance of impropriety alone is not sufficient to require disqualification." In re Stephanie X, 6 A.D.3d 778, 780, 773 N.Y.S. 2d 766, 767 (3d Dep't 2004); see also Hickman v. Burlington Bio-Med. Corp., 371 F. Supp. 2d 225, 229 (E.D.N.Y. 2005). Nor does it provide a basis for enjoining ESDC from issuing a Final Scoping Document, which is only a preliminary step in the SEQRA review. If it turns out that the Atlantic Yards project is ultimately approved by the ESDC without complying with SEQRA, petitioners will be able to challenge the approval in court. Cf. Hell's Kitchen Neighborhood Ass'n v. New York City Dept of City Planning, 6 Misc. 3d 1031(A), 800 N.Y.S. 2d 347 (Sup. Ct. N.Y. County 2004) (Table)

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<sup>10</sup> Two other cases cited by petitioners, Narel Apparel Ltd. v. American Utex International, 92 A.D.2d 913, 460 N.Y.S.2d 125 (2d Dep't 1983), and In re Hof, 102 A.D.2d 591, 478 N.Y.S.2d 39 (2d Dep't 1984), are similarly inapposite. In Narel, the court disqualified an attorney from representing the plaintiff because the attorney might have to cross-examine defendants, who were also his clients, and the scope of cross-examination could include confidential information imparted to him by defendants. 92 A.D.2d at 914, 460 N.Y.S.2d at 128. In Hof, an attorney represented a widow and child in the administration of the decedent's estate. On behalf of the son, the attorney brought an action for an accounting against the widow, who then discharged the attorney as her counsel and commenced her own proceeding seeking to disqualify the attorney from representing the son in matters relating to the estate. 102 A.D.2d at 592, 478 N.Y.S. 2d at 40. In granting disqualification, the court found that the circumstances made it reasonable to infer that the attorney gained confidential information from the former client that would be used against that former client in an adversarial proceeding. Id. at 593-94, 478 N.Y.S.2d at 41.

(text available at 2004 WL 3218419, at \*5-7) (holding that challenge to draft EIS was not ripe for review because petitioners have not exhausted administrative remedies and ultimately will be able to seek judicial review); In re Abrams, 62 N.Y.2d 183, 198, 476 N.Y.S.2d 494, 501 (N.Y. 1984) (vacating disqualification of counsel because party seeking disqualification had not exhausted all the avenues open to him).

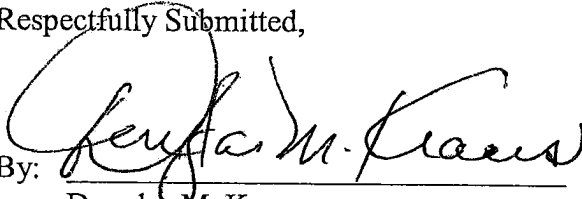
Under the circumstances, petitioners' cause of action seeking to disqualify Mr. Paget and his firm from representing ESDC on the Atlantic Yards project fails as a matter of law and should be dismissed.

### CONCLUSION

For the reasons set forth herein, petitioners' request for a preliminary injunction should be denied in all respects, and the two causes of action against ESDC should be dismissed as a matter of law.

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Respectfully Submitted,

  
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