

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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DEVELOP DON'T DESTROY BROOKLYN, et al.,	:	Index No. 100686/06
	:	
Petitioners – Respondents,	:	
	:	
- against -	:	
	:	
EMPIRE STATE DEVELOPMENT CORPORATION,	:	
	:	
Respondent –Appellant,	:	
	:	
-and-	:	
	:	
FOREST CITY RATNER COMPANIES,	:	
	:	
Respondent.	:	
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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT-APPELLANT  
EMPIRE STATE DEVELOPMENT CORPORATION'S  
APPLICATION FOR A STAY PENDING APPEAL AND A PREFERENCE**

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**TABLE OF CONTENTS**

	<u>Page</u>
Preliminary Statement.....	1
Summary of this Motion .....	1
BACKGROUND .....	4
ARGUMENT .....	9
ESDC IS ENTITLED TO A STAY PENDING APPEAL AND A PREFERENCE .....	9
A.    ESDC Is Entitled to a Stay .....	9
B.    ESDC Is Entitled to a Preference.....	10
1.    ESDC Will Suffer Substantial Hardship in the Absence of a Preference .....	10
2.    Good Cause for a Preference Exists Because ESDC Is likely to Succeed on the Merits of this Appeal .....	12
a.    The Court Below Ignored the Issue of Petitioners' Lack of Standing to Seek Disqualification of Mr. Paget.....	13
b.    The Court Below Failed to Address ESDC's and Forest City's Waiver of Any Potential Conflict .....	14
c.    The Court Below Made Clearly Erroneous Factual Findings and Employed Improper Procedure .....	15
CONCLUSION.....	18

### **Preliminary Statement**

Respondent-Appellant Empire State Development Corporation ("ESDC") submits this memorandum of law in support of its application for (i) a stay pending appeal pursuant to CPLR § 5519(a)(1) and/or CPLR § 5519(c), and (ii) a preference in the hearing of this appeal pursuant to CPLR § 5521(a) and 22 NYCCRR 600.12.

### **Summary of this Motion**

On February 14, 2006, Supreme Court, New York County (Hon. Carol Edmead) issued an Order which, among other things, disqualified David Paget, Esq. and his firm, Sive, Paget & Riesel P.C. ("Sive Paget"), from acting as ESDC's outside environmental counsel on the proposed Atlantic Yards Arena and Redevelopment Project ("Atlantic Yards") in Brooklyn, and directing ESDC to retain new counsel within 45 days. In so ruling, the court below expressly stated: *"I don't doubt on the issue of Paget that the Court's determination may not stand. . . . The Court may be wrong on that, and on appeal, I will understand and read the reversal on that issue."* (Tr. of Feb. 14, 2006 Hearing at 115:4-5, 9-11 (emphasis added))

The lower court's doubts about the correctness of its ruling are well founded, because it was wholly at odds with settled law. The court based its ruling on an asserted "appearance" of impropriety, expressing concern that members of the "public" might question ESDC's impartiality if it continued to use Mr. Paget as its lawyer, since he had been retained by the developer of the proposed Atlantic Yards project at an earlier stage of the project. But the court selected a remedy — disqualification of Mr. Paget under the Code of Professional Responsibility — that is far too draconian, is not sanctioned by the Code, and cannot be squared with well established case law from this Court and the Court of Appeals.

First and foremost, the lower court simply ignored decisions of the Court of Appeals and this Court holding that parties who, like petitioners here, have never had an

attorney-client relationship with the lawyer they seek to disqualify lack standing to seek such disqualification. If petitioners or any other members of the public are aggrieved by any action taken by ESDC on the Atlantic Yards project, their remedy is to bring an Article 78 proceeding, in which that action will be reviewed on the merits on a full record. But they cannot move to disqualify a lawyer who never represented them because such a lawyer owes them no duty, and "if there is no duty owed, there can be no duty breached." Stathis v. N.Y. City Hous. Auth., N.Y.L.J., Dec. 20, 1993, at 29 (Sup. Ct. N.Y. County Dec. 17, 1993) (quoting Rowley v. Waterfront Airways, Inc., 113 A.D.2d 926, 927, 493 N.Y.S.2d 828, 829 (2d Dep't 1989)).

The court below also failed to address a long line of authorities holding that clients (including even a public entity like ESDC) can waive a potential conflict, and further refused to consider the fact that just such a waiver was given here by well-informed clients represented by counsel. In addition, the court ignored the authorities holding that the Disciplinary Rule concerning an appearance of impropriety cannot "trump" a waiver that is properly given pursuant to other Disciplinary Rules that expressly permit it. In sum, the lower court's ruling disqualifying Mr. Paget cannot stand as a matter of law.

ESDC is now threatened with serious and continuing harm as a result of the lower court's ruling. First, it is being deprived of its fundamental right to counsel of its choosing in connection with the large and complex Atlantic Yards redevelopment project. Mr. Paget has advised ESDC on its largest and most complex projects for nearly 30 years. He is widely known as one of the most knowledgeable and experienced environmental lawyers in the United States, and ESDC has developed complete confidence in him. As explained in the accompanying affirmation of Douglas M. Kraus, Esq. in support of this application, there are only — literally

— a handful of other environmental lawyers with the expertise and experience to handle a matter such as this, and three of them are already engaged on the Atlantic Yards project for other parties.

Second, if ESDC is required to change counsel at this point in time, with the environmental review process under the State Environmental Quality Review Act ("SEQRA") already well under way, that process — including, most importantly, the preparation of the extensive Environmental Impact Statement ("EIS") that will be required for this project — will be significantly delayed. Such delay obviously benefits petitioners, who have declared their steadfast opposition to the project, but it is not in the interest of the numerous other constituencies that have expressed support for the project, and it clearly does not serve the public interest generally.

Finally, the lower court's ruling is presently being actively exploited by petitioners for their own public relations purposes. For example, on February 16, 2006, just hours after ESDC's counsel advised petitioners' counsel, as required by this Court's rules, that ESDC intended to make the present application for a stay and a preference, petitioner Develop Don't Destroy Brooklyn published a press release on its web site disparaging ESDC for exercising its right to pursue this appeal, excoriating it for seeking to retain the services of its counsel of choice, Mr. Paget, and accusing ESDC (in a quote attributed to one of the lawyers who appeared for petitioners in the court below) of being biased in favor of "developers" and against the "community." (See Affirmation of Douglas M. Kraus, Esq. Ex. F (submitted herewith; hereinafter ("Kraus Aff."))) This press release makes clear the purely tactical nature of petitioners' disqualification claim. But it also calls out for a prompt review of the lower court's ruling, so as to provide an authoritative answer to the question whether ESDC may properly

retain Mr. Paget's services in this matter and to bring a halt to petitioners' efforts to disparage the all-important environmental review process on this highly publicized project.

Accordingly, ESDC respectfully requests that this Court stay the lower court's disqualification order and expedite the briefing and argument of the issues on this appeal. Petitioners will not be harmed by such expeditious review, since the issues have been thoroughly briefed and argued below. Indeed, all parties and the public will benefit by a speedy resolution of this matter.

ESDC is prepared to submit its brief on the merits on Tuesday, February 21, 2006, and asks that petitioners be directed to file their brief in opposition on February 28, 2006, with ESDC's reply brief to be filed on March 3, 2006. ESDC further respectfully requests that oral argument be scheduled for the week of March 6, 2006.

### **BACKGROUND**

#### **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. (Opinion at 5) As a state-wide agency, ESDC has the power to override local zoning ordinances and exercise condemnation power in furtherance of its mission. (Kraus Aff. Ex. C (Affirmation of Anita Laremont dated Feb. 8, 2006 ¶ 8, hereinafter "Laremont Aff."))

#### **The Atlantic Yards Project**

The Atlantic Yards project is a major community redevelopment project proposed to be built above and adjacent to the Metropolitan Transit Authority's Atlantic Terminal rail yards in Brooklyn. It includes a sports and convention center, extensive commercial office and

retail space, new residential space including affordable middle-income and market-rate housing, and parking. (Kraus Aff Ex E (Affidavit of Rachel Shatz dated Feb. 8, 2006 ¶ 6 and Ex. A, hereinafter ("Shatz Aff.")) The project is expected to eliminate blighted conditions, 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. Respondent Forest City Ratner Companies ("Forest City") is the developer of the Atlantic Yards project.

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

Before being approved, the Atlantic Yards project will have to comply with the requirements of 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) 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.) Along 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. (Id. ¶ 7)

After considering 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. (Id. ¶ 7) Prior to the ruling of the court below, ESDC had expected to issue the Final Scoping Document in early or mid-March. The issuance of this Final Scoping Document, however, is only a preliminary event that will lead to a

detailed and exhaustive analysis of the potential environmental impacts of the Atlantic Yards project. After issuing the Final Scoping Document, ESDC will prepare and 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 will 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 is subject to judicial review.

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

David Paget is a member of Sive Paget firm and is considered to be one of the preeminent environmental lawyer in the United States. (Laremont Aff. ¶¶ 3, 12) He has special expertise in the preparation of EIS's required for large and 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 process. (Kraus Aff. Ex D (Affirmation of David Paget dated Feb. 8, 2006 ¶ 3, hereinafter "Paget Aff. ")) 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 environmental studies, reports, and other submissions that would likely be required by ESDC in its review of the Atlantic Yards project. (Id. ¶ 6) ESDC was aware of this retention and approved of it. (Laremont Aff. ¶ 5)

At the time Forest City retained Mr. Paget, 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)<sup>1</sup>

### **The Proceedings Below**

Petitioners are various neighborhood organizations and individuals who claim to live in or near the "footprint" of the Atlantic Yards project — all of whom have declared their opposition to the project. (Kraus Aff. Ex. G (Petition ¶¶ 6-21)) On January 19, 2006, they brought an Article 78 proceeding by Order to Show Cause against both ESDC and Forest City, seeking, among other things, a preliminary injunction enjoining the demolition of certain buildings within the footprint of the Atlantic Yards project. Petitioners also asserted two causes of action against ESDC. The first was for an alleged violation of SEQRA and sought the annulment of the ESDC's Declaration of Emergency which authorized demolition of the buildings. (Petition ¶¶ 59, 62) The second alleged a conflict of interest in Mr. Paget's representation of ESDC on the Atlantic Yards project on the grounds that he previously

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<sup>1</sup> The court below concluded that ESDC "formally retained Mr. Paget as outside counsel" in February 2005, citing a February 2005 cost reimbursement agreement between Forest City and ESDC. (Opinion at 36) In fact, however, the record is uncontroverted that ESDC retained Mr. Paget effective as of October 1, 2005 (Laremont Aff. ¶ 5; Paget Aff. ¶ 11) pursuant to a formal retainer agreement dated October 24, 2005 (Paget Aff. Ex. B).

represented Forest City on the same project and other lawyers of his firm are continuing to represent Forest City on other unrelated matters. (Id. ¶¶ 72-74) Based on this alleged conflict, petitioners sought an order disqualifying Mr. Paget and Sive Paget from representing ESDC on the Atlantic Yards project (id. ¶¶ 79-81) and directing ESDC to refrain from issuing a Final Scoping Document until it retains new counsel. (Id. ¶ 82)<sup>2</sup>

ESDC opposed petitioners' application for a preliminary injunction, and cross-moved to dismiss the two causes of action against it. The court below held oral argument on these motions on February 14, 2006. Immediately after the hearing, the court announced its ruling from the bench and issued a written Order and Memorandum Decision. The court denied petitioners' application for a preliminary injunction, granted ESDC's cross-motion to dismiss petitioners' cause of action for annulment of the Declaration of Emergency, denied ESDC's cross-motion to dismiss petitioners' cause of action for disqualification of Mr. Paget and Sive Paget, and granted petitioners' Verified Petition as to the cause of action for disqualification "to the extent that the ESDC is hereby enjoined from taking any further action which requires the services of outside counsel David Paget and his firm, until new counsel is engaged." (Opinion at 40-41) The Order also directed ESDC to retain new counsel within 45 days. (Id. at 41)

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<sup>2</sup> During the hearing before the court below, petitioners withdrew their request to enjoin ESDC from issuing the Final Scoping Document until it retains new counsel. (Tr. of Feb. 14, 2006 Hearing at 4:7-15)

**ARGUMENT**

**ESDC IS ENTITLED TO A STAY  
PENDING APPEAL AND A PREFERENCE**

**A. ESDC Is Entitled to a Stay**

CPLR § 5519(a)(1) provides for an automatic stay pending appeal where, as here, the appellant is a state agency. It provides, in pertinent part:

(a) **Stay without court order.** Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state . . . .

CPLR § 5519(a). This automatic stay applies to appeals taken by a government agency from an Article 78 proceeding. See Bloomfield Bldg Wreckers, Inc. v. City of Troy, 41 N.Y.2d 1102, 1103, 364 N.E.2d 1130, 396 N.Y.S.2d 359, 359 (1977) (noting that City's "service of a notice of appeal in an article 78 proceeding effected a stay of 'all proceedings to enforce the judgment or order appealed from' therein") (citation omitted); Hunt v. Grinker, 169 A.D.2d 477, 478, 564 N.Y.S.2d 350, 351 (1st Dep't 1991) (noting that order was automatically stayed by service of city agency's affidavit of intent to move for leave to appeal).

Here, ESDC is New York State's lead economic agency, and it has served on petitioners' counsel a Notice of Appeal from the portion of the lower court's order disqualifying Mr. Paget and his firm from representing ESDC on the Atlantic Yards project. Accordingly, it is entitled to an automatic stay pursuant to CPLR § 5519(a)(1). Wholly apart from this automatic stay provision, however, ESDC respectfully submits that it would be entitled to a stay pursuant

to CPLR § 5519(c), given the exigent circumstances surrounding the present appeal as described below.

**B. ESDC Is Entitled to a Preference**

Under the rules of this Court, "[a] preference under CPLR 5521 may be obtained upon good cause shown in an application made to the court on notice to the other parties to the appeal." 22 NYCRR 600.12(a)(2); see also Matter of Schulz v. State of New York, 175 A.D.2d 356, 357, 572 N.Y.S.2d 434, 435 (3d Dep't 1991) ("Calendar preferences can be granted to appeals before the Appellate Divisions and the Court of Appeals upon a showing of urgency and good cause.").

**1. ESDC Will Suffer Substantial Hardship  
in the Absence of a Preference**

The court below premised its disqualification of Mr. Paget on its concern that Mr. Paget's representation of ESDC "has such a severe crippling appearance of impropriety on a project of such great magnitude." (Kraus Aff. Ex. B (Tr. of Feb. 14, 2006 Hearing at 115:13-15)) It failed, however, to take into account ESDC's competing interest in exercising its right to retain counsel of its choice. As the Court of Appeals has stated: "Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party's right to representation by counsel of choice and danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation." Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 638, 707 N.E.2d 414, 417-18, 684 N.Y.S.2d 459, 462-63 (1998); cf. Board of Education v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (although lawyer's potential conflict gave appearance of impropriety because of "the public importance of the civil rights issue at the heart of the dispute," in absence of claim that trial will be tainted, "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases").

ESDC will suffer substantial hardship if it is not permitted to keep Mr. Paget and his law firm as its counsel in the Atlantic Yards project. "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." Olmoz v. Town of Fishkill, 258 A.D.2d 447, 447, 684 N.Y.S.2d 611, 612 (2d Dep't 1999) (citation omitted); see also S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 508 N.E.2d 647, 650, 515 N.Y.S.2d 735, 738 (1987) (although not absolute, the right to counsel of choice "is a valued right and any restrictions must be carefully scrutinized"). This is especially so given that "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client." Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 310, 632 N.E.2d 437, 440, 610 N.Y.S. 2d 128, 131 (1994); see also First Hudson Fin. Group, Inc. v. Martinos, No. 114378/05, 2005 WL 3700724, at \*2 (Sup. Ct. N.Y. County Dec. 6, 2005) (to be published in N.Y.S.2d) ("[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").

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) Until the court below issued its Order, Mr. Paget and his firm were fully engaged in the environmental review of the Atlantic Yards project, which was proceeding actively and on schedule. ESDC has already held an initial public hearing, attended by more than 500 persons, to solicit comments on the Draft Scope of Analysis for an EIS, and was

preparing to issue a Final Scoping Document. Before the lower court issued its ruling, ESDC had been expecting to issue the Final Scoping Document by early or mid-March, after which it was to conduct the detailed environmental studies and analyses required before issuing a draft EIS for public review and comment. (Kraus Aff. ¶ 8)

A project of this magnitude requires the advice of experienced counsel who is familiar with the intricacies of the SEQRA review process. Having worked with Mr. Paget on numerous major projects for nearly 30 years, ESDC has complete confidence in Mr. Paget's advice and his ability to deal with all types of exigencies. (Kraus Aff. ¶ 7) If this Court were to uphold the lower court's order of disqualification, the Atlantic Yards project would have to be suspended while ESDC searches for a replacement for Mr. Paget. (*Id.* ¶ 9) Even assuming that ESDC can locate suitable substitute counsel, it is unlikely ever to have the same comfort level with that attorney that it has developed over the years with its counsel of choice, Mr. Paget.

ESDC would suffer these substantial hardships unfairly — and entirely unnecessarily — if this Court ultimately determines, as we submit it should, that the lower court's Order disqualifying Mr. Paget should be reversed. Thus, ESDC should be accorded preference on this appeal so that this issue can be resolved definitively before Mr. Paget is replaced.

**2. Good Cause for a Preference Exists Because ESDC Is likely to Succeed on the Merits of this Appeal**

The lower court's decision to disqualify Mr. Paget and his firm from representing ESDC on the Atlantic Yards project should be reversed on appeal because it ignored established precedent and made clearly erroneous factual findings.

a. **The Court Below Ignored the Issue of Petitioners' Lack of Standing to Seek Disqualification of Mr. Paget**

The court below failed to address ESDC's showing that petitioners lacked standing to seek disqualification of Mr. Paget and his law firm from representing ESDC on the Atlantic Yards project. It is well-settled that a party has no standing to move to disqualify another party's counsel where it has never had an attorney-client relationship with such counsel. "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.'" Stathis v. N.Y. City Hous. Auth., N.Y.L.J., Dec. 20, 1993, at 29 (Sup. Ct. N.Y. County Dec. 17, 1993) (quoting Rowley v. Waterfront Airways, Inc., 113 A.D.2d 926, 927, 493 N.Y.S.2d 828, 829 (2d Dep't 1989)) (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, petitioners have never claimed that they were ever represented by Mr. Paget or his firm. Thus, petitioners lack standing to seek to disqualify them from representing ESDC in connection with the Atlantic Yards project. If, as they contend, they are interested in protecting the integrity of the SEQRA review process, petitioners 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 on the merits through an Article 78 proceeding.

**b. The Court Below Failed to Address ESDC's and Forest City's Waiver of Any Potential Conflict**

The court below erred as a matter of law in not recognizing the waiver by both ESDC and Forest City of any potential conflict. With respect to Mr. Paget's prior representation of Forest City on the Atlantic Yards project, the applicable ethical rule is DR 5-108(A)(1), which the court below completely ignored. This rule 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." N.Y. Code of Prof'l Responsibility DR 5-108(A)(1). Forest City gave its consent to Mr. Paget's representation of ESDC on the Atlantic Yards project. Thus, the consent of Forest City alone is sufficient to make Mr. Paget's representation of ESDC permissible under DR 5-108(A)(1).<sup>3</sup>

It is also true that other lawyers at the Sive Paget firm are representing Forest City on two minor matters that do not involve ESDC and are completely unrelated to the Atlantic Yards project. However, ESDC and Forest City, both of which are sophisticated entities with their own in-house counsel, have consented to their simultaneous representation by Sive Paget on

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<sup>3</sup> Indeed, even without a waiver, there would be no violation of DR 5-108(A)(1). Under this rule, a party seeking disqualification of its adversary's lawyer based on a prior representation 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 interest of the present client and former client are materially adverse." *Jamaica Pub. Serv.*, 92 N.Y.2d at 636, 707 N.E.2d at 416, 684 N.Y.S.2d at 461. All three inquiries must be satisfied for an irrebuttable presumption of disqualification to arise. *See id.*; *see also Solow*, 83 N.Y.2d at 308, 632 N.E.2d at 439, 610 N.Y.S.2d at 130 (1994) (purpose of DR 5-108 is "to fully protect client confidences and secrets, to offer a clear test which is easy to administer and to avoid an appearance of impropriety on the part of the attorney or the law firm"). As discussed above, no attorney-client relationship ever existed between petitioners and Mr. Paget, so DR 5-108(A)(1) simply does not apply.

those different matters. (Laremont Aff. ¶ 11; Kraus Aff. Ex. H (Affidavit of James Stuckey dated Feb. 8, 2006, ¶¶ 16, 17)) Because a disinterested lawyer would believe that Mr. Paget can competently represent the interest of ESDC on the Atlantic Yards project and that other lawyers in his firm can competently represent Forest City on other unrelated matters that do not involve ESDC, these consents by ESDC and Forest City are sufficient under DR 5-105(C) to waive any potential conflicts. See In re Metropolitan Transp. Auth., 222 A.D.2d 340, 341, 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 N.Y. City Bar Ass'n Formal Op. 2001-2, 2001 WL 1870202, at \*3 ("[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"). Moreover, petitioners themselves have conceded that a governmental entity may waive an attorney's potential conflict of interest in the same way as a private party. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 629, 1992 WL 46531, at \*1, \*4 (1992).

**c. The Court Below Made Clearly Erroneous Factual Findings and Employed Improper Procedure**

"Although factual findings by [a trial] court are not to be lightly disregarded, plainly unjustified or clearly erroneous findings are not to be accepted." People v. Tempton, 192 A.D.2d 369, 370, 597 N.Y.S.2d 292, 293 (1st Dep't 1993). The rule of deference normally accorded the trier of fact "must give way when the appellate court determines that the fact findings under review are against the weight of the evidence." Id. (citation omitted). This is especially so where, as here, the lower court acted solely on a paper record.

Here, the court below made clearly erroneous factual findings on which it based, at least in part, its Order disqualifying Mr. Paget and his firm from representing ESDC on the Atlantic Yards project. Its Memorandum Decision states, in relevant part:

Thus, in December 2003, Ratner Companies commissioned Mr. Paget and his lawfirm [sic] to begin working on the Atlantic Yards Project. From the time Mr. Paget was retained in 2003, until September 2005, he provided advice to Ratner Companies. Yet, *in February 2005*, during this almost two-year period, and mid-project completion, the ESDC formally retained Mr. Paget as outside counsel to the ESDC to perform "[l]egal services . . . in connection with the environmental analysis of the Project" that ESDC would "authorize and oversee" (Ratner Companies, Exh. H). In short, the ESDC essentially hired the sponsor's current lawyer, at the sponsor's expense, to assess the environmental ramifications of the sponsor's project.

(Opinion at 36) (ellipsis and second alteration in original, emphasis added)

Based on the above findings, the court below held that Mr. Paget's simultaneous representation of ESDC and Forest City on the Atlantic Yards project created a *prima facie* conflict. (*Id.* at 37) As a threshold matter, the record is uncontroverted that Mr. Paget never simultaneously represented ESDC and Forest City *on that project*. (Paget Aff. ¶ 11) The "Ratner Companies, Exh. H" cited in the above passage, which the court below relied on to establish the date Mr. Paget was retained by ESDC, is in fact a *draft* of a cost reimbursement letter dated February 2, 2004 (not 2005). This draft, as well as the final version, sets forth the agreement of Forest City to pay certain costs incurred by ESDC with respect to the Atlantic Yards project, including "[l]egal services to be provided by Sive, Page & Riesel, P.C. in connection with the environmental analysis of the Project." (Affidavit of Jane Marshall dated Feb. 8, 2006, ¶¶ 6, 8 and Exs. C and H (emphasis added)) It is undisputed that ESDC did not retain Mr. Paget until October 1, 2005, after which Mr. Paget represented only ESDC on the Atlantic Yards project. (Paget Aff. ¶ 11 and Ex. B; Laremont Aff. ¶ 5; see also Kraus Aff. Ex. F

(Petitioners' February 16, 2006 press release, referring to Mr. Paget's retention by ESDC in October 2005)) Given the clear and uncontroverted record, this Court need not accept the lower court's clearly erroneous finding that Mr. Paget represented ESDC and Forest City simultaneously on the Atlantic Yards project.

But even if there had been a *prima facie* showing of a conflict, the proper procedure was not to summarily grant petitioners' cause of action seeking disqualification. Rather, where an adverse representation is *prima facie* improper, "the attorney must be prepared to meet the very high standard that there will be no actual or apparent conflict in loyalties or diminution in the vigor of representation." (Opinion at 35 (citing Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).))

Here, the court below disqualified Mr. Paget from representing ESDC on the Atlantic Yards project based solely on the asserted *prima facie* conflict, without first giving him an opportunity to make that showing. Cf. University of Rochester v. G.D. Searle & Co., No. 00-CV-6161L B, 2000 WL 1922271, at \*4-7 (W.D.N.Y. Dec. 11, 2000) (finding that even if defendants had established a *per se* conflict under DR 5-105, plaintiff met its burden of demonstrating absence of actual or apparent conflict in loyalties or diminution in vigor of representation).

This was clearly error. The lower court's precipitous action in disqualifying Mr. Paget was also at odds with CPLR § 7804(f). That section provides that if a motion to dismiss is denied, "the court shall permit the respondent to answer, upon such terms a may be just." Here, the lower court denied ESDC's cross-motion to dismiss petitioners' cause of action for disqualification of counsel, but rather than giving ESDC an opportunity thereafter to file an


answer, the court below summarily granted petitioners' cause of action for disqualification of counsel. Truncating the proceedings in such a manner constitutes clear error.

**CONCLUSION**

For all the foregoing reasons, this Court should grant a stay pending the disposition of this appeal and a preference in the hearing of this appeal.

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Respectfully submitted,

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