PRELIMINARY STATEMENT

Amicus curiae Letitia James, New York City Council Member representing District 35, on behalf of herself and amici curiae Congressman Major R. Owens and State Senator Velmanette Montgomery, respectfully submits this Memorandum of Law in support of the motion of the petitioners for a preliminary injunction staying the demolition of 12 buildings within District 35 by respondent Forest City Ratner Companies ("FCRC").

STATEMENT OF INTEREST OF AMICI CURIAE

The Districts represented by the amici curiae include the entire footprint of FCRC's proposed publicly subsidized, mixed-use redevelopment project known as the Atlantic Yards Arena and Redevelopment Project (the "Project"). The proposed Project would cover 22 acres within District 35, include a sports arena and 16 skyscrapers, require the closing of city streets, and rely on the use of eminent domain by New York State to acquire property in the footprint from current residents, business owners and property owners to be transferred to FCRC.

Many residents within these Districts believe the proposed Project would have a substantially detrimental impact on the community environment, and have been exercising their rights to voice opposition to the Project in its current form and to lobby governmental officials to alter or defeat the Project. In addition and in particular, a number of residents and property owners within the proposed Project's footprint, including some of the petitioners herein, do not wish to sell their homes or properties to FCRC and are adamantly opposed to the State's use of eminent domain to compel them to do so.

Respondent Empire State Development Corporation ("ESDC") has been designated the lead agency for the Project, and, as a state agency organized pursuant to the State's Urban Development Corporation Act, has exercised its authority to override New York City's zoning

laws and land use review requirements. The Project is currently undergoing review by ESDC, as lead agency, pursuant to the New York State Environmental Quality Review Act ("SEQRA"),[1] New York Environmental Conservation Law ("ECL") § 8-0101, et seq. Although FCRC has already acquired properties in the Project footprint in anticipation of the Project's eventual approval and execution, under SEQRA both FCRC and ESDC are prohibited from commencing any physical changes related to the Project, such as demolition of buildings, until the SEQRA review process is completed, except for certain narrowly defined circumstances. See 6 NYCRR § 617.3(a).

Nevertheless, ESDC has approved FCRC's application to commence demolition of 12 buildings it owns in the Project footprint, on the purported grounds that the buildings at issue, some of which FCRC has owned for more than 18 months, are structurally unsound and must be demolished, as stated in ESDC's so-called "Declaration of Emergency Pursuant to SEQRA" dated December 15, 2005 (the "Emergency Declaration"), a copy of which is attached as Exhibit "A" to the Affidavit of Letitia James sworn to on February 7, 2006. As demonstrated in the James Affidavit and as discussed herein, allowing FCRC, in effect, to "jump start" the Project by commencing demolition before the SEQRA review has been completed would give the appearance that the Project is already going forward, thereby intimidating and squelching legitimate opposition to the Project, and discouraging opponents from participating in the SEQRA process.

ESDC's approval of FCRC's application is fatally flawed, and should be enjoined, because, among other things, ESDC apparently relied entirely on the representations of FCRC as to the condition of the buildings and failed to consider whether action less drastic than

[1] The definition of environment under SEQRA includes "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character". ECL § 8-0105(6). See Seawall Associates v. New York, 134 Misc. 2d 187, 203, 510 N.Y.S.2d 434, 447 (Sup. Ct. N.Y. Cty. 1986).

demolition would protect the public. Moreover, the same lawyer who until recently represented FCRC with respect to the Project, and whose law firm still represents FCRC, now represents ESDC with respect to the Project and, it appears, played a role in ESDC's approval of FCRC's application to demolish the buildings in the footprint, raising an obvious issue as to the existence of a conflict of interest.

ARGUMENT

The ESDC's approval of FCRC's application for demolition appears to be exactly the type of closed, bilateral review process which the Court of Appeals has stated does not meet a lead agency's obligations under SEQRA:

> The environmental review process was not meant to be a bilateral negotiation between a developer and lead agency but, rather, an open process that also involves other interested agencies and the public.

Merson v. McNally, 90 N.Y.2d 742, 753, 665 N.Y.S.2d 605, 611 (1997). As demonstrated herein, this Court should preliminarily enjoin demolition pending a full hearing of the propriety of ESDC's approval, because the petitioners are likely to succeed on the merits of their claims, and the damage to the petitioners and the community if demolition is allowed to proceed will be irreparable.

POINT I

PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE ESDC FAILED TO FULFILL ITS OBLIGATIONS UNDER SEQRA

"[A] Court's function in an Article 78 proceeding is to determine, upon the proof before the Administrative Agency, whether the determination had a rational basis in the record or was arbitrary and capricious." Matter of Lee v. Chin, 2003 N.Y. Misc. LEXIS 1503 (Sup. Ct. N.Y. Cty. Oct. 29, 2003) (Edmead, J.), reported without opinion at 1 Misc. 3d 901A, 781 N.Y.S.2d

625. “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was ‘arbitrary, unreasonable, irrational or indicative of bad faith.’” Matter of Halperin v. City of New Rochelle, 2005 N.Y. App. Div. LEXIS 14877 at *4 (2d Dep’t, Dec. 27, 2005), quoting Matter of Cowan v. Kern, 41 N.Y.2d 591, 599, 394 N.Y.S.2d 579 (1977).

The determination at issue here was an “emergency action” which SEQRA regulations permit when such actions

> are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment...

6 NYCRR §617.5(c)(33) (emphasis supplied)

As lead agency on the proposed Project, ESDC is required to comply with the letter, not just the spirit, of SEQRA. The law is clear that “literal compliance with SEQRA’s procedural requirements is mandated, as substantial compliance would not comply with SEQRA’s underlying purposes, but would tempt State and local agencies to circumvent SEQRA’s mandates.” Williamsburg Around the Bridge Block Ass’n v. Giuliani, 223 A.D.2d 64, 644 N.Y.S.2d 252 (1st Dep’t 1996) (emphasis added) (citations omitted).

In other words, SEQRA obligates ESDC to do more than simply “rubber stamp” FCRC’s application to begin demolition of buildings in the Project footprint. Cf. Matter of Halperin v. City of New Rochelle, 2005 N.Y. App. Div. LEXIS 14877 at *16 (2d Dep’t, Dec. 27, 2005) (“Rather than rubber-stamping the applicant's proposal, the Zoning Board modified it, placed

significant restrictions on the project . . . and approved several variances that were lesser in degree than those initially sought"). Nevertheless, the ESDC's Emergency Declaration, by its own language, appears to be nothing more than a "rubber-stamp" approval of FCRC's application to demolish buildings.

Specifically, the Emergency Declaration contains no reference to any evidence of the buildings' condition other than a "report prepared by FCRC's consultant" and does not even mention any consideration of which action would "cause the least change or disturbance, practicable under the circumstances, to the environment." 6 NYCRR § 617.5(b)(33). The referenced report was prepared by FCRC's own outside consultants, LZA Technology, is dated November 7, 2005 (the "LZA Report"), and is attached to the petitioners' Petition and Complaint as Exhibit A thereto. The LZA Report does not discuss any alternative to demolition to cure the described threat to the public safety, and does not discuss whether demolition is the best, or even the only, solution to that purported threat.

It appears ESDC did not request or consult any other report by an independent engineer. In addition, FCRC refused amicus Letitia James' request to bring an independent engineer into the buildings to make an independent determination of their condition, although FCRC was willing to allow her to enter inspect the buildings without an engineer. See James Aff. at ¶¶17-18. Moreover, as discussed in more detail below, the very same attorney who once represented FCRC with regard to "obtaining permits and approvals" for, and "successfully defending legal challenges to," the Project, and whose law firm continues to represent FCRC, now represents ESDC with respect to its approval of FCRC's demolition application. See James Affid. ¶¶26-28 and Exhibit "A" thereto.

Under these circumstances, the ESDC's determination is plainly "arbitrary and capricious." As the Court of Appeals has stated, under SEQRA,

> [w]here an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled.

Merson v. McNally, 90 N.Y.2d 742, 752, 665 N.Y.S.2d 605, 610 (1997) (internal quotation marks and citation omitted). At the very least, the ESDC's approval warrants this Court's scrutiny before FCRC is permitted to commence demolition in the Project footprint.

POINT II

DEMOLITION PRIOR TO THE SEQRA REVIEW WOULD INTIMIDATE RESIDENTS AND PROPERTY OWNERS, AND WOULD FRUSTRATE LEGAL AND POLITICAL PROCESSES.

It is difficult to overstate the harm that will result not only to the petitioners, but also to the community as a whole, if this Court does not enjoin FCRC's commencement of demolition of buildings within the Project footprint. Most obvious, once the 12 buildings at issue are demolished, Prospect Heights will be permanently altered regardless of the outcome of FCRC's proposed Project, and local residents will be forced to endure the dangers and inconveniences of large-scale demolition which may ultimately be proved unnecessary. The respondents cannot reasonably contend that the demolition of these buildings would not constitute irreparable harm. See Montgomery v. State Dep't of Mental Hygiene, 43 A.D.2d 552, 552-553, 349 N.Y.S.2d 719, 720 (1st Dep't 1973) ("Of course, if the houses are demolished, the plaintiffs and the community will suffer irreparable injury.")

Just as significant, however, are the intimidation and apparent subversion of the legal and political processes which will be the unavoidable consequences of FCRC's premature demolition in the Project footprint. The remaining residents and property owners in the footprint already feel coerced to sell their property under the threat of eminent domain, which it appears FCRC's representatives have been using as a strong-arm negotiating tool against those who are reluctant to sell. (James Aff. ¶¶15-16) Allowing FCRC to begin demolishing buildings on the very blocks where these persons live, operate their businesses and/or own property, will only further intimidate them and discourage them from exercising their legal rights vis-à-vis FCRC.

Frustration of legal rights in this manner constitutes irreparable harm warranting injunctive relief. See, e.g., Trauernicht v. Bd. of Cooperative Educational Services, 95 Misc. 2d 394, 396, 407 N.Y.S.2d 398, 399 (Sup. Ct. Nassau Cty. 1978) (finding irreparable harm where compelled disclosure "would only serve an inequitable one-sided negotiating ploy" and frustrate declared legislative policy); see also Szal v. Pearson, 289 A.D.2d 562, 735 N.Y.S.2d 200 (2d Dep't 2001) (denial of due process constitutes irreparable injury); Matter of Crowe v. Kelly, 2005 N.Y. Misc. LEXIS 2023, (Sup. Ct. N.Y. Cty., Aug. 16, 2005) (same), reported without opinion at 9 Misc. 3d 1111A; 806 N.Y.S.2d 444.

Moreover, commencement of demolition of buildings in the Project footprint, regardless of the stated reason for the demolition, will inevitably signal that the Project is moving forward. FCRC's demolition of buildings which it has already slated for demolition to make way for the Project, before the legally mandated SEQRA review, would create the unavoidable appearance that the Project has already begun and that the SEQRA review is nothing more than a meaningless procedural nicety. Thus, even if the Project were eventually approved, the premature demolitions would effectively disenfranchise those residents of District 35 who

oppose this Project by discouraging them from continuing to participate in the legal and political processes.

Although FCRC would gain a huge tactical advantage by commencing demolition now, it has no legally sound right or interest in doing so before the Project has been approved, unless a building truly requires emergency action and demolition is the most practicable action "to cause the least change or disturbance." (6 NYCRR 617.5(b)(33)) Given that FCRC has not proceeded with any lack of urgency to demolish the 12 buildings, even though it has owned some of them for more than one and one half years, it appears likely that FCRC would be able to protect the public adequately by measures less drastic than demolition.

Even if it were ultimately determined that the conditions of some of the 12 buildings at issue truly present a public danger, choosing a less obtrusive action such as repairing and/or shoring up the buildings where necessary, and limiting demolition to only those buildings, if any, that could not be made safe by less drastic means, would send a clear message that the Project's approval is not a foregone conclusion. Moreover, it would signal that SEQRA, and the legal process generally, actually work to protect the public's interest in the preservation and development of their own community environments.

POINT III

THE INVOLVEMENT OF FCRC'S LAWYER FOR THE PROJECT IN ESDC'S REVIEW OF THE SAME PROJECT IMPLIES AN ACTUAL CONFLICT OF INTEREST.

ESDC, as a public benefit corporation charged with overseeing the SEQRA review of the Project and authorized to override the City's zoning and land use review procedures, should be held to the highest standards of ensuring the public trust. This cannot be the case where, as here, the same lawyer who advertises to the public that he represented FCRC with respect to the

Project, and was even charged with "obtaining related permits and approvals" for and "defending legal challenges to" the Project, now represents ESDC with respect to its approval of FCRC's application to commence demolition of buildings in the Project footprint. James Aff. ¶¶26-31 and Exhibits "A" and "B" thereto.

This is not an issue of a "theoretical" or "potential" conflict of interest on the part an attorney. Not only has the same attorney been on both sides of the Project, it appears his firm continues to represent FCRC and, therefore, it appears he necessarily has a personal interest in the Project's outcome. Regardless of the degree of personal integrity of the attorney involved, these circumstances mandate his withdrawal from representation of ESDC in this matter and warrant annulment, or, at the very least, a close examination, of the ESDC's approval of FCRC's application . See, e.g., Matter of English, 182 A.D.2d 185, 587 N.Y.S.2d 35 (2d Dep't 1992) (impermissible conflict of interest where attorney who held position of village attorney represented private client's interest in zoning matter before village board of zoning appeals and his law firm brought proceeding against village board); Matter of Parker v. Town of Gardiner Planning Board, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992) ("In determining whether a disqualifying conflict exists, the extent of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act."); Matter of McFarlane v. Burdine, 86 A.D.2d 731, 446 N.Y.S.2d 592 (3d Dep't 1982) (finding possible conflict of interest on part of attorney who represented both town and seller of property acquired by town, if attorney were deemed a town employee with an interest in the transaction); Matter of Heustis v. Town of Ticonderoga Planning Board, 11 A.D.3d 868, 784 N.Y.S.2d 187 (3d Dep't 2004) (in Article 78 proceeding challenging planning board's approval of application to excavate gravel

from town property, sustaining claim of impermissible conflict of interest where member of planning board was related to construction company that purchased gravel from applicant).

CONCLUSION

For the reasons stated herein, and for the reasons state in the accompanying affidavits of Letitia James, Major R. Owens, and Velmanette Montgomery, the amici curiae respectfully request that this Court grant the petitioners' motion for a preliminary injunction, together with such other and further relief as this Court deems just and proper.

Dated: February 7, 2006

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