INTRODUCTION AND INTEREST OF *AMICUS*

Respondent–Appellant Empire State Development Corporation ("ESDC") is the designated lead agency overseeing the environmental review of Forest City Ratner Companies' ("FCRC"'s) proposed Atlantic Yards Arena and Redevelopment Project in Brooklyn, New York (the "Atlantic Yards"). The project as currently conceived will be the largest development project in Brooklyn history, comprising 22 acres, approximately 8.5 of which are owned by the Metropolitan Transportation Authority, with the remainder either acquired by FCRC since the proposal's inception or remaining in the hands of private owners. Petitioners-Respondents commenced this proceeding on January 18, 2006 in Supreme Court, New York County, seeking to block the planned demolition of properties located in the project's proposed footprint and requesting that the Court disqualify David Paget, Esq. and his firm, Sive, Paget & Riesel P.C., from acting as ESDC's outside environmental counsel regarding the Atlantic Yards. Petitioners-Respondents sought to disqualify Mr. Paget as he had also been retained by FCRC to advise on the Atlantic Yards, creating an impermissible conflict of interest and compromising ESDC's ability to conduct an impartial environmental review

By order dated February 14, 2006, the Honorable Carol Edmead upheld the ESDC's decision to demolish the properties, but disqualified Mr.

Paget and his firm from acting as ESDC's outside environmental counsel and directed ESDC to retain new counsel within 45 days. Recognizing the importance of governmental decision-making being free from any publicly perceived bias, Justice Edmead held that:

> "Mr. Paget's representation of both the applicant and the public agency reviewing the application undermines the public confidence in the process, and its expectation that the ESDC will undertake an objective review of the Project. The dual representation of Mr. Paget could also prejudice and irreparably harm petitioner by resulting in the issuance of a Final Scope that may be biased in favor of Ratner Companies."

(Develop Don't Destroy Brooklyn v. Empire State Development Corp., Index No. 100686/2006, slip op. at 20 (N.Y. County Sup. Ct. Feb. 14, 2006)). The ESDC appealed Justice Edmead's disqualification of Mr. Paget and his firm, and on February 21, 2006, Petitioners-Respondents filed a Notice of Cross-Appeal and sought a Preliminary Injunction to prevent demolition of the buildings. *Amicus* submits this brief in support of Petitioners-Respondents' position regarding the disqualification of Mr. Paget and his firm.

Amicus Council of Brooklyn Neighborhoods ("CBN") is a coalition of 28 recognized diverse community groups active in Community Boards 2, 3, 6, and 8, all of whom are concerned with the cumulative effects of development proposed in their area of Brooklyn, and many of whose individual members are stakeholders within the impact study area of the Atlantic Yards proposal. In 2004,

many of the groups comprising CBN were invited by Brooklyn Borough President Marty Markowitz to take part in a series of discussions at Brooklyn's Borough Hall on FCRC's proposed Atlantic Yards development. These discussions focused upon how the communities most affected by the Atlantic Yards proposal would provide meaningful input to the ESDC, who is overseeing the drafting of the Environmental Impact Statement ("EIS") pursuant to the State Environmental Quality Review Act ("SEQRA"). CBN was formed in 2005 as a direct result of these meetings, the community groups recognizing that a cohesive strategy would best ensure that the public's concerns would be fully addressed by the ESDC. CBN does not take a position, for or against, the Atlantic Yards project. To the contrary, CBN endeavors to ensure that the SEQRA review process is transparent, comprehensive, incorporates meaningful methodologies and assumptions, fully discloses all impacts, considers reasonable alternatives, and effectively addresses all potential negative impacts. Thus, CBN's mission is to provide a guarantee to members of the affected communities that they will be meaningfully engaged throughout the EIS process.

Within its purview, CBN has members professionally experienced in civic advocacy, transportation planning, neighborhood preservation, urban planning, the development of affordable housing, safety and security improvement, quality of life promotion, and small business development. CBN's expertise and

commitment to a transparent and fair EIS process have been commended by Mr. Markowitz, who has stated, "[CBN is] an important part of this planning process … In my opinion they represent a cross-section of legitimate concerns of the Atlantic Yards Project." ("CBN Seeks Help Obtaining Consultant for Ratner Project," *Fort Greene Courier*, Jan. 16, 2006). *Amicus* is uniquely qualified to discuss the issues relating to the open and effective review of the Atlantic Yards proposal which has been compromised by ESDC's insistence that Mr. Paget and his firm remain as its outside environmental counsel during the EIS process. As described below, some decisions of the ESDC have negatively affected *amicus*'s ability to adequately participate in the EIS process, and there is reason to believe that these decisions were related to Mr. Paget's conflict of interest. *Amicus*, in submitting this brief, wishes to eliminate this perceived conflict of interest that will continue to taint the review process and undermine the affected communities' faith in the ESDC's unbiased review.

The outcome of this appeal will have a profound impact on how community groups involved with the process, in addition to those still considering participation, will view the independence of the ESDC as lead agency for the project and its appointed role as the only guardian of the public interest. To this end, CBN respectfully seeks to present its views to this Court as *amicus curiae*.

ARGUMENT

WHERE, AS HERE, THE ESDC IS A PUBLIC AGENCY OVERSEEING A PROJECT THAT IF REALIZED WILL HAVE ENORMOUS IMPACTS ON THE COMMUNITY, IT MUST FULFILL ITS STATUTORY MANDATE AND CONDUCT AN UNBIASED REVIEW WITH MEANINGFUL COMMUNITY INPUT, TO THE EXCLUSION OF MR. PAGET'S PARTICIPATION

A. The Guarantee of Unbiased Governmental Decision-Making

The independence of governmental decision-making is a bulwark of democracy in the United States which must be assiduously protected by the courts. As one legal scholar has written: "The proper operation of democratic government requires that public officials and employees be independent, impartial and responsible to the people; that government decisions and policy be made in proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of government." (Deborah L. Markowitz, *A Crisis in Confidence: Municipal Officials Under Fire*, 16 Vt. L. Rev. 579 (1992); see generally Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. Va. L. Rev. 281 (1991-92)). Indeed, in the public sector, anything which gives one person a competitive advantage over another in pursuing the benefits and resources that government can provide is ethically suspect. "Many Americans today expect that law can, should, and will be used to assure a level playing field in public life by eliminating, insofar as

possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government." (Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 St. Mary's L.J. 717, 752-53 (1999)).

The ESDC is a public benefit corporation and a political subdivision of New York State. (N.Y. Unconsolidated Laws § 6254[1]). The obligation before the public of agencies such as the ESDC, then, is to ensure that they will avoid situations that will compromise the public trust in the agency and also to eliminate publicly perceived conflicts of interest when they are discovered. This obligation was invoked by Justice Edmead in her decision when she held that uncertain disqualification issues must be resolved in favor of disqualification so as to preserve public confidence in the process. (Develop Don't Destroy Brooklyn, Index No. 100686/2006, slip op. at 20-21 (N.Y. County Sup. Ct. Feb. 14, 2006). In discussing governmental ethics laws, one commentator has summarized the position on preemptive disqualification as follows: "[T]he prevention of unethical conduct does far more for integrity in government that the punishment of unethical conduct. It is better to shut the barn door before the horse has bolted." (Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. Sch. L. Rev. 177, 177-78 (1995)).

B. ESDC's Statutory Mandate to Conduct Unbiased Review

In addition to the aforementioned principles guiding ethics in government, the laws of New York require ESDC to ensure that the EIS process be removed of all potential conflicts of interest. SEQRA contains numerous provisions that uphold the standard that a lead agency must constantly assert its independence throughout the EIS process and eliminate any factors that may compromise its unbiased review. Pursuant to SEQRA, the lead agency may delegate drafting of the EIS to the applicant, (ECL § 8-0109[3] and [4]), but it must nevertheless remain sufficiently involved in the underlying review process to render its own evaluation of the impact statement produced. Indeed, "notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of the environmental impact statement." (ECL § 8-0109[3]). The lead agency must find the draft EIS satisfactory with respect to scope, content and adequacy before an application for project authorization may be deemed complete, (ECL § 8-0109[5]), and it alone is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it. (6 NYCRR § 617.14[i]).

The protections afforded by SEQRA are designed to ensure that the environmental review process not simply be "a bilateral negotiation between a

developer and lead agency but, rather, an open process that also involve[s] other interested agencies and the public." (Merson v. McNally, 90 N.Y.2d 742, 753 (1997)). If this process is compromised by any conflict of interest, then the lead agency would have failed in its mandate pursuant to SEQRA, as at the conclusion of the process, the agency is required to make express findings that SEQRA's requirements have been met. (ECL § 8-0109[8]). If, as in the instant case, the agency's legal advisor with regard to an application has significant ties to the applicant, then it cannot be said with any certainty that the agency is capable of conducting an "independent review" as required by SEQRA. (ECL § 8-0109[3]).

C. Conflicts of Interest in the ESDC's Decisions to Date

Certain discretionary actions already taken by the ESDC have unreasonably benefited the applicant, FCRC, and seriously diminished the ESDC's representation of the public interest.

One such action is the decision of the ESDC to designate six buildings within the footprint of the proposed Atlantic Yards project as requiring SEQRA Type II emergency demolition. This action, taken by the ESDC despite the lack of substantiation of the claims of imminent danger by a party independent of the applicant, without any attempt by the applicant or requirement by the ESDC to install public safety precautions during the duration of the supposed emergency,

and although those parcels are currently under SEQRA review and otherwise subject to the requirement that the proposed Project area be left as-is until the process is complete, unreasonably inures to the benefit of the applicant and the detriment of the public.

Another such action was taken by ESDC in response to CBN's request for assistance in funding its environmental review of the proposed Project. In early September 2005 and again in October 2005, CBN and elected officials representing the affected area asked the ESDC to request that the applicant, FCRC, fund the community's hiring of technical assistance in understanding and responding to the Final Scope of Work and the draft EIS when they are published. The ESDC did not acknowledge CBN's letter. However, the ESDC did answer our elected officials in the negative, advising them that it is not the "policy" or "practice" of the ESDC to fund, or recommend that the applicant fund, community reviews. Since both the ESDC and Mr. Paget admit that they have frequently worked together, it is not inconsistent with Mr. Paget's responsibilities to presume that he himself advised the ESDC to enunciate such "policy and practice." This action also clearly inures to the benefit of the applicant, FCRC, for whom Mr. Paget worked up until October 1, 2005, and severely compromises the ability of the community to have meaningful input into the process.

The costs of environmental reviews conducted by the ESDC are borne by the applicant, FCRC, under SEQRA rules. (ECL § 8-0109[7]). The agreement between the ESDC and FCRC allows ESDC's expenses regarding the SEQRA review process to be passed through to FCRC for payment. This agreement also allows FCRC to include these expenses in subsequent public financing. The public, not FCRC, will eventually be paying for all the SEQRA documentation FCRC produces. The prejudice to the public is that the ESDC, while Mr. Paget is acting as its attorney, has refused to provide funds to the public to hire the technical expertise they require for meaningful participation in the process, thereby insuring that the final EIS will only be a negotiation between the agency and the applicant. Nevertheless, the ESDC insists that the independence of their consultants insure that the public interest will be well-represented.

To allow the same consultant to write the draft EIS for FCRC and then review the community comments for the ESDC presents a clear danger that Mr. Paget's influence as ESDC's counsel will influence the ESDC's discretionary power to identify alternate methodologies and to provide in-depth supporting documentation to the community with the draft EIS. This conflict could unreasonably favor the applicant, FCRC. By its claim that it had retained 'independent' counsel, Sive, Paget & Riesel P.C., to fulfill ESDC's SEQRA obligations to the public. the ESDC concealed from those officials and the

general public the existence of the potential conflict of interest, and the express waiver of such conflict by the ESDC.

D. The Lower Court Did Not Abuse Its Discretion in Disqualifying Mr. Paget

The lower court did not abuse its discretion when it disqualified Mr. Paget and his firm. Counsel for Petitioners-Respondents in his instant Cross-Appeal Brief provides ample factual considerations regarding Mr. Paget's improper simultaneous representation of FCRC and the ESDC. (See Cross-Appeal Brief for Petitioners-Respondents, dated February 28, 2006, at 22-27). Based on the factual record, it is clear that Mr. Paget is acting in a capacity against which the American Bar Association ("ABA") has warned. The ABA's Model Rules of Professional Conduct contain provisions dealing specifically with conflicts of interest concerning lawyers working in a public capacity. In its commentary to Rule 1.11—Special Conflicts of Interest for Former and Current Government Officers and Employees—the ABA states that when:

> "successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where a benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service."

(ABA Model Rules of Professional Conduct, p. 65 (2004)). Indeed, as the ESDC is obliged to consider alternatives to the Atlantic Yards proposal during the EIS process, (see ECL § 8-0109[2]), there is a significant danger that Mr. Paget would share confidential information on proposed alternatives with FCRC.

Moreover, Justice Edmead's disqualification of Mr. Paget is consistent with the applicable case law of New York State. New York courts have articulated the standards governing attorney disqualification in light of perceived conflicts of interest. (See, e.g., Cardinale v. Golinello, 43 N.Y.2d 288, 296 (1977) ("an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests")). In the context of governmental decision-making bodies, courts have required disqualification of individuals with voting authority where those individuals are perceived to have impermissible conflicts of interest. (See, e.g., Matter of Parker v. Town of Gardiner Planning Bd., 585 N.Y.S.2d 571 (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 Tuxedo Conservation & Taxpayers Assn. V. Town Bd. of Town of Tuxedo, 418 N.Y.S.2d 638, 641 (1979) (impermissible conflict of interest found where town board member voted to approve construction of a project while he was an officer of advertising agency employed by developer's parent company)). Justice Edmead correctly followed

New York case law and conflict of interest principles in arriving at her decision that Mr. Paget's continued representation of the ESDC would seriously erode the public confidence in the EIS process. It cannot be said that the lower court abused its discretion in disqualifying Mr. Paget and his firm, and, therefore, Justice Edmead's decision regarding Mr. Paget must stand.

CONCLUSION

For the reasons stated above, to ensure the integrity of the EIS process and the continued meaningful participation of the public, this Court should affirm the lower court's disqualification of Mr. Paget and his firm from representing the ESDC during its review of the Atlantic Yards proposal.

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Respectfully submitted,
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