TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

PRELIMINARY STATEMENT

There are times when the analysis of legal issues must begin and end with the larger principle. This is one of those times, and that principle is nothing less than the integrity of government and the public trust in it.

Amicus curiae Letitia James, New York City Council Member representing District 35 in Brooklyn, the area most affected by Forest City Ratner's highly controversial proposed redevelopment project at the MTA's Atlantic Yards ("the Project"), respectfully submits this brief on behalf of herself and *amici curiae* Congressman Major R. Owens and State Senator Velmanette Montgomery, who also represent the communities within the immediate vicinity of the Project. The *amici* oppose the appeal by the Empire State Development Corporation ("ESDC") of the February 14, 2006, Order of the Supreme Court, New York County (Edmead, J.) disqualifying David Paget, Esq. and his law firm from acting as ESDC's environmental counsel in the review of the Project under the State Environmental Quality Review Act ("SEQRA").

The *amici* submit that the public's faith in the integrity of the environmental review of a controversial development project is an interest far more worthy of protection than ESDC's right to choose its own counsel. ESDC is a public benefit corporation and owes its first duty to the public. The likelihood that Mr. Paget, while working for ESDC, would be influenced by long-held loyalties to FCRC –

his client of many years and the developer of the Project whose first interest is to see it approved – is simply too strong to risk. Moreover, it has long been the rule that in order to maintain public confidence in the integrity of government, public officials should avoid even the appearance of impropriety.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Districts represented by the *amici curiae* include the entire footprint of this proposed publicly-subsidized, mixed-use redevelopment Project. The residents within these Districts, the *amici's* constituents, are overwhelmingly opposed to the Project, believing that, as proposed, it would have a significant detrimental impact on the community environment, overshadowing vibrant, low-rise neighborhoods with 60-story skyscrapers and overwhelming them with traffic, among other major concerns. Many of these residents 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, a number of residents and property owners within the proposed Project's footprint 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.

Given the strong controversy surrounding the Project, it is imperative that its environmental review by ESDC be untainted by even a suggestion of bias,

favoritism, or unfair advantage.

The *amici's* interest is in protecting the public's trust in the political process.

STATEMENT OF FACTS

The description of the tremendous scope and scale of the Project, and the controversy surrounding it, is before the Court and will not be repeated here.

While the Project may be controversial the facts relevant to this appeal are not.

ESDC is a public benefit corporation which has been designated as the lead agency for the Project. As such, it is charged with conducting an environmental review of the Project under SEQRA and determining whether to approve or disapprove it. If ESDC approves the Project, it will exercise the authority granted it under the Urban Development Corporation Act to override New York City's zoning laws and land use review requirements, and to exercise the power of eminent domain to condemn and transfer private property to FCRC, a private developer.

It is not controverted that David Paget, Esq. initially represented FCRC in its efforts to obtain approval of the Project, and at some later point began to represent ESDC in its environmental review of the Project. Mr. Paget has been an attorney for FCRC on several occasions in the past, and has known and worked with its

Executive Vice President off and on since the late 1970's. (R.488) Mr. Paget's bio from his law firm's web site, as it appeared on February 6, 2006, not only identifies him as representing FCRC in connection with the Project, but identifies the Project as being among the many undertakings in which Mr. Paget has successfully defended legal challenges. (R.276-277)

While there may be a factual dispute as to whether the representation was simultaneous or consecutive, the *amici* submit that this is immaterial when the conflict question involves not private litigants and their lawyers but a public litigant, and the public trust.

ARGUMENT
THE COURT BELOW WAS CORRECT IN FINDING A "SEVERE, CRIPPLING APPEARANCE OF IMPROPRIETY."

A. As a Public Benefit Corporation Conducting an Environmental Review, ESDC Owes its First Duty to the Public and Must be Above Suspicion.

In appealing the disqualification ruling rather than retaining another attorney, in exalting its alleged harm in not being able to choose its own attorney over the public's interest in an untainted political process, in insisting that the environmental review process is a collaboration with the developer, in failing to cite a single conflict-of-interest case that is outside the private realm – ESDC fails to understand and acknowledge its status as "a political subdivision and public benefit corporation." N.Y. Unconsolidated Laws §6254(1).[1]

As a public benefit corporation charged with overseeing the SEQRA review of the Project, ESDC serves the public.[2] It is the interest of the public and the public alone that should be ESDC's guiding force. Clearly it is not in the public

---

[1] A "public benefit corporation" is defined as "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits of which inure to the benefit of this or other states, or to the people thereof." N.Y. General Construction Law §66(4) (emphasis supplied).

[2] ESDC serves the public not only because it is a public benefit corporation but also because SEQRA exists for the benefit of the public; the environment is, after all, the physical context of public life and the environment belongs to everyone. SEQRA charges every citizen with "a responsibility to contribute to the preservation and enhancement of the quality of the environment," and citizens have a recognized "interest in adequate environmental review." Society of Plastics Ind. v. County of Suffolk, 77 N.Y.2d 761, 777, 779, 570 N.Y.S.2d 778 (1991).

interest to have the developer's own lawyer conduct the government's environmental review of a controversial development project, particularly when that project, if approved, will involve the taking of private property by eminent domain in favor of the developer. This has been obvious to the public, which has expressed its outrage, and to Justice Edmead, who saw the impropriety as "severe and crippling."

Contrary to ESDC's position, the environmental review process under SEQRA is not and cannot be a collaborative process with the developer. The Court of Appeals has clearly stated that

> [t]he 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). The clubhouse atmosphere created by ESDC's employment of the developer's own lawyer is anathema to an open political process.

Moreover, the result of the environmental review may be at odds with the developer's goals, making it ever more important the attorney conducting the environmental review be, and appear, entirely independent.

SEQRA represents an attempt to "strike a balance between social and economic goals and concerns about the environment." Jackson v. N.Y.S. Urban

Devel. Corp., 67 N.Y.2d 400, 414, 503 N.Y.S.2d 298 (1986).[3] It requires agencies to "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." Id., 67 N.Y.2d at 416; ECL §8-0109(1).

Thus, SEQRA's mandate divides the interests of ESDC and FCRC; the results of the environmental review might counsel against the Project, or mandate significant reductions in scale, or require another alternative. However, nothing in the law requires the agency to reach any particular result; it is simply required to take a "hard look" at the environmental impact of a proposal and make a "reasoned elaboration" of the basis for its determination. Jackson, supra, 67 N.Y.2d at 417. The courts are not permitted to "second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence." Id.

Since SEQRA does not require any particular result, only that environmental effects be considered, and since judicial review of the agency's determination is extremely limited, the protection of the environment and the character and quality of a community inheres in one thing and one thing only: the objectivity and independence of the persons charged with the environmental review.

Furthermore, approval of the Project will lead to the State's exercise of

---

[3] The environment is defined to include..."existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105(6).

eminent domain to acquire private property for use in a private development project. Just as courts defer to agencies' determinations under SEQRA, they play a narrow role in ensuring that the condemnation is for a public use. Brody v. Village of Portchester, 434 F.3d 121, 134 (2d Cir. 2005).

This is why independent counsel is critical, and it is not enough that Mr. Paget may believe he can be independent and objective; public faith and meaningful participation in the process require that counsel appear independent and objective. Citizens are not going to participate in a process if they have no confidence in its integrity. This has been obvious to the public, local elected officials, local civic and community groups – obvious, apparently, to everyone involved except ESDC and FCRC.

The courts have long held, and the Attorney General has repeatedly opined, that in order to maintain public confidence in government public servants must be above suspicion and avoid even the appearance of impropriety. See, e.g., Matter of Tuxedo Conservation and Taxpayers Assoc. v. Town of Tuxedo, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979); 2002 N.Y. Op. Atty. Gen. (Inf.) 8 (N.Y.A.G.). This is a rule that guards the health of civic society and should be applied here.

B. An Attorney Working for ESDC on its Environmental Review Must be Considered a Public Servant Bound by Governing Ethical Rules.

Officials and employees of ESDC are unquestionably bound by the code of ethics contained in Public Officers Law §74. If, as public servants, ESDC, its officials and employees are held to the highest standard of ensuring the public trust, why should it be any different for the attorney ESDC engages for its public purposes, simply because the attorney is an independent contractor?

The rules of ethics governing public bodies and their officials are always interpreted broadly in order to preserve the integrity of government. Interpreting Public Officers Law §74 narrowly to exclude independent contractors would undermine the purpose of having a code of ethics for public servants in the first place.

In situations involving the public trust the spirit of the law must prevail over any technical interpretation.

In MacFarlane v. Budine, 86 A.D.2d 731, 446 N.Y.S.2d 592 (3d Dep't 1982), app. den., 56 N.Y.2d 506 (1982), the Court held that an attorney working as an independent contractor for the town on a particular project might be considered an "employee" for purposes of the General Municipal Law's conflict of interest rules, and granted leave to amend the petition to permit resolution of the issue.

In Matter of Zagoreos v. Conklin, 109 A.D.2d 281, 287-8, 491 N.Y.S.2d 358 (2d Dep't 1985), the court had no trouble applying the spirit rather than the letter of the General Municipal Law article dealing with conflicts of interest among public employees. While the members of the zoning board who were also employees of the applicant were not in violation of the specific provisions of the law (presumably because their employment with the applicant was not at a decision-making level), their votes were correctly set aside anyway, because of a perceived conflict:

> In light of the unusual nature of the applications and the substantial controversy surrounding the matter, it was crucial that the public be assured that the decision would be made by town officials completely free to exercise their best judgment of the public interest, without any suggestions of self-interest or partiality. Anything less would undermine the people's confidence in the legitimacy of the proceedings and the integrity of the municipal government. As we stated in Matter of Tuxedo Conservation & Taxpayers Assn.... 'the test to be applied is not whether there is a conflict, but whether there might be....It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest.

Id. (Citations omitted)

If, "a public official must always be above suspicion," Matter of Tuxedo, supra, 69 A.D.2d at 324, then surely so must an attorney working in a fiduciary capacity for a public agency. There should be no real question that Mr. Paget's

role as attorney for a public benefit corporation, hired to conduct the environmental review required by law for the benefit of the public, makes him a public servant.

C. A Conflicted Interest is not Necessarily a Financial One.

In Matter of Zagoreos, the applicant employees whose zoning board votes were set aside were found to be affected not by the possibility of direct financial gain, but by psychological pressures arising from divided loyalties.

> The importance of this project to [the applicant] is obvious. Equally so are those subtle but powerful psychological pressures the mere knowledge of that importance must inevitably place upon any employee of the utility who is in a position to either effectuate or frustrate the project and who is concerned for his or her future with the company. Any attempt to disregard these realities would be senseless, for the public is certainly aware of them. Of course, we do not suggest that [the applicant] did in fact attempt to improperly influence the three individuals involved, either by promises of reward or threat of punishment. Human nature being what it is, however, it is inconceivable that such considerations did not loom large in the minds of the three. Under these circumstances, the likelihood that their employment by [the applicant] could have influenced their judgment is simply too great to ignore.

Matter of Zagoreos, supra, 109 A.D.2d at 288 (emphasis supplied).

Here, Mr. Paget's interest is less financial, though certainly his law firm, of which he is a partner, stands to benefit if one of its major clients succeeds in realizing its development goal. But more critically, Mr. Paget's conflicted interest

is one of loyalty. David Paget, Esq., has been in a fiduciary relationship with Forest City Ratner – a relationship the law holds sacrosanct – on many occasions over the past many years. Over the course of these years and these fiduciary relationships, Mr. Paget's role has been to protect and promote FCRC's interests, to gain and hold its trust, to give his undivided loyalty to his client's cause. How can anyone, even Mr. Paget himself, truly know that his judgment will not be affected by this long history, by loyalties so deeply woven into the tapestry of his professional life?

This is not a case where a public official has simply expressed his opinion about a project on which he had a vote – a circumstance which obviously does not constitute an impermissible bias implicating the letter or spirit of the applicable conflict-of-interest rules. Cf., Webster Assoc. v. Town of Webster, 59 N.Y.2d 220, 227, 464 N.Y.S.2d 431 (1983). Rather, this is a case where an attorney is working as a fiduciary for a state agency, which is expected to serve only the public good, but has also, in the past, worked as a fiduciary for the sponsor of a development project subject to the same agency's approval, but which project may or may not be in the public's interest.

Any attempt to disregard the reality of this psychological pressure would be senseless, for the public is surely aware of it.

D. When in Doubt, and with so Much at Stake, it is Best to Err on the Side of Disqualification.

The environmental review process is supposed to be an open and deliberative public process. Merson v. McNally, supra, 90 N.Y.2d at 753. An environmental review process cannot be truly open when there is even an appearance of bias or favoritism. Any sense among the public that the process is tainted by a conflict of interest, or that the result is a foregone conclusion, will have a chilling effect on public participation.

While ESDC says that it "is committed to hearing the views of all interested persons and thoroughly reviewing all potential environmental impacts before deciding whether the project should be permitted to proceed," (ESDC brief at 4), counsel for ESDC also stated to Justice Edmead that it has "an interest in seeing a project go forward..." (R. 896-7)

Given this predisposition toward the development project, which disposition is not in complete harmony with ESDC's obligations under SEQRA, it is particularly important that ESDC retain environmental counsel that is entirely independent of the developer. If ESDC wants to see the Project go forward, and its environmental lawyer is pulled by loyalties to the developer, then who is protecting the public and the environment?

And given that Mr. Paget has advertised to the public, via his website, that the Project is among many in which he has successfully defended legal challenges, how can the residents in Brooklyn who are opposed to the Project, or have serious concerns about the environmental impact of the Project, have any confidence that the legally mandated review process is truly open and deliberative, and free from bias and favoritism?

It is best to err on the side of disqualification particularly when the matter at hand is controversial.

> It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial.

Byer v. Town of Poestenkill, 232 A.D.2d 851, 852-3, 648 N.Y.S.2d 768 (3d Dep't 1996).

Given the enormity of the Project and the controversy surrounding it, given the public outcry at Mr. Paget's dual representation and the widely-held belief that it compromises the objectivity of the environmental review, given that the integrity of government and the public's belief in it is of paramount importance here, and, finally, given that ESDC cannot be seriously harmed by having to hire a different lawyer, the judgment of the court below that disqualification was appropriate should not be disturbed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Order of the court below disqualifying David Paget, Esq., from serving as ESDC's attorney in this matter be affirmed.

Dated: New York, New York
March 8, 2006

Lynn Armentrout
Attorney for *Amici Curiae*
299 Broadway, Suite 1700
New York, New York 10007
212-732-3093