

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative :
administrator of the estate of OLIVER ST. CLAIR STEWART :
and in his individual capacity, THE GELIN GROUP, LLC, : 06 CV 5827 (NGG) (RML)
CHADDERTON'S BAR AND GRILL INC., d/b/a :
FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, :
JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA :
MUFLEH-ODEH, JAN AKHTAR and DAVID SHEETS, :

Plaintiffs, :

v. :

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW :
YORK STATE URBAN DEVELOPMENT CORPORATION :
d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, :
BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY :
ENTERPRISES, INC., FOREST CITY RATNER :
COMPANY, RATNER GROUP, INC., BR FCRC, LLC, BR :
LAND, LLC, FCR LAND, LLC, BROOKLYN ARENA, LLC, :
ATLANTIC YARDS DEVELOPMENT COMPANY, LLC, :
MICHAEL BLOOMBERG, DANIEL DOCTOROFF, :
ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF :
NEW YORK and NEW YORK CITY ECONOMIC :
DEVELOPMENT CORPORATION, :

Defendants. :

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**FOREST CITY RATNER DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT**

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**FOREST CITY RATNER DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT**

Preliminary Statement

The Forest City Ratner defendants respectfully submit this memorandum of law in support of their motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and Fed. R. Civ. P. 9(b) for failure to plead fraud with particularity.¹

The complaint purports to assert three claims under 42 U.S.C. § 1983 for violations of the federal constitution – *i.e.*, of the public use, equal protection and due process clauses – in connection with the condemnation of real property that plaintiffs own or occupy. The complaint should be dismissed, because, as shown below, none of these claims is viable. In addition, the Forest City Ratner defendants join in the arguments made by defendant New York State Urban Development Corporation, d/b/a Empire State Development Corporation, and its chairman, defendant Charles A. Gargano (collectively, “ESDC”), in their motion to dismiss.

Statement of the Case

This action is the first in a series of anticipated lawsuits to challenge ESDC’s approval of the Atlantic Yards Arena and Redevelopment Project. This project is an ambitious public-private undertaking that is intended to transform central Brooklyn by redeveloping a largely derelict swath of underutilized land. It will, among other things, eliminate blight, end the 50-year absence from Brooklyn of a major league sports franchise, create important new mass transit facilities, and build much needed new housing. The project enjoys broad support among

¹ Defendants Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner Company, Ratner Group, Inc., BR FCRC, LLC, BR Land, LLC, FCR Land, LLC, Brooklyn Arena, LLC and Atlantic Yards Development Company, LLC are, collectively, the “Forest City Ratner defendants.” In addition to this memorandum of law, the Forest City Ratner defendants also submit the declaration of Jeffrey L. Braun, with exhibits.

the general public and among elected officials. Now that the project has been approved by ESDC, however, its diehard opponents hope to kill it by asking the courts to substitute their judgment for that of the public officials who were legally entrusted with the responsibility for making the necessary decisions.²

ESDC's Board of Directors approved the Atlantic Yards project, adopted a General Project Plan and made its determination and findings under the Eminent Domain Procedure Law ("EDPL"), the State Environmental Quality Review Act ("SEQRA") and the Urban Development Corporation Act (the "UDC Act") on December 8, 2006. Owners of the properties within the project's footprint – *i.e.*, the properties that ESDC has decided to condemn – have been served with a summary of ESDC's determination and findings, and have been advised by ESDC that the deadline for commencement of a proceeding under EDPL § 207 to challenge the exercise of eminent domain is January 11, 2007. Proceedings under EDPL § 207 must be commenced in the Appellate Division, which is obligated to hear and decide them "as expeditiously as possible and with lawful preference over other matters." EDPL § 207(B). The questions that may be reviewed in a proceeding under § 207 include whether "the proceeding was in conformity with the federal and state constitutions," and whether "a public use, benefit or purpose will be served by the proposed acquisition." EDPL § 207(C).

According to the complaint (see Braun Decl. Ex. A), the Atlantic Yards project's footprint encompasses "22 acres of land" (Compl. ¶ 2 n. 1) "in the heart of Central Brooklyn" (id. ¶ 2), including "the MTA's 8.5-acre active rail yard and bus depot" (¶ 42) known as

² Plaintiffs' co-counsel, Jeffrey S. Baker of the Albany law firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, appeared in opposition to the project at ESDC's public hearing and has stated publicly that, were the Atlantic Yards project to be approved by ESDC, he would bring a proceeding under CPLR Article 78 to challenge ESDC's determination on grounds that would include ESDC's alleged failure to comply with the State Environmental Quality Review Act, Environmental Conservation Law § 8-0101, et seq. ("SEQRA").

“Vanderbilt Yards” (¶ 2 n. 1). It is “bounded generally by” Atlantic Avenue, Dean Street, Fourth Avenue and Vanderbilt Avenue (¶ 44). A substantial portion of the project’s footprint is within “the Atlantic Terminal Urban Renewal Area (‘ATURA’),” originally “designated by New York City in 1968” (¶ 51), and thereafter revised by a series of “ten amendments,” most recently in 2004 (¶ 53). The project is to include “a sports arena” and “16 high-rise apartment and office towers” that will contain “6,860 housing units,” only “4,610 of [which] would be market rate” (¶ 2 n. 1), which means that 2,250 units would be below market rate.

The project was announced in December 2003 (Compl. ¶ 64). In February 2005, ESDC, the City and defendant Forest City Ratner Companies (“FCRC”) entered into two memoranda of understanding by which it was agreed, among other things, that ESDC would be the “lead agency” under SEQRA for purposes of examining the proposed project’s environmental impacts and (subject to completion of its review and the approval of its board) would exercise its power under State law to override New York City zoning (see Compl. ¶¶ 66-67). In May 2005, the MTA issued a request for proposals for the purchase of the development rights attributable to its Vanderbilt Yards site (id. ¶ 71). FCRC and one competitor, Extell Development Company (“Extell”), submitted formal bids (¶¶ 73-74). On July 27, 2005, MTA’s Board of Directors selected FCRC as the winning bidder and granted it a 45-day period of exclusivity to negotiate the terms of an agreement with the MTA (¶ 75). On September 14, 2005, the MTA and FCRC “formally announced” the terms of an agreement (¶ 76).

On July 24, 2006, ESDC issued a notice of public hearing under the EDPL and SEQRA (Compl. ¶ 79). EDPL Article 2 requires that, “prior to acquisition,” a condemnor “shall conduct a public hearing ... at a location proximate to the property which may be acquired,” for the purpose of “inform[ing] the public” and “review[ing] the public use to be served by a proposed

public project and the impact on the environment” EDPL § 201. Notice of the hearing must be published, and also must be mailed to “each assessment record billing owner or his or her attorney of record.” EDPL § 202. “At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent,” after which “any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project.” EDPL § 203. “A record of the hearing shall be kept, including written statements submitted,” and the record must be made available to the public for inspection and copying. *Id.* Within 90 days after the public hearing’s conclusion, the condemnor “shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination.” EDPL § 204(A). The condemnor must “serve, by personal service or certified mail, return receipt requested, a notice of the brief synopsis ... upon each assessment record billing owner or his or her attorney of record whose property may be acquired.” EDPL § 204(C). This notice must, among other things, advise condemnees of their rights under EDPL § 207 to seek judicial review in the Appellate Division. *Id.*

ESDC’s public hearing was held on August 23, 2006, and was well attended (Compl. ¶ 80). It was followed by a community forum in September, at which members of the public were given a further opportunity to speak about the project (*id.* ¶ 81).³ “The final deadline for public comment on the Project was September 29, 2006” (¶ 82). The close of the public comment period triggered the 90-day deadline established by EDPL § 204(A) for ESDC’s determination. See Wechsler v. New York State Dep’t of Environmental Conservation, 153 A.D.2d 300, 550

³ Although the complaint refers to a single “community forum” on “September 12, 2006” (¶ 81), in fact ESDC held two separate community forums in September 2006.

N.Y.S.2d 749 (3d Dep't), aff'd, 76 N.Y.2d 923, 563 N.Y.S.2d 50 (1990). Therefore, this deadline was December 28, 2006.

On October 26, 2006, plaintiffs commenced this action, alleging that “[i]n the next few days, ESDC will announce that FCRC has passed every aspect of the review process” (Compl. ¶ 83), and that “[t]he condemnation and seizure of plaintiffs’ properties will follow quickly thereafter” (id. ¶ 84). As indicated above, ESDC’s determination to approve the project and exercise its power of eminent domain was made on December 8, 2006. Under EDPL Article 4, however, ESDC does not actually acquire ownership of any properties until it has commenced a proceeding in the State Supreme Court, obtained an order authorizing it to file an acquisition map, and actually filed the map with the county clerk or register, at which point “the acquisition of the property ... shall be complete and title to such property shall then be vested in the condemnor.” EDPL § 402(B)(5). Such a vesting proceeding may be commenced “up to three years after the conclusion of” judicial review under § 207. EDPL § 401(A).

According to the complaint, the project’s footprint includes “sixty-eight privately-owned parcels totaling 123 tax lots” (¶ 42). Plaintiffs are (1) the owner of one residential condominium unit within the project’s footprint (Compl. ¶ 6), (2) two owners of single-family homes in the footprint (¶¶ 7-8), (3) one commercial tenant (¶ 9), and (4) six residential tenants (¶¶ 11-16). Defendants are (1) ESDC (both the corporate entity and its chairman) (¶¶ 19-21), (2) the Forest City Ratner defendants (¶¶ 22-31), (3) Governor Pataki (¶ 18), and (4) the City and various City officials (including Mayor Bloomberg) and the City’s Economic Development Corporation (¶¶ 33-38). With the Court’s permission, all of these defendants now move to dismiss.

Argument

**THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE
TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED**

Plaintiffs' claims rest entirely on conclusory assertions, not facts. Those facts that the complaint does allege and the documents to which the complaint refers belie the pleading's conclusory assertions and demonstrate that plaintiffs' claims are without merit. Thus, the complaint can survive this motion to dismiss only if the Court ignores the governing principles that, on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court should accept as true the complaint's factual allegations and draw all reasonable inferences in favor of plaintiffs, but should not presume that "bald assertions and conclusions of law" are true. Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). See also Mason v. American Tobacco Co., 346 F.3d 36, 39 (2d Cir. 2003) ("Deductions or opinions couched as factual allegations" are not given a presumption of truthfulness"); Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 369 F.Supp.2d 353, 359 (S.D.N.Y. 2005) ("Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice," and "the facts that are pleaded must provide a basis for a reasonable inference" that the defendants engaged in wrongful conduct that injured the plaintiffs, because "the Court is not obligated to draw unreasonable inferences in plaintiffs' favor"). Similarly, the Court should not sustain a complaint on the basis of conclusory allegations that are contradicted by "more specific allegations in the complaint" or "facts of which [a court] may take judicial notice." Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1095 (2d Cir. 1995).

On a Rule 12(b)(6) motion, a court also may consider (1) "documents attached to [the complaint] or incorporated in it by reference," (2) "documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference," and (3) "documents or information ... if plaintiff has knowledge or possession of the material and relied on it in framing

the complaint.” In re Merrill Lynch & Co., Inc., 273 F.Supp.2d 351, 356-57 (S.D.N.Y. 2003). See also Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (a court may consider “documents either in plaintiffs’ possession or of which plaintiffs had knowledge and relied on in bringing suit”). Therefore, where a complaint “relies heavily upon” a document, the document itself may be considered. International Audiotext Network, Inc. v. American Tel. and Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995). See also Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) (“the district court ... could have viewed [the documents] on the motion to dismiss because there was undisputed notice to plaintiffs of their contents and they were integral to plaintiffs’ claim”); Meyer Pincus & Associates P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759, 762 (2d Cir. 1991) (a court should not “close [its] eyes to the contents of” a document and allow a plaintiff “to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference”); In re Bristol-Myers Squibb Sec. Litig., 312 F.Supp.2d 549, 555 (S.D.N.Y. 2004) (“A court need not accept as true an allegation that is contradicted by documents on which the complaint relies”).⁴

When examined in the light of these principles, none of plaintiffs’ three “causes of action” states a viable claim under 42 U.S.C. § 1983 for violation of a constitutional right.

A. PLAINTIFFS’ CLAIM THAT THE ATLANTIC YARDS PROJECT LACKS A PUBLIC PURPOSE IS UNTENABLE AND SHOULD BE DISMISSED

The complaint’s “first cause of action” (¶¶ 127-44) challenges ESDC’s exercise of eminent domain on the ground that it purportedly does not serve any public use or benefit. In

⁴ Here, the complaint liberally refers to numerous public documents generated in connection with ESDC’s consideration of the Atlantic Yards project, including a July 2006 blight study (Compl. ¶¶ 94-102), the Draft Environmental Impact Statement (“DEIS”) (¶¶ 42, 44, 51, 87, 89, 103-116), and bids that were submitted to the MTA by FCRC and Extell, respectively (Compl. ¶¶ 73-76). These documents or portions thereof are annexed as Exhibits B through E to the Braun declaration and may be considered on this motion to dismiss.

fact, plaintiffs have specifically characterized this lawsuit as “brought primarily under the public use clause” (Nov. 21, 2006 Conf. Tr. at 5:18-19) (emphasis added).

In considering a challenge under the public use clause, the courts’ “role ‘is an extremely narrow one.’” Brody v. Village of Port Chester, 434 F.3d 121, 127-28 (2d Cir. 2005), quoting Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954). A court must “not substitute its judgment for a legislature’s judgment as to what constitutes a public use, ‘unless the use be palpably without reasonable foundation.’” Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329 (1984), quoting United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 680, 16 S.Ct. 427, 429 (1896). See also Berman, 348 U.S. at 32, 75 S.Ct. at 102 (“when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,” and “[t]his principle admits of no exception merely because the power of eminent domain is involved”).⁵

1. The Public Purposes to Be Served by the Project Have Long Been Recognized as Satisfying the Public Use Clause

The complaint is larded with conclusory rhetoric and mischaracterizations of public documents, but plaintiffs cannot avoid the fact that the Atlantic Yards project furthers numerous substantial public purposes, including (a) the elimination of blight, including the construction of a \$120 million platform over Vanderbilt Yards to cover this enormous open trench near the heart of downtown Brooklyn and allow the site’s integration into the surrounding communities (see

⁵ The cases often speak of the decision to condemn property as “legislative,” but in fact eminent domain frequently is exercised by agencies that a legislature has empowered to condemn property. For example, in Midkiff the Supreme Court sustained condemnations by the Hawaii Housing Authority, an agency created by the Hawaii Legislature, 467 U.S. at 233, 104 S.Ct. at 2325, while in Berman the condemnations were effectuated by the District of Columbia Redevelopment Land Agency, which was empowered by Congress to condemn land in the District of Columbia. 348 U.S. at 29, 75 S.Ct. at 100-101. Here, ESDC’s power of eminent domain derives from a specific legislative grant of authority in the UDC Act. See N.Y. Unconsol. Laws § 6263.

DEIS [Braun Decl. Ex. B], at pp. S-1, S-10, 1-2, 1-4; see also FCRC bid [Braun Decl. Ex. D], at pp. 1-2, 1-4), (b) a new arena that will be the home of Brooklyn's first major league sports franchise since 1957, and that also will be available for numerous other community-related functions such as amateur athletic events, job fairs, civic events, graduation ceremonies, concerts, circuses and the like (see Compl. ¶ 48, DEIS at pp. S-5, S-10, 1-9, 1-18), (c) at least 2,250 units of affordable housing (see Compl. ¶ 104), (d) transit improvements costing in excess of \$200 million, including a new state-of-the-art Vanderbilt Yards facility for the MTA and the LIRR, extensive subway improvements and environmental clean-up of the MTA's property (see DEIS at pp. S-6, S-10, 1-12, 1-20, 1-21; see also FCRC bid at pp. 2.1-2.4), and (e) at least seven acres of publicly accessible open space (see DEIS at pp. S-5, 1-19). These purposes have repeatedly been determined to satisfy the public use clause.

Plaintiffs profess disagreement with the ultimate value to the public of these benefits, but the Supreme Court's decisions demonstrate that this disagreement is not relevant. See, e.g., Midkiff, 467 U.S. at 242-43, 104 S.Ct. at 2330 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings ... are not to be carried out in the federal courts"). In its most recent decision on the subject, Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005), the Supreme Court reaffirmed the principle that the condemnor's determination to condemn property for redevelopment was "entitled to our deference." 125 S.Ct. at 2665. Citing Midkiff, the Court specifically declined to inquire into the value of the benefits that would arise from the project. 125 S.Ct. at 2667.

Because it is beyond the Court's role to determine the actual value of the public benefits to be provided by the project, plaintiffs' allegations that the public benefit of the Atlantic Yards

project may not be as great as ESDC maintains are irrelevant. See Midkiff, 467 U.S. at 241, 104 S.Ct. at 2329-30 (“where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause”). Here, each one of the Atlantic Yards project’s public benefits has been held to satisfy the public use clause of the Fifth Amendment.

(a) Elimination of blight

The removal of blight is a legitimate public purpose that justifies the use of eminent domain. In Berman v. Parker, *supra*, the Supreme Court not only unanimously recognized blight elimination as a public purpose justifying eminent domain, but it sustained the inclusion of non-blighted sites in the properties that were to be condemned for redevelopment. 348 U.S. at 35, 75 S.Ct. at 104 (“Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending,” because “it is the need of the area as a whole which Congress and its agencies are evaluating”). See also, e.g., Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp., 771 F.2d 44, 46 (2d Cir. 1985) (“the condemnation of [plaintiffs’] building to make way for the redevelopment of [a] blighted area is a classic example of a taking for a public use or purpose within the law of eminent domain,” notwithstanding that plaintiffs’ building was not blighted); Forty-Second Street Co. v. Koch, 613 F.Supp. 1416 (S.D.N.Y. 1985) (rejecting a challenge by movie theater operators to the condemnation of their properties for redevelopment of 42nd Street, and holding that the condemnor need not show that the theaters themselves caused blight).

Faced with this insurmountable authority establishing that blight elimination is a valid public use, plaintiffs allege that the portion of the project’s footprint in which their properties are situated never was regarded as blighted until FCRC affiliates began to acquire properties there (see Compl. ¶¶ 94-102). To support this theory, plaintiffs divide the project’s footprint into two

components: one consists of the properties owned by the MTA or situated within the Atlantic Terminal Urban Renewal Area (“ATURA”); and the second, which plaintiffs have entitled the “Takings Area” (Compl. ¶ 51), consists of two city blocks (Blocks 1127 and 1129) and part of a third (Block 1128). All properties that plaintiffs own or occupy are within this so-called “Takings Area.” A diagram showing these areas and plaintiffs’ properties is Exhibit J to the Braun declaration.

Plaintiffs do not dispute the fact that the MTA properties, comprising the MTA’s Vanderbilt Yards facility, are a huge open trench that creates an ugly barrier separating the properties on one side of the Yards (which are part of ATURA) from the so-called “Takings Area” immediately to the other side of the Yards. Nor do plaintiffs dispute the fact that ATURA has been designated by the City as blighted for the last 40 years, and that, while redevelopment has remediated blight elsewhere in ATURA, the portion of ATURA within the Atlantic Yards footprint remains blighted. It is the two and a fraction blocks of the project’s footprint that are outside ATURA that, according to plaintiffs, are not really blighted. However, plaintiffs’ allegations do not survive scrutiny and are insufficient to avoid dismissal of their complaint.

First, the courts will not entertain disputes about the boundary line that is drawn by a condemnor to eliminate blight. Berman, 348 U.S. at 35, 75 S.Ct. at 104 (the condemnor’s determination of “the need of the area as a whole” controls, because, “[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly,” as a result of which “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis”). See also Rosenthal & Rosenthal, 771 F.2d at 46. In short, plaintiffs are making “a plea to substitute the landowner’s standard of the public need for

the standard prescribed” by the condemnor – a proposition that was unanimously rejected by the Supreme Court in Berman. 348 U.S. at 35, 75 S.Ct. at 104.

Second, the blight study that ESDC commissioned (see Braun Decl. Ex. C) comprehensively documents the condition of the properties in the project’s footprint and compiles ample evidence to support a determination by ESDC that there was significant blight within the so-called “Takings Area” prior to the acquisition of properties by FCRC affiliates.⁶ The blight study thus reports, for example, that on Block 1127 not only were four vacant buildings in such an extreme state of disrepair that they were unsafe and therefore were demolished with ESDC approval (see pp. C-3, C-90 to C-97), but ten lots were underutilized (pp. C-70, C-81, C-88, C-98, C-101, C-106, C-109, C-113, C-124, C-132) while one was entirely vacant prior to its acquisition by an FCRC affiliate (p. C-134). In the portion of Block 1128 within the project’s footprint, the mid-block area was “overgrown with weeds, enclosed by a chain-link fence, and occupied by several parked cars, many of which appear to be abandoned” (p. C-3), while two lots were vacant (pp. C-148) and three were underutilized (pp. C-155, C-157, C-159). Finally, as to Block 1129, two lots were vacant (p. C-166), a third had broken-down cars and auto parts and was littered with debris (pp. C-169 to C-171), and two others were used for open-air parking (pp. C-172). The warehouse on another lot had windows that “have been sealed with cinder blocks or glass block,” while “scaffolding covers the majority of the building’s ground-floor ... , contributing to the abandoned appearance of the building,” which also displayed graffiti, large cracks in the façade and an interior that was in poor condition (pp. C-3, C-180 to C-190). The three small buildings on another lot were so “severely dilapidated” that FCRC’s structural engineer recommended their prompt demolition (pp. C-4, C-204 to C-

⁶ The blight study is specifically referred to in the complaint (see ¶¶ 94-102) and therefore properly may be considered by this Court on the present motion (see pp. 6-7, supra).

214), while the warehouse on another lot was so unsafe that it was demolished with ESDC's approval (pp. C-3, C-238 to C-242). Another lot was "in a state of extreme disrepair," being "overgrown with weeds and littered with trash and surrounded by a chain link fence ... topped with barbed wire," while "[g]raffiti covers many of the surfaces on the lot, including the facades of the five-story warehouse, two dilapidated structures adjacent to the main building, and the wall of the building on [the] adjacent lot," with "[a]ll of the windows on the warehouse building having been permanently sealed" (pp. C-4, C-226 to C-233). Another lot contained a half-empty residential building with an interior that was in disrepair (pp. C-215 to C-221).

Third, plaintiffs' claim that the so-called "Takings Area" was not blighted before FCRC affiliates acquired properties there is belied by the courts' determination of a prior litigation. Under the regulations implementing SEQRA (see 6 NYCRR § 617.3(a)), the applicant for approvals that are subject to SEQRA is precluded from changing the affected property while the application is pending, subject to an exception for emergencies (§ 617.5(c)(33)). Here, as FCRC affiliates acquired properties within the project's footprint, their structural engineer determined that six of these buildings – including five buildings within the so-called "Takings Area" – were so decrepit and structurally unsound that they posed a danger of imminent collapse and thus constituted a threat to public safety. After reviewing the structural engineer's written report, ESDC concurred and issued emergency declarations authorizing immediate demolition.⁷ Several opponents of the Atlantic Yards project (including plaintiffs Goldstein and Sheets), represented by Mr. Baker, plaintiffs' co-counsel in the present action, brought suit in New York State Supreme Court to challenge ESDC's emergency declaration and enjoin the demolition. The Supreme Court denied the injunction, dismissed this claim and sustained ESDC's emergency

⁷ The report of FCRC's structural engineer is part of the blight study (see Braun Decl. Ex. C, at App. A). ESDC's emergency declaration is Exhibit F to the Braun declaration.

determination.⁸ The Appellate Division unanimously affirmed. Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 A.D.3d 144, 816 N.Y.S.2d 424 (1st Dep't 2006).⁹ Not only does this determination demonstrate that there indeed was significant blight within the so-called "Takings Area" before FCRC affiliates acquired properties there, but it precludes two plaintiffs in this action (including the lead plaintiff) from relitigating the blighted condition of the properties.¹⁰

There thus is more than ample evidence supporting a determination by ESDC that condemnation is appropriate to eliminate the blight that characterizes this area.¹¹

⁸ The locations within the so-called "Takings Area" of the buildings whose demolition was authorized by ESDC are shown on Exhibit J to the Braun declaration. Copies of the plaintiffs' pleading in that case and the New York Supreme Court's unreported decision are Exhibits G and H, respectively.

⁹ A motion for leave to appeal from this decision is pending before the New York Court of Appeals, but the proposed appeal does not challenge the Appellate Division's ruling on ESDC's emergency declaration and, instead, only addresses a completely unrelated issue.

¹⁰ "Because the Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to accord state judgments the same preclusive effect those judgments would have in the courts of the rendering state," federal courts must apply state law in determining the preclusive effect of a state court judgment. Hoblock v. Albany County Board of Elections, 422 F.3d 77, 92-93 (2d Cir. 2005). Under New York law, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." Ryan v. New York Telephone Co., 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 826 (1984). See also, e.g., Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478, 482 (1999).

¹¹ In addition to these conditions, the blight study also found that the diverse ownership of the numerous parcels contributed to the blight by preventing the site assemblage necessary for comprehensive redevelopment (see p. iii). Diversity of ownership has been recognized as a factor that can indicate blight. See Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Dev. Corp., 605 F. Supp. 612, 618 (S.D.N.Y. 1984), aff'd, 771 F.2d 44 (2d Cir. 1985) ("Nothing in the Constitution prevents a state from deciding that in a particular area diversity of land ownership stands in the way of full economic development, and that assembling a major site to be developed as a piece is the best way to serve the public purposes"). The blight study also found evidence that the incidence of crime was higher in the project area than in surrounding areas (Braun Decl. Ex. C, at pp. D-1 to D-4).

(b) The Arena

The use of eminent domain to create stadiums and other sports arenas is so well-established that it was acknowledged as a proper public use by the dissenters in Kelo. Justice O'Connor's dissent thus stated that "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use – such as with ... a stadium." 125 S.Ct. at 2673. See also Southeast Land Development Associates, L.P. v. District of Columbia, No. Civ. A. 05-1413 RWK, 2005 WL 3211458 (D.D.C. Nov. 1, 2005) (taking property for construction of a baseball stadium does not violate the public use clause); City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960 (5th Cir. 1995) (a baseball stadium parking lot is a public use); cf. Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (observing that New York City had acquired title to Yankee Stadium and surrounding land by eminent domain).

(c) Affordable housing

It is equally well established that the use of eminent domain for housing purposes complies with the public use clause. See, e.g., Midkiff, 468 U.S. at 243, 104 S.Ct. at 2330 (condemnation to address deficiencies in a State's residential property market satisfied the public use clause); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), cert. denied, 489 U.S. 1077, 109 S.Ct. 1527 (1989) (condemnations to create low income housing were for a public purpose). See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 102 S.Ct. 3164, 3178 (1982) (collecting cases and stating that "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general").

Here, the complaint acknowledges that the project will include 2,250 units of affordable housing, but seeks to impugn the project by asserting that this housing is not low-income housing (see Compl. ¶¶ 108-11). The complaint thus alleges that "[n]o units will be available for

household's [sic] earning \$21,000 or less" (§ 109), and that "[n]early half of the units described as 'affordable' are slated for household incomes between \$71,000 and \$113,000" (§ 110).

This professed objection is so entirely without merit that it exposes the specious nature of plaintiffs' whole case. It is meant to create a misleading inference that "affordable" housing is synonymous with "low-income" housing and that the comprehensive affordable housing component of this project somehow was invented by ESDC and the Forest City Ratner defendants. Nothing could be further from the truth. In recognition of chronic anomalies in the local housing market, for decades both New York State and New York City have pursued a wide array of policies, within which the affordable housing provided for in this project comfortably fit, that have been intended to create incentives for the construction by private developers of below-market-rate (i.e., "affordable") housing for middle-income households.¹² Here are just a few examples:

1. New York State created the Mitchell-Lama program in 1955 (Article 2 of the Private Housing Finance Law), providing for government-assisted financing and local real estate tax abatements to encourage private investment in new housing for middle-income households. See Columbus Park Corp. v. Dep't of Housing Preservation and Development, 80 N.Y.2d 19, 23, 586 N.Y.S.2d 554, 555 (1992) ("The Mitchell-Lama Law ... is a government program for encouraging the private development of low and middle income housing").

2. The Bloomberg Administration has published a white paper entitled The New Housing Marketplace: Creating Housing for the Next Generation 2004-2013, which sets forth the City's housing agenda and states that one of "[t]he key goals of our plan" is to "[c]reate 92,000 units of affordable housing for 280,000 New Yorkers, including an ambitious middle-class housing

¹² Contemporary usage generally differentiates between "low-income," "moderate-income" and "middle-income." The definitions are based on Areawide Median Income ("AMI") as determined annually by the United States Department of Housing and Urban Development ("HUD"), which is the standard reference. For 2006, the New York AMI as set by HUD is \$70,900. See http://www.huduser.org/Datasets/IL/IL06/ny_fy2006.pdf (Braun Decl. Ex. P). "Low income" is defined as less than 80% of AMI (see 42 U.S.C. § 1437a(b)(2)). The New York City Housing Development Corporation defines "middle-income" as earning a maximum income equal to 175% of AMI (see Braun Decl. Ex. L).

program for the 21st Century” (Braun Decl. Ex. K, at 3) – a goal that is repeated in a 25-year master plan entitled “PLANYC,” published by the City on December 12, 2006, and available on-line ([see http://www.nyc.gov/html/planyc/html/about/openyc_housing_form/shtml](http://www.nyc.gov/html/planyc/html/about/openyc_housing_form/shtml)). Pursuant to this initiative, Mayor Bloomberg and the Port Authority of New York and New Jersey recently agreed to the transfer of approximately 24 acres of land to the City for new middle-income housing at Queens West in Long Island City. This project will contain approximately 5,000 residential units for families earning up to \$145,000 annually – \$32,000 more than what plaintiffs claim is the highest income that would allow a household to occupy affordable housing at Atlantic Yards ([see](#) Braun Decl. Ex. M).

3. The City’s Zoning Resolution has for many years contained inclusionary housing incentives under which owners may construct larger residential buildings than otherwise would be allowable if they include units for lower-income residents or, in some cases, build them at other locations. [See](#) Zoning Resolution §§ 23-90 through 23-953. The City’s recent rezoning of Hudson Yards – the underutilized portion of Manhattan between Midtown and the Hudson River – includes provisions pursuant to which such bonuses are available for the development of housing for “lower income,” “moderate income” and “middle income” households, with a “middle income household” being defined as one “having an income equal to or less than” 175% of “the income limits ... for New York City residents established by [HUD] for lower income families receiving housing assistance payments” Zoning Resolution § 93-231. Likewise, the City’s recent rezoning to establish a Special West Chelsea District provides for floor area bonuses in exchange for the development of housing for “middle income households,” subject to the same definition as applies to Hudson Yards. Zoning Resolution § 98-261. As HUD’s New York region Areawide Median Income for 2006 is \$70,900 ([see](#) n. 13, [supra](#)), housing for a family with an annual income of \$124,075 – *i.e.*, \$11,075 more than what plaintiffs claim is the highest income that would allow a household to occupy affordable housing at Atlantic Yards – would satisfy these statutory requirements.

4. The New York City Housing Development Corporation (“HDC”) is a public benefit corporation established pursuant to the New York City Housing Development Corporation Act (Private Housing Finance Law §§ 653-654) as a vehicle by which private developers can obtain tax-exempt financing for the construction of subsidized housing. HDC has a New Housing Opportunities Program (“New HOP”) to meet affordable housing needs of middle-income families. New HOP provides funding in support of the “Cornerstone Program” of the City’s Department of Housing Preservation and Development, which builds middle-income housing on vacant City-owned land. One example is The Hamilton in Harlem. The apartments in this building are available to households with annual incomes up to \$157,000, which is \$44,000 more than the maximum household income that, according to plaintiffs, will be allowable for occupants of affordable housing at Atlantic Yards ([see](#) Braun Decl. Exs. N, O).

(d) Mass transit improvements

Takings of private property for mass transit and other public transportation purposes plainly satisfy the public use clause. See, e.g., Rindge Co. v. County of Los Angeles, 262 U.S. 700, 706, 43 S.Ct. 689, 692 (1923) (“a taking of property for a highway as a taking for public use has been universally recognized, from time immemorial”); National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422-423, 112 S.Ct. 1394, 1404 (1992) (condemnation to facilitate intercity rail passenger service furthers a public use).

(e) Public open space

It is equally clear that condemnation to create parks and other public open space serves a public use. See, e.g., Shoemaker v. United States, 147 U.S. 282, 297, 13 S.Ct. 361, 390 (1893) (“land taken in a city for public parks and squares, by authority of law, where advantageous to the public for recreation, health, or business, is taken for a public use”); United States ex rel. Tennessee Valley Auth. v. Welch, 327 U.S. 546, 552, 66 S.Ct. 715, 718 (1946) (the condemnation of private property for inclusion within a national park serves a public use).

2. Plaintiffs’ Conclusory Assertions of Favoritism Cannot Overcome the Presumption of Regularity and the Project’s Manifest Public Purposes

The complaint contains assertions – overwhelmingly conclusory rather than factual – that the public defendants showed favoritism toward the Forest City Ratner defendants, and that the project is intended solely for the latter’s private benefit (see Compl. ¶¶ 2, 3, 72, 117-21, 129-34, 147, 150). These absurd assertions are a vain attempt to posture this case within particular language in Justice Kennedy’s concurrence in Kelo, which states that “[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.” 125 S.Ct. at

2669. However, Justice Kennedy's concurrence does not authorize a court faced with naked assertions of favoritism to ignore all of the Supreme Court's prior jurisprudence, or to undertake a de novo factual inquiry into the purposes of a project or the subjective motives of a condemnor's individual decision makers. Here, plaintiffs' assertions of favoritism are bereft of any factual support and too conclusory to support the de novo inquiry that plaintiffs want this Court to conduct.¹³

Justice Kennedy aimed his formulation at takings with "only incidental or pretextual public justifications." 125 S.Ct. at 2669. In Kelo, the only public purpose of the takings was economic development – a controversial justification that the Supreme Court's dissenters perceived as acutely susceptible to abuse, because, where a taking is not necessary to eliminate blight, the prospect of greater tax revenues can tempt a condemnor (in the dissenters' view) to use eminent domain simply to transfer private property to another private owner who will put the property to more productive use. See Kelo, 125 S.Ct. at 2677 (O'Connor, J., dissenting).

In fact, it is difficult to conceive what kind of taking other than one premised solely on economic development could fit Justice Kennedy's formulation of one based on "only incidental or pretextual justifications" – unless it was a taking that was infected by out-and-out corruption. In the present case, plaintiffs' assertions of favoritism, and of a "sham" public review process, amount to a claim that defendants have acted corruptly and perpetrated a fraud on the public. This contention is untenable.¹⁴

¹³ Justice Kennedy's concurrence expresses the view of a single Justice. None of the four other Justices who constituted the majority in Kelo joined Justice Kennedy's opinion, while the four dissenters rejected Justice Kennedy's approach as ineffective and instead favored a bright-line ban on all takings premised only on economic development. See Kelo, 125 S.Ct. at 2675 (O'Connor, J., dissenting).

¹⁴ As shown below, this claim also is subject to the heightened pleading requirement of Fed. R. Civ. P. 9(b) and fails to comport with that requirement.

The Atlantic Yards project serves substantial and indisputably proper public purposes, and is not premised solely upon economic development. Despite the complaint's conclusory assertions to the contrary, there is no "plausible accusation of impermissible favoritism." Kelo, 125 S.Ct. at 2670 (Kennedy, J., concurring) (emphasis added). The complaint's scant factual allegations do not support an inference that the project's public purposes are merely incidental to private purposes or otherwise pretextual, and therefore are insufficient to overcome "the presumption," to which even Justice Kennedy agreed that "the government's actions" are entitled, that those actions "were reasonable and intended to serve a public purpose." Id. The majority opinion in Kelo, in which Justice Kennedy joined, adhered to the Court's prior holdings in Berman and Midkiff:

The disposition of this case ... turns on the question of whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

125 S.Ct. at 2663. Even the dissenters in Kelo acknowledged that, "[b]ecause courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives," the Supreme Court has "emphasized the importance of deferring to legislative judgments about public purpose." Id. at 2674.

Similarly, in Brody, 434 F.3d at 135-36, decided after Kelo, the Second Circuit again recognized the "broad deference" to which condemnation determinations are entitled, and rejected a claim that the Constitution requires a "detailed examination of the thought processes of those exercising the legislative prerogative" of eminent domain.¹⁵

¹⁵ In Western Seafood Co. v. United States, No. 04-41196, 2006 WL 2920809 (5th Cir. Oct. 11, 2006), an unreported decision, a Fifth Circuit panel declined to subject a condemnation to a heightened standard of review notwithstanding charges of favoritism premised upon the fact that the condemned property was to be conveyed to an adjacent private property owner for redevelopment as a marina, and the owner of this adjacent property in turn was owned by a

The one allegation in the complaint relating to purported favoritism that contains any specificity at all is the allegation that FCRC's bid to the MTA for the development rights attributable to Vanderbilt Yards was inferior to Extell's competing bid, because Extell offered the MTA \$150 million, while FCRC only offered \$50 million, which thereafter was increased to \$100 million (see Compl. ¶¶ 69-78). A comparison of the actual bids – as opposed to the complaint's characterization of the bids – exposes plaintiffs' contention as entirely specious.¹⁶ While plaintiffs are correct that FCRC's bid contained an offer of \$50 million in cash while Extell's bid offered the MTA \$150 million in cash, the complaint fails to advise the Court that FCRC's bid also offered to (1) build a new Vanderbilt Yards for the MTA at an estimated cost to FCRC of \$182 million, (2) conduct environmental remediation and clean-up of the MTA's property at an estimated cost to FCRC of \$20 million, (3) compensate MTA for increased operating costs that had an estimated present value of \$25,400,000, (4) construct additional mass transit improvements relating to the nearby subway station at an estimated cost to FCRC of \$29,000,000, and (5) share with the MTA sales tax revenues from the project that had an estimated present value of \$23,000,000 (see Braun Decl. Ex. D, at p. 2.1). FCRC's bid thus reasonably could be valued at \$329.4 million dollars before the cash component was increased from \$50 million to \$100 million.

Finally, the fact that the Atlantic Yards project is to be implemented by a private developer whose motivation is economic gain, and the allegation that it is the developer who

prominent local family, had initiated contact with the municipality about the project, and had been identified as the selected developer at the earliest stages of the planning process.

¹⁶ FCRC's bid and Extell's bid are Exhibits D and E, respectively, to the Braun declaration. As these documents are expressly referred to and relied upon in the complaint (see ¶¶ 73-76), this Court may refer to them on this motion and is not required to assume the correctness of the complaint's mischaracterization of these documents (see pp. 6-7, supra).

initiated the project, are completely irrelevant. In sustaining an exercise of eminent domain against a charge that it served a private rather than public purpose, the Supreme Court reaffirmed in Kelo that “the government’s pursuit of a public purpose will often benefit individual private parties.” 125 S. Ct. at 2666. See also, e.g., Berman, 348 U.S. at 34, 75 S. Ct. at 103 (“The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude,” and “[w]e cannot say that public ownership is the sole method of promoting the public purpose of community redevelopment projects”). In New York, the UDC Act specifically directs ESDC to “encourag[e] maximum participation by the private sector of the economy” in ESDC projects. N.Y. Unconsol. Laws § 6252. See East Thirteenth Street Comm’ty Ass’n v. New York State Urban Development Corp., 189 A.D.2d 352, 358, 595 N.Y.S.2d 961, 964-65 (1st Dep’t 1993).

The complaint seeks to bolster plaintiffs’ claim of favoritism by asserting that the Forest City Ratner defendants initiated the project (Compl. ¶ 44). However, even were this assertion to be true (which it is not), standing by itself it would not be enough to create a viable claim. It would be bad public policy for the courts to create a rule that would discourage private enterprise from approaching responsible governmental agencies with creative proposals for addressing public needs. As the complaint acknowledges, FCRC has a history of successful development in downtown Brooklyn (¶ 45), and FCRC’s bid to the MTA points out that FCRC “and its staff have extensive experience in developing complex public/private development projects in New York City,” including “MetroTech” and “Atlantic Terminal” in Brooklyn – the projects specifically referred to in the complaint (¶ 45) – as well as several in Manhattan (Braun Decl. Ex. 4, at “Executive Summary”). FCRC therefore is a logical choice for a project of this complexity at this location, while ESDC’s decision to proceed with FCRC was consistent with both the UDC

Act's dictate that it "maximize participation by the private sector" and the Supreme Court's repeated recognition in Kelo and Berman of the legitimacy of private enterprise's participation in community development projects.

The Atlantic Yards project has undergone an exhaustive review process, and manifestly serves several indisputably substantial public purposes. Viewed against the deferential standard of judicial review applicable to plaintiffs' claim, the public purposes that the Atlantic Yards project is intended to achieve are more than sufficient to satisfy the public use clause. Plaintiffs' challenge cannot be sustained.

3. The Complaint Fails to Satisfy the Requirements of Rule 9(b)

As stated above (p. 19), the complaint's assertions of favoritism really amount to a claim of corruption by government officers and fraud on the public. This claim should be subjected to the heightened pleading standard for fraud set forth in Fed R. Civ. P. 9(b), which requires that the circumstances constituting the fraud must be stated with particularity. See Rosenthal & Rosenthal, Inc., 605 F. Supp. at 618 (to claim that a proposed taking violated their constitutional rights due to the chosen developer's alleged relationship with Mayor Koch, the plaintiffs "would have to be able to plead that the public purposes put forth for the plan were a sham and a fraud on the public, and that the project existed to profit [the developer] – not merely that it was shaped in such a way as to make it more profitable for him," which "would amount to a serious allegation of public fraud" and therefore "would have to be pleaded with specificity").

To satisfy Rule 9(b), allegations of fraud must specify each defendant's particular conduct, and "give particulars as to the respect in which it is contended that" the conduct was "fraudulent." Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp.2d 275, 286 (S.D.N.Y. 1998). See also, e.g., McLaughlin v. Anderson, 962 F.2d 187, 191 (2d Cir. 1992). In addition, "[a]lthough scienter need not be alleged with great specificity, plaintiffs are still required to

plead the factual basis which gives rise to a ‘strong inference’ of fraudulent intent.” Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990).

Here, vague assertions that the Atlantic Yards project is intended to benefit only FCRC fail to satisfy this particularity requirement, which is further grounds for dismissal of the complaint.¹⁷

B. PLAINTIFFS’ EQUAL PROTECTION CLAIM IS NOT VIABLE AND SHOULD BE DISMISSED

The complaint’s “second cause of action” (¶¶ 145-57) purports to allege a violation of the Fourteenth Amendment’s equal protection clause. While the claim is murky and confusing, its thrust appears to be that defendants allegedly have “singl[ed] out plaintiffs” for “adverse” treatment while “selecting FCRC as the recipient of irrational largess” (¶ 150). There is no merit to this claim.

The equal protection clause “is essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254 (1985). Here, the complaint does not allege that plaintiffs are being treated differently from similarly situated persons, but instead seems to compare the plaintiffs’ treatment with that of “FCRC” (¶ 150), which is not similarly situated. A comparison to the treatment of similarly situated persons is an essential element of an equal protection claim, and its absence in

¹⁷ Furthermore, a fraud claim “may not rely upon blanket references to acts or omissions by all the defendants, for each defendant named is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he is individually charged.” Granite Partners, 17 F.Supp.2d at 286. Here, the complaint lumps ten different defendants together – two individuals, two corporations (one of which is publicly held) and six limited liability companies – and accuses them of conspiring to deprive plaintiffs of constitutional rights without ever specifying any particular act taken by any particular defendant. Some of these defendants are merely officers or members of other defendants. The complaint’s failure to differentiate among these defendants in any manner is inconsistent with Rule 9(b) and, therefore, deficient. Similarly, conclusory allegations of conspiracy are insufficient to charge a private party with liability under 42 U.S.C. § 1983. See, e.g., Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002).

and of itself requires dismissal of plaintiffs' claim. See, e.g., Gagliardi v. Village of Pawling, 18 F.3d 188, 192 (2d Cir. 1994) ("it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently"); Economic Opportunity Commission v. County of Nassau, 106 F.Supp.2d 443, 441 (E.D.N.Y. 2000) ("Without an allegation that other persons similarly situated were treated differently, the 'equal' portion of the Equal Protection clause becomes meaningless"). The complaint makes clear that the exercise of eminent domain in this case is part of a large-scale project to redevelop a 22-acre site, and that plaintiffs' properties are far from the only ones to be condemned. Therefore, plaintiffs are not being treated differently from similarly situated persons. See Didden v. Village of Port Chester, 304 F.Supp.2d 548, 561 (S.D.N.Y. 2004) (equal protection claim was not likely to succeed where 37 other lots also would be condemned).¹⁸

Furthermore, where as here the classification at issue was not based upon suspect distinctions such as race, an equal protection claim fails if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 2101 (1993). Here, the public interest in eliminating blight and redeveloping the condemned properties is a sufficient basis for the condemnations that plaintiffs challenge.

¹⁸ Plaintiffs also seem to assert that they have been "selected" for adverse treatment (see Complaint ¶¶ 147-50). If that is their claim, they also need to allege that "the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations such as race, religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure a person." Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995). Plaintiffs have made no such allegation.

C. PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM IS NOT TENABLE AND SHOULD BE DISMISSED

Dismissal of plaintiffs' third "cause of action" (§§ 158-66), a claim that defendants violated plaintiffs' rights to due process, is mandated by the Second Circuit's recent decision in Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005). The complaint alleges that defendants violated plaintiffs' rights to procedural due process by:

- (1) circumventing local and community review and local zoning regulations;
- (2) failing to provide sufficient time to meaningfully respond between the release of the Draft Environmental Impact Statement and the hearing on August 23, 2006;
- (3) failing to provide a hearing that allowed plaintiffs to meaningfully state their objections; and
- (4) at all times providing an empty, meaningless, process, with a pre-determined outcome.

(Compl. ¶ 160.) In Brody, which is dispositive of this claim, the Second Circuit held that the procedures established by New York's EDPL – precisely the procedures that ESDC has followed here – satisfy the requirements of due process.

"Due process requires that a deprivation of property be preceded by notice that is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,' ... and an 'opportunity for hearing appropriate to the nature of the case.'" Brody, 434 F.3d at 127, quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57 (1950). "The fundamental requisite of due process of law is the opportunity to be heard." Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020 (1970), quoting Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914).

In Brody, the Second Circuit rejected a condemnee's due process challenge, holding that a condemnee "has no constitutional right to participate in the [condemnor's] initial decision to exercise its power of eminent domain," that "the post-determination review procedure set forth in EDPL § 207 is sufficient," and that "[d]ue process does not require New York to furnish a

procedure to challenge public use beyond that which it already provides.” 434 F.3d at 133. The court also observed that the degree of “public participation” that is provided for in the EDPL goes “well beyond that which is required by the Due Process Clause” *Id.* at 134 n. 11.

Here, there is no allegation that ESDC failed to comply with the procedural requirements of the EDPL. To the contrary, the complaint acknowledges that ESDC held a public hearing on August 23, 2006, followed by a public forum in September (Compl. ¶¶ 80-81), and accepted written comments from the public until September 29 (*see* Compl. ¶ 82). Therefore, ESDC’s procedures exceeded the EDPL’s requirements, which in turn exceed the requirements of due process. The specific procedural defects alleged in the complaint thus cannot constitute a due process violation. The 30-day period between publication of the DEIS and the August 23 public hearing (*see* Compl. ¶ 79) complied with State law, and there is no claim that plaintiffs were precluded from submitting comments to ESDC. Plaintiffs do not allege that they failed to receive notice of the August 23 hearing or September 12 forum. The complaint also alleges that “[m]any people wishing to attend” the August hearing “could not get in and most wishing to speak were not allowed to do so” (¶ 80), and that defendants scheduled the September 12 forum on an inconvenient date (¶ 81). But *Brody* holds that there is no constitutional right to participate in such events. In any event, there is no allegation in the complaint that any of the plaintiffs were prevented from attending or speaking.¹⁹

Finally, the complaint’s assertion that defendants circumvented community review and local zoning regulations (Compl. ¶ 160) appears to refer to ESDC’s override of local zoning, as a result of which the procedures applicable to land use decisions under the City’s Uniform Land

¹⁹ To the contrary, plaintiffs’ co-counsel, Mr. Baker, spoke and submitted extensive written comments, while plaintiff Goldstein and a lawyer from South Brooklyn Legal Services also spoke.

