

To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

DEVELOP DON'T DESTROY BROOKLYN; DANIEL GOLDSTEIN; ATLANTIC AVENUE BETTERMENT ASSOCIATION; FORT GREENE ASSOCIATION; BOERUM HILL ASSOCIATION; FIFTH AVENUE COMMITTEE; EAST PACIFIC BLOCK ASSOCIATION; PROSPECT HEIGHTS ACTION COALITION by its President Patti Hagan; PRATT AREA COMMUNITY COUNCIL; SOCIETY FOR CLINTON HILL; DEAN STREET BLOCK ASSOCIATION (4TH TO 5TH Ave.) by its President Judy Sackoff; PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL; ELISELLE ANDERSON; DAVID SHEEIS; KEN DIAMONSTONE; and PACIFIC CARLTON DEVELOPMENT CORP.,

Petitioners-Respondents,

against

EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Appellant,

and

FOREST CITY RATNER COMPANIES,

Respondent.

BRIEF FOR RESPONDENT-APPELLANT

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Preliminary Statement

This brief is submitted on behalf of Respondent-Appellant Empire State Development Corporation ("ESDC") in support of its appeal from that portion of an order and judgment of Supreme Court, New York County (Hon. Carol Edmead), entered February 15, 2006, that granted the request of Petitioners-Respondents (hereinafter "petitioners") to disqualify ESDC's longstanding environmental counsel David Paget, Esq. and his firm Sive, Paget & Riesel, P.C. ("Sive Paget") from continuing to represent ESDC in connection with the proposed Atlantic Yards Arena and Redevelopment Project ("Atlantic Yards") in Brooklyn, and directed that ESDC retain new environmental counsel within 45 days.

Questions Presented

1. Did the court below properly grant petitioners' motion to disqualify Mr. Paget and his firm, where it is not disputed that petitioners do not have, and never have had, an attorney-client relationship with either of them?

Answer: No. The Court of Appeals and this Court have clearly held that a person who has never had an attorney-client relationship with a lawyer lacks standing to move to disqualify that lawyer.

2. Did the court below correctly conclude that Mr. Paget had a conflict of interest under DR 5-105 as a result of his asserted simultaneous

representation of ESDC and Respondent Forest City Ratner Companies ("Forest City"), the developer of the Atlantic Yards project?

Answer: No. The only evidence in the record demonstrates that there was no simultaneous representation on the Atlantic Yards project, since Mr. Paget was retained by ESDC as of October 1, 2005 and provided no further advice to Forest City on the project thereafter. Thus, the asserted conflict should have been analyzed as one involving consecutive representation under DR 5-108. But, in any case, there simply was no conflict here.

3. Even assuming that there was a conflict under the applicable Disciplinary Rules (which ESDC disputes), did the court below commit error by failing to consider that both Forest City and ESDC – the only parties with an attorney-client relationship with Mr. Paget and his firm – waived any conflict that may have existed, having been properly informed and represented by counsel when they did so?

Answer: Yes. The court below committed clear error by failing to address the waiver issue. The lower court's perception of an "appearance" of impropriety does not cure this error, since the rule governing the appearance of impropriety does not "trump" a waiver that is properly given pursuant to other Disciplinary Rules that expressly permit it.

4. In issuing its disqualification order, did the court below improperly rely on the asserted appearance of impropriety, without considering the harm to ESDC that would result from disqualifying its longstanding counsel of choice on the large and complex Atlantic Yards project?

Answer: Yes. The court below acted solely on the basis of a perceived appearance of impropriety, and gave no consideration to the harm to ESDC resulting from its disqualification order. Had it done so, it is respectfully submitted that it would have concluded that any potential harm from allowing ESDC's counsel to continue was sufficiently mitigated by the fact that petitioners, or any other member of the public who is aggrieved by any final action taken by ESDC respecting the Atlantic Yards project, can obtain review of such action, on the merits and on a fully developed record, in an Article 78 proceeding or other appropriate legal action, whereas disqualifying Mr. Paget operates to deprive ESDC of its counsel of choice on the large and complex Atlantic Yards project, harms the parties and the public interest by bringing the environmental review process to a screeching halt while new counsel is sought, and affords petitioners an unwarranted tactical advantage in their continuing campaign to oppose the Atlantic Yards project.

Nature of the Case and Summary of Argument

ESDC appeals from that portion of an order of the Supreme Court, New York County that disqualified its long-time outside environmental counsel, David Paget, and his law firm Sive Paget, from representing ESDC in connection with its review, under the State Environmental Quality Review Act ("SEQRA"), of the Atlantic Yards redevelopment project in Brooklyn, a proposed multi-billion dollar development that includes a sports arena and convention center, as well as commercial office and retail space and affordable housing. The project – if ESDC allows it to proceed – is expected to eliminate blighted conditions, re-energize downtown Brooklyn and provide affordable housing, living-wage jobs and public amenities.

But no large redevelopment project is without opposition from some members of the public, and petitioners have made clear their ardent opposition to the Atlantic Yards project. Of course, the project has its supporters too, including Senator Charles Schumer, Congressman Edolphus Towns, members of the State Legislature and City Council, and community leaders. (See R 757-800) ESDC 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.

The present dispute had its genesis in a challenge by petitioners (which the court below properly rejected) to a Declaration of Emergency, issued by ESDC on December 15, 2005, that authorized the developer of the project, Forest City, to demolish five vacant and dilapidated buildings within the "footprint" of the proposed development, on the ground that they posed a threat to public health and safety. However, petitioners also sought an order disqualifying Mr. Paget as counsel to ESDC, claiming that he had a conflict of interest because he had represented Forest City at an earlier stage of the Atlantic Yards project and because other members of his firm continue to represent Forest City on two small matters that are unrelated to the project and do not involve ESDC.

Although it is not disputed that both ESDC and Forest City at all times knew of and approved Mr. Paget's representation of the other in connection with the Atlantic Yards project, the court below nonetheless concluded that ESDC's retention of Mr. Paget created an "appearance of impropriety" because members of the public might question ESDC's impartiality if it continued to use Mr. Paget as its lawyer, since he had been retained by the project's developer at an earlier time. Accordingly, even though it found no improper conduct by Mr. Paget, the court disqualified him and his firm, and directed ESDC to retain new counsel within 45 days. In so ruling, the lower court expressly stated, *"I don't doubt on the issue of Paget that the Court's determination may not stand. . . . The Court may be*

wrong on that, and on appeal, I will understand and read the reversal on that issue." (R 915) (Emphasis added)

ESDC respectfully submits that the doubts expressed by the court below as to the correctness of its ruling are well founded, and that its decision is fraught with error. First and foremost, the court below simply ignored decisions of this and other Courts holding that parties who, like petitioners here, have never had an attorney client relationship with the lawyer they seek to disqualify lack standing to seek such disqualification. If petitioners or any other members of the public are aggrieved by any final action taken by ESDC on the Atlantic Yards project, their remedy is to bring an Article 78 proceeding, in which that administrative action can be reviewed on the merits and on a fully developed record. But they cannot move to disqualify a lawyer who never represented them because such a lawyer owes them no duty, and "if there is no duty owed, there can be no duty breached." Stathis v. N.Y. Housing Auth., N.Y.L.J., Dec. 20, 1993, at 29 (Sup. Ct. N.Y. Co. Dec. 17, 1993) (quoting Rowley v. Waterfront Airways, Inc., 113 A.D. 2d 926, 493 N.Y.S. 2d 828, 829 (2d Dep't 1989). (See Argument, Point I, infra)

Wholly apart from its failure to even address the threshold issue of standing, the court below also failed to properly identify the applicable Disciplinary Rule under the facts of this case, and its conclusion that a conflict existed was clearly in error. The lower court analyzed the asserted conflict in this

case as one arising from Mr. Paget's asserted *simultaneous* representation of Forest City and ESDC under DR 5-105. But the only evidence concerning the dates of Mr. Paget's engagements clearly shows that he provided advice to Forest City on the Atlantic Yards project from time to time from December 2003 through September 2005, after which he ceased advising Forest City on the project, and that his engagement by ESDC began – as explicitly stated in a written retainer letter signed by Mr. Paget and ESDC – effective as of October 1, 2005. (R 469-80)

Thus, the applicable rule in this case is DR-108, which deals with consecutive representation, and not DR 5-105. But there is no violation of DR 5-108 here, because that rule is particularly concerned with the protection of the confidences of former clients and it is well settled that it cannot be invoked by persons (like petitioners here) who never had an attorney-client relationship with the lawyer in question. Moreover, while other lawyers at Mr. Paget's firm did continue to represent Forest City on two small matters after he began representing ESDC, this simultaneous representation cannot give rise to a conflict under DR 5-105 because those matters do not involve either the Atlantic Yards project or the ESDC, and no reasonable lawyer would conclude that they would adversely affect Mr. Paget's professional judgment on the Atlantic Yards matter. Thus, there is simply no legally cognizable conflict here. (See Argument, Point II, infra)

But even assuming that a "conflict of interest" existed with respect to Mr. Paget's representation of ESDC and Forest City (a point with which ESDC does not agree), the court below failed to address the fact that the only two clients in this case – ESDC and Forest City – clearly waived that conflict, and were well-informed and advised by counsel when they did so. By finding an appearance of impropriety in the face of such a waiver, the court below violated well-established law holding that the Disciplinary Rule concerning an appearance of impropriety cannot "trump" a representation that is proper pursuant to other provisions of the Disciplinary Rules. (See Argument, Point III, infra)

Finally, in summarily disqualifying Mr. Paget on the ground of a perceived appearance of impropriety, the court below failed to balance against this concern (or even to consider) the very real and serious harm that its decision was likely to cause to ESDC in this matter. Courts have repeatedly cautioned that the right to counsel of one's choosing is an important right that is not to be taken lightly. Yet, while petitioners clearly have an adequate remedy in the form of an Article 78 proceeding in the event ESDC takes final action that is inappropriate here, the court below gave no consideration at all to the consequences to ESDC of disqualifying Mr. Paget – one of the preeminent environmental lawyers in the United States, on whom ESDC has relied for nearly 30 years for environmental

advice with respect to its largest and most complex development projects, and who will be very difficult, if not impossible, to replace.

The lower court also failed to heed the repeated admonitions of this and other courts that motions to disqualify counsel should be viewed with great skepticism, particularly where they may have been interposed by an adversary to gain a tactical advantage. That is clearly the case here, where, no sooner had the court below issued its ruling, than petitioners' counsel announced to the press that the disqualification of Mr. Paget "colors everything else" and suggested that it could be used to bolster a potential future challenge to the project as a whole after the environmental review process is concluded. See N. Confessore, *Demolition Can Proceed for Brooklyn Arena*, New York Times, Feb. 15, 2006, at B-4. ESDC submits that, balanced against the lower court's asserted perception of impropriety, the following facts clearly weigh against the extraordinary remedy of disqualification in this case:

- petitioners had no attorney-client relationship with Mr. Paget and thus lacked standing;
- the only parties who did have such a relationship (ESDC and Forest City) clearly waived any conflict that may have existed;
- petitioners and other members of the public have an adequate remedy by means of an Article 78 proceeding to address any final action taken by ESDC with which they may disagree;

- the lower court's disqualification order operates to deprive ESDC of its longstanding counsel of choice for complex development projects such as this one;
- the disqualification order harms all parties and the public by bringing the important environmental review process for the Atlantic Yards project to an abrupt halt, just as it is getting under way; and
- the order appealed from effectively provided petitioners an unwarranted tactical advantage in their continuing campaign to oppose the Atlantic Yards project.

(See Argument, Point IV, infra)

Accordingly, as explained in greater detail below, ESDC respectfully submits that the order and judgment below should be reversed to the extent that it disqualified Mr. Paget and his firm from continuing to represent ESDC on the Atlantic Yards project and directed that ESDC retain new counsel within 45 days.

FACTS

The Empire State Development Corporation

ESDC is New York State's lead economic development agency. Its primary mission is to encourage economic investment and prosperity in the state. To this end, ESDC offers a wide range of development programs, and helps promote large-scale real estate projects that create and retain jobs and/or re-invigorate distressed areas. (R 10) As a state-wide agency, ESDC has the power to override local zoning ordinances and exercise condemnation power in furtherance of its mission. (R 451 ¶ 8)

The Atlantic Yards Project

The Atlantic Yards project is a major mixed-use redevelopment project proposed to be built in the Atlantic Terminal area in Brooklyn. It includes a sports and convention center, extensive commercial office and retail space, new residential space including affordable middle-income and market-rate housing, and parking. (R 297) The project is expected to eliminate blighted conditions, re-energize downtown Brooklyn and improve the overall quality of life by providing housing for a wide range of incomes, living wage jobs with career ladders and public amenities. Respondent Forest City is the developer of the Atlantic Yards project.

ESDC's Review of the Atlantic Yards Project under SEQRA

Before being approved, the Atlantic Yards project will have to comply with the requirements of SEQRA and will be subjected to extensive environmental analysis and review, a process that began last Fall. On September 16, 2005, ESDC issued a "Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement" for the Atlantic Yards project. (R 288-89 ¶ 6) This document, more commonly known as a "Positive Declaration," announced that ESDC had determined that the proposed project was a "Type I" action within the meaning of the SEQRA regulations, and that it would be acting as the lead agency in connection with the preparation of the

Environmental Impact Statement ("EIS") for the project required under SEQRA. (R 289 ¶ 6) Along with the Positive Declaration, ESDC disseminated to the public a 41-page Draft Scope of Analysis for an Environmental Impact Statement (the "Draft Scoping Document"). ESDC held a public hearing on October 18, 2005 to obtain comments on the Draft Scoping Document. (R 289 ¶ 7)

After considering comments from the public, ESDC will revise the Draft Scoping Agreement and issue a Final Scope of Analysis for an Environmental Impact Statement (the "Final Scoping Document"), which will determine the issues, as well as the methodologies for analyzing those issues, that will be addressed in the EIS. (Id.) Prior to the ruling of the court below, ESDC had expected to issue the Final Scoping Document in early or mid-March. The issuance of this Final Scoping Document, however, is only a preliminary event that will lead to a detailed and exhaustive analysis of the potential environmental impacts of the Atlantic Yards project. After issuing the Final Scoping Document, ESDC will prepare and make available to the public a draft EIS, and will hold one or more public hearings to obtain comments on the draft. (R 289-90 ¶ 8) The hearings will provide an opportunity for the public to present their views on whether the draft EIS is adequate in its examination of potential environmental impacts and its proposals for mitigation of those potential impacts. Thereafter, a final EIS will be issued, which is subject to judicial review.

ESDC's Outside Environmental Counsel

David Paget is a member of the Sive Paget firm and is considered to be one of the preeminent environmental lawyers in the United States. (R 449 ¶ 3, 452 ¶ 12) He has special expertise in the preparation of EIS's required for large and complex projects pursuant to the National Environmental Policy Act and its New York State and New York City counterparts, SEQRA and the City Environmental Quality Review process. (R 462 ¶ 3) For nearly 30 years, he has represented ESDC on a wide variety of major projects. (R 462 ¶ 5)

In December 2003, Forest City contacted Mr. Paget seeking to retain him for the limited purpose of providing advice regarding the nature, scope and preparation of the environmental studies, reports, and other submissions that would likely be required by ESDC in its review of the Atlantic Yards project. (R 463 ¶ 6) ESDC was aware of this retention and approved of it. (R 450 ¶ 5)

At the time Forest City retained Mr. Paget, it was represented by the firm of Fried Frank Harris Shriver & Jacobson LLP as its counsel in connection with the Atlantic Yards project. (R 463 ¶ 6) Moreover, Mr. Paget expected that ESDC was likely to seek to retain him in connection with the preparation of the EIS in the event ESDC became the lead agency for the Atlantic Yards project, and said so at a meeting in February 2004 with representatives of Forest City and Fried Frank. (R 463-64 ¶ 8) ESDC shared this expectation. (R 450 ¶ 7) Accordingly, it

was understood by all relevant parties – Sive Paget, Forest City, Fried Frank, and ESDC – that Mr. Paget's representation of Forest City would be of limited duration, and that his ultimate client would be ESDC. (R 450 ¶ 7, 463-64 ¶ 8)

In September 2005, as it prepared to begin the environmental review process for the Atlantic Yards project, ESDC advised Mr. Paget that it wished to retain him to represent ESDC in connection with that review beginning on October 1, 2005. Shortly thereafter, a formal retainer agreement was executed. (R 469-80) Since October 1, 2005, Mr. Paget and his firm have advised only ESDC with respect to the project and have provided no advice to Forest City concerning the project. (R 465 ¶ 11)

The Proceedings Below

Petitioners are various neighborhood organizations and individuals who claim to live in or near the "footprint" of the Atlantic Yards project – all of whom have declared their opposition to the project. (R 72-82) On January 19, 2006, they brought an Article 78 proceeding by Order to Show Cause against both ESDC and Forest City, seeking, among other things, a temporary restraining order and a preliminary injunction enjoining ESDC from "undertaking or authorizing" the demolition of the five vacant buildings within the footprint of the Atlantic Yards project that were the subject of ESDC's December 15, 2005 Declaration of Emergency. (R 56-58, 143-44)

Petitioners' verified petition asserted two causes of action against ESDC. The first was for an alleged violation of SEQRA and sought the annulment of ESDC's Declaration of Emergency. (R 89-90) The second alleged a conflict of interest in Mr. Paget's representation of ESDC on the Atlantic Yards project on the grounds that he previously represented Forest City on the same project and that other lawyers in his firm are continuing to represent Forest City on other unrelated matters which do not involve ESDC. (R 91-92) Based on this alleged conflict, petitioners sought an order disqualifying Mr. Paget and Sive Paget from representing ESDC on the Atlantic Yards project and directing ESDC to refrain from issuing a Final Scoping Document until it retained new counsel. (R 92)¹

On January 19, 2006, finding that petitioners failed to make a sufficient showing of irreparable harm or a likelihood of success on the merits, the court below denied their motion for a temporary restraining order. (R 182-83) It did, however, set an expedited briefing schedule for the preliminary injunction motion.

ESDC opposed petitioners' application for a preliminary injunction and cross-moved to dismiss the two causes of action against it. (R 284-86) Forest

¹ During the preliminary injunction hearing before the court below, petitioners withdrew their request to enjoin ESDC from issuing the Final Scoping Document until it retains new counsel. (R 804)

City also cross-moved to dismiss petitioners' claims against it. The court below held oral argument on these motions on February 14, 2006. (R 801-917)

At the conclusion of the hearing, the court announced its ruling from the bench and issued a written Order and Memorandum Decision. The court denied petitioners' application for a preliminary injunction, granted ESDC's cross-motion to dismiss petitioners' cause of action for annulment of the Declaration of Emergency, denied ESDC's cross-motion to dismiss petitioners' cause of action for disqualification of Mr. Paget and Sive Paget, and granted petitioners' verified petition as to the cause of action for disqualification "to the extent that the ESDC is hereby enjoined from taking any further action which requires the services of outside counsel David Paget and his firm, until new counsel is engaged." (R 6) The order also directed ESDC to retain new counsel within 45 days. (Id.)

Although it found no improper conduct by Mr. Paget, the court disqualified him based on its conclusion that his representation of ESDC on the Atlantic Yards project created an "appearance of impropriety." (R 43-44) In so ruling, however, the court stated: "*I don't doubt on the issue of Paget that the Court's determination may not stand. . . . The Court may be wrong on that, and on appeal, I will understand and read the reversal on that issue.*" (R 915)

On February 17, 2006, ESDC filed this appeal from the portion of the lower court's decision disqualifying Mr. Paget from representing ESDC on the Atlantic Yards project and directing that it retain new counsel. (R 3-4)

**THE LEGAL STANDARD
APPLICABLE TO THIS APPEAL**

Whether the court below properly disqualified Mr. Paget and his firm from representing ESDC on the Atlantic Yards project is reviewable for an abuse of discretion. See Prudential Sec., Inc. v. Wyser-Pratte, 187 A.D.2d 306, 306, 589 N.Y.S.2d 335, 336 (1st Dep't 1992). Issues of law, however, are reviewed by the Court *de novo*. See Humble Oil & Ref. Co. v. Jaybert Esso Serv. Station, Inc., 30 A.D.2d 952, 952, 294 N.Y.S.2d 190, 192 (1st Dept 1968); see also Dukas v. Davis Aircraft Prods. Co., 123 A.D.2d 304, 305, 506 N.Y.S.2d 203, 204 (2d Dep't 1986) (reversing determination granting disqualification of counsel and noting that it was "substitut[ing]" its discretion for that of the court below).

Moreover, this Court need not defer to the factual findings of the court below in this case. See Orbit Holding Corp. v. Anthony Hotel Corp., 121 A.D.2d 311, 315, 503 N.Y.S.2d 780, 783 (1st Dep't 1986). Where, as here, findings of the lower court are based on a paper record, this Court is "equally empowered to draw inferences and make findings of fact based upon the evidence in the record." Id. See also Forum Ins. Co. v. Worcester County Inst. for Sav., 219 A.D.2d 492, 492, 631 N.Y.S.2d 165, 165 (1st Dep't 1995) (where trial court's findings are "based

largely on uncontradicted documentary evidence," appellate court is equally empowered as trial court to draw inferences and make findings of fact upon evidence in the record).

Applying the above principles to this case, this Court should reverse the lower court's order disqualifying Mr. Paget and his firm.

ARGUMENT

I

PETITIONERS LACK STANDING TO SEEK MR. PAGET'S DISQUALIFICATION

It is well-settled that a party has no standing to move to disqualify another party's counsel where it does not have and has never had an attorney-client relationship with such counsel. See Promanagement Assocs., Inc. v. DeMott, 284 A.D.2d 124, 124, 725 N.Y.S.2d 338, 339 (1st Dep't 2001). "The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by an attorney to a current or former client. When the [counsel] sought to be disqualified had never represented the moving party, that [counsel] owed no duty to that party. And it follows that *if there is no duty owed there can be no duty breached.*" Rowley v. Waterfront Airways, Inc., 113 A.D.2d 926, 927, 493 N.Y.S.2d 828, 829 (2d Dep't 1985) (emphasis added); Stathis v. N.Y. Housing Auth., N.Y.L.J. Dec. 20, 1993, at 29 (Sup. Ct. N.Y. Co. Dec. 17, 1993) (quoting Rowley); see also Saftler v. Gov't Employees Ins. Co., 95 A.D.2d 54, 57, 465 N.Y.S.2d 20, 22 (1st

Dep't 1983) (noting that where party had no previous attorney-client relationship with counsel it sought to disqualify, court was not confronted with the requisite "delicate balanc[ing]" between "the interests of the client who desires to retain an attorney of his or her choice against the interests of the opposing party to be free from any risk of opposition by an attorney who had been privy to that litigant's confidence"); Singh v. Friedson, 10 A.D.3d 721, 722, 783 N.Y.S.2d 46, 47 (2d Dep't 2004) ("Since the plaintiff was neither a former nor present client of the law firm . . . , he did not have standing to seek its disqualification from dual representation of the two defendants").

The purpose of restricting standing to seek disqualification of counsel to those within the intended zone of protection of the conflicts rules is to safeguard against potential misuse of those rules. As the Court of Appeals for the Fifth Circuit aptly observed:

The underlying rules relating to attorney conflicts of interest are designed to allay any apprehension a client may have in frank discussion of confidential information with his attorney. . . .

To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist. It would place in the hands of the unauthorized surrogate powerful presumptions which are inappropriate in his hands. . . . *We are reluctant to extend this where the party receiving*

such an advantage has no right of his own which is invaded.

In re Yarn Processing Patent Validity Litig., 530 F.2d 83, 90 (5th Cir. 1976)

(emphasis added).

Here, petitioners have never claimed that they were ever represented by Mr. Paget or his firm. Thus, petitioners lack standing to seek to disqualify them from representing ESDC on the Atlantic Yards project. If, as they contend, they are interested in protecting the integrity of the SEQRA review process, petitioners have other avenues for doing so. SEQRA has procedures in place for public participation in the lengthy process of preparing first a draft and then a final Environmental Impact Statement. Moreover, if the Atlantic Yards project is ultimately approved by ESDC without proper compliance with SEQRA, petitioners can challenge the approval on the merits through an Article 78 proceeding or other appropriate action.

Although ESDC raised the issue of petitioners' lack of standing to seek Mr. Paget's disqualification in the court below, the lower court simply ignored this dispositive issue. ESDC submits that the lower court erred by considering petitioners' disqualification motion despite their lack of standing.

II

THE COURT BELOW ERRED AS A MATTER OF LAW IN FINDING THAT MR. PAGET HAD A CONFLICT

The court below based its decision to disqualify Mr. Paget and his firm on the clearly erroneous conclusion that Mr. Paget had engaged in *simultaneous* representation of Forest City and ESDC on the Atlantic Yards project (R 43), even though the *only* evidence in the record clearly showed that his representation of these two entities on that project was sequential, not simultaneous. This led the lower court to erroneously evaluate Mr. Paget's alleged conflict under DR 5-105, which deals with simultaneous representation, instead of the correct provision, DR 5-108, which deals with consecutive representation. As will be shown, there was no conflict under *either* provision.

A. The Lower Court's Finding of a *Prima Facie* Conflict Was Based on a Clearly Erroneous Factual Finding

The court below based its order disqualifying Mr. Paget and his firm on its clearly erroneous finding that Mr. Paget *simultaneously* represented both Forest City and ESDC on the Atlantic Yards project. In its Memorandum Decision, the lower court stated:

Thus, in December 2003, Ratner Companies commissioned Mr. Paget and his lawfirm [sic] to begin working on the Atlantic Yards Project. From the time Mr. Paget was retained in 2003, until September 2005, he provided advice to Ratner

Companies. Yet, in February 2005, during this almost two-year period, and mid-project completion, the ESDC formally retained Mr. Paget as outside counsel to the ESDC to perform "[l]egal services . . . in connection with the environmental analysis of the Project" that ESDC would "authorize and oversee" (Ratner Companies, Exh. H). In short, the ESDC essentially hired the sponsor's current lawyer, at the sponsor's expense, to assess the environmental ramifications of the sponsor's project.

(R 43) (Emphasis added; ellipsis in original)

Based on the above findings, the court below held that Mr. Paget's simultaneous representation of ESDC and Forest City on the Atlantic Yards project created a *prima facie* conflict under DR-105. (R 43) As a threshold matter, however, the record is uncontroverted that Mr. Paget *never* simultaneously represented ESDC and Forest City on the Atlantic Yards project. (R 465 ¶ 11)

"Ratner Companies, Exh. H," which the court below cited in the above-quoted passage to support its conclusion concerning the date Mr. Paget was retained by ESDC, is in fact nothing more than a *draft* of a *cost reimbursement* agreement between Forest City and ESDC dated February 2, 2004 (not 2005). This draft, as well as the final version, merely sets forth the agreement of Forest City to pay certain costs incurred by ESDC with respect to the Atlantic Yards project, including "[l]egal services to be provided by Sive, Paget & Riesel, P.C. in connection with the environmental analysis of the Project." (R 501-12 ¶¶ 6, 8, 524-30, 634-39) (Emphasis added)

It is undisputed that ESDC did not retain Mr. Paget until October 1, 2005, pursuant to a formal engagement agreement signed by ESDC and Mr. Paget dated October 24, 2005. (R 449 ¶ 5, 464-65 ¶ 11, 469-80) Mr. Paget ceased providing advice to Forest City in September 2005 and thereafter represented only ESDC on the Atlantic Yards project. (R 465 ¶ 11) Indeed, even petitioners have not contended otherwise; a press release issued by petitioners on February 16, 2006 specifically states that Mr. Paget began representing ESDC on the Atlantic Yards project in October 2005. See Press Release, Develop Don't Destroy Brooklyn, Inc., Empire State Development Corporation to Appeal Decision to Disqualify Conflicted Attorney David Paget from Review of Ratner's "Atlantic Yards" (Feb. 16, 2006), <http://www.developdontdestroy.org/litigation/ESDCAppealRelease021606.php>.

Given the clear and uncontroverted record, this Court need not accept the lower court's clearly erroneous finding that Mr. Paget represented ESDC and Forest City simultaneously on the Atlantic Yards project. Orbit Holding, 121 A.D.2d at 315, 503 N.Y.S.2d at 783; Forum Ins., 219 A.D.2d at 492, 631 N.Y.S.2d at 165. This is significant, because the lower court's erroneous finding on the issue of simultaneous representation led the court to apply the wrong Disciplinary Rule in evaluating the asserted conflict here.

B. There Is No Conflict Under DR 5-108

Because Mr. Paget's representation of Forest City ended before he began representing ESDC on the same project, the applicable ethical rule here is DR 5-108, which deals with consecutive representation on substantially related matters. This rule, which the court below completely ignored, provides that an attorney "who has represented a client in a matter . . . shall not, without the consent of the former client after full disclosure . . . represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client." DR 5-108(A)(1).

It is well-settled that a party seeking disqualification of its adversary's lawyer based on a prior representation must demonstrate that (i) there was an attorney-client relationship between the moving party and opposing counsel, (ii) the matters involved in both representations are substantially related, and (iii) the interests of the present client and former client are materially adverse. See Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 636, 684 N.Y.S.2d 459 (1998). All three tests must be satisfied to warrant disqualification of counsel. Id.; see also Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 308, 610 N.Y.S. 2d 128, 130 (1994) (purpose of DR 5-108 is "to fully protect client confidences and secrets, to offer a clear test which is easy to administer and to avoid an appearance of impropriety on the part of the attorney or the law firm").

As discussed above, no attorney-client relationship ever existed between petitioners and Mr. Paget. Thus, disqualification of Mr. Paget or his firm is plainly not warranted under DR 5-108(A)(1).

C. There Is Likewise No Conflict Under DR 5-105

As the undisputed record evidence makes clear, the only simultaneous representation at issue here arises from the fact that, after Mr. Paget began representing ESDC on the Atlantic Yards project, other members of Mr. Paget's firm continued to represent Forest City on two small matters that have no relationship to the Atlantic Yards project and do not in any way involve ESDC. (R 466-67 ¶ 15)² The determination of whether this presents an impermissible conflict is governed by DR 5-105, which states in pertinent part:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be

² One of these matters involves a federal Clean Air Act compliance issue, on which Mr. Paget's firm has billed Forest City at total of approximately \$23,000 since the inception of this matter in March 2004. The other involves an oil spill, on which the fees have totaled approximately \$4,000 since inception in September 2003. (R 466-67 ¶ 15)

adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

C. In the situations covered by DR 5-105 [1200.24] (A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Because the matters on which other lawyers at the Sive Paget firm are representing Forest City are wholly unrelated to the Atlantic Yards project on which Mr. Paget is representing ESDC, and do not involve ESDC in any way, there is no likelihood that Mr. Paget's exercise of independent professional judgment on behalf of ESDC will be adversely affected so as to violate subparagraph A or B above. See Asset Alliance Corp. v. Ervine, 279 A.D.2d 365, 365-66, 719 N.Y.S.2d 247, 248 (1st Dep't 2001) (holding that law firm's representation of petitioner's officers in unrelated lawsuit involving unrelated issues did not create a conflict warranting disqualification); cf. EC 5-15 ("Simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not by itself require consent of the respective clients").

But even if there had been a *prima facie* showing of a conflict, the proper procedure was not to summarily grant petitioners' cause of action seeking

disqualification, as the lower court did here. Rather, where an adverse representation is *prima facie* improper, "the attorney must be prepared show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976).

Here, the court below, despite referring to the very language from Cinema 5 quoted above, nevertheless summarily disqualified Mr. Paget from representing ESDC on the Atlantic Yards project based solely on the asserted *prima facie* conflict, without first giving him an opportunity to make that showing. This was clearly error. Cf. Aerojet Props. Inc. v. State of NY, 138 A.D.2d 39, 41, 530 N.Y.S.2d 624, 626 (3d Dep't 1988) (applying *prima facie* standard to simultaneous representation, but holding that law firm met burden of demonstrating absence of any conflict in loyalties or impediments to vigorous representation of each client, especially given that there was "absolutely no substantive nexus between the two lawsuits" or "any real potential for the disclosure of confidential information"); Univ. of Rochester v. G.D. Searle & Co., No. 00-CV-6161L B, 2000 WL 1922271, at *4-7 (W.D.N.Y. Dec. 11, 2000) (finding that even if defendants had established a *per se* conflict under DR 5-105, plaintiff met its burden of demonstrating absence of actual or apparent conflict in loyalties or diminution in vigor of representation).

Moreover, the lower court's precipitous action in disqualifying Mr. Paget was at odds with CPLR § 7804(f). That section provides that if a motion to dismiss is denied, "the court *shall* permit the respondent to answer, upon such terms as may be just." (Emphasis added) Here, the lower court denied ESDC's cross-motion to dismiss petitioners' cause of action for disqualification of counsel, but rather than giving ESDC an opportunity thereafter to file an answer (and thus to demonstrate the absence of any actual or apparent conflict in Mr. Paget's loyalties), the court below summarily granted petitioners' cause of action for disqualification of counsel. Truncating the proceedings in such a manner also constitutes clear legal error.

III

EVEN IF A CONFLICT EXISTED, IT WAS WAIVED BY ESDC AND FOREST CITY

Wholly apart from its error in finding a conflict on the record in this case, the court below further erred as a matter of law in failing to recognize the waiver by both ESDC and Forest City of any potential conflict. Indeed, the court below simply failed to address this issue, even though, like the issue of petitioners' lack of standing, it was clearly raised by ESDC below.

With respect to Mr. Paget's prior representation of Forest City on the Atlantic Yards project, the applicable ethical rule (as explained above) is DR 5-108(A)(1). On its face, this rule provides that the prior client of an attorney can

consent to that attorney's subsequent representation of another client on a substantially related matter in which the second client's interests are materially adverse to the interests of the prior client. See N.Y. Code of Prof'l Responsibility DR 5-108(A)(1).

Here, the record is clear that Forest City, which at all relevant times has been represented by the law firm of Fried Frank Harris Shriver & Jacobson LLP, gave its consent to Mr. Paget's representation of ESDC on the Atlantic Yards project. (R 492 ¶ 17) Thus, the consent of Forest City alone is sufficient to make Mr. Paget's representation of ESDC permissible under DR 5-108(A)(1).

While it is true that other lawyers at the Sive Paget firm are currently representing Forest City on two minor matters, these are completely unrelated to the Atlantic Yards project and do not even involve ESDC. (R 466-67 ¶ 15) Here again, however, ESDC and Forest City, both of which are sophisticated entities with their own in-house counsel, have consented to their simultaneous representation by Sive Paget on those different matters. (R 452 ¶¶ 10, 11, 492-493, ¶¶ 15, 17) Cf. St. Barnabas Hosp. v. N.Y.C. Health and Hosps. Corp., 7 A.D.3d 83, 93, 775 N.Y.S.2d 9, 17 (1st Dep't 1994) (finding waiver by plaintiff in part because it was "a sophisticated, institutional client, and one obviously well-versed in dealing with attorneys"). It is well-settled that a governmental entity may waive an attorney's potential conflict of interest in the same way as a private party. See N.Y.

State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 629, 1992 WL 46531, at *1, *4 (1992).

Because a disinterested lawyer would believe that Mr. Paget can competently represent the interest of ESDC on the Atlantic Yards project and that other lawyers in his firm can competently represent Forest City on the two smaller and unrelated matters that do not involve ESDC, these consents by ESDC and Forest City are sufficient under DR 5-105(C) to waive any potential conflict. See In re Metropolitan Transp. Auth., 222 A.D.2d 340, 341, 635 N.Y.S.2d 604, 605 (1st Dep't 1995) (affirming denial of application to disqualify counsel where counsel satisfied DR 5-105(C) by obtaining informed consent of all parties they were simultaneously representing); see also N.Y. City Bar Ass'n, Formal Op. 2001-2, 2001 WL 1870202, at *3 ("[T]here are many situations in transactional practice involving the simultaneous representation of clients with 'differing interests' where the 'disinterested lawyer' test of DR 5-105(C) may be satisfied"); Levine v. Levine, 56 N.Y.2d 42, 48, 451 N.Y.S.2d 26, 29 (1982) (parties to an agreement "have an absolute right to be represented by the same attorney provided 'there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement'") (citation omitted).

In light of the express waivers given by ESDC and Forest City, it was clearly error for the court below to disqualify Mr. Paget and his firm.

IV

THE COURT BELOW IMPROPERLY PREMISED ITS DISQUALIFICATION ORDER ON AN "APPEARANCE OF IMPROPRIETY" AND FAILED TO GIVE ADEQUATE CONSIDERATION TO ESDC'S RIGHT TO COUNSEL OF ITS CHOICE

As shown in Point II, above, in finding that a conflict existed here, the court below (1) erroneously concluded that the present situation involved simultaneous (instead of consecutive) representation, (2) improperly applied DR 5-105 (instead of DR 5-108), (3) erroneously concluded that a *prima facie* showing had been made that a conflict existed, and then (4) summarily disqualified Mr. Paget without affording him the requisite opportunity to demonstrate that there would be no conflict as a result of his representation of ESDC in this matter. The court then compounded this pile of errors, as shown in Point III above, by failing to consider that, if any conflict existed here, it was waived by ESDC and Forest City – the only two parties with standing to address the issue of Mr. Paget's disqualification.

But the court below did not stop there. It further compounded these multiple errors by committing two more errors of law that were equally serious, if not more so.

First, it premised its disqualification of Mr. Paget on its conclusion that his representation created an "appearance of impropriety," since it felt that residents of Brooklyn would not perceive that ESDC's review of the Atlantic Yards project was fair and impartial where ESDC's environmental lawyer had previously represented Forest City. (R 43, 915-916) It is well-settled, however, that "[t]he appearance of impropriety alone is not sufficient to require disqualification." In re Stephanie X., 6 A.D.3d 778, 780, 773 N.Y.S. 2d 766, 767 (3d Dep't 2004); see also First Hudson Fin. Group, Inc. v. Martinos, No. 114378/05, 2005 WL 3700724, at *2 (Sup. Ct. N.Y. County Dec. 6, 2005) (to be published in N.Y.S. 2d); N.Y. City Bar Assn. Comm. on Prof'l & Judicial Ethics, Formal Op. 1996-3, at n.5, 1996 WL 1581122, at *9 (April 2, 1996). Indeed, there can be no appearance of impropriety if the representation does not violate another ethical rule. See Landa v. Bleier, 1 Misc. 3d 902(A), 781 N.Y.S. 2d 625 (text available at 2003 WL 22928561, at *8 (Sup. Ct. Nassau Co. Nov. 19, 2003) ("Since a conflict does not exist, an appearance of impropriety is not present and disqualification is not warranted"); Bennett Silvershein Assocs. v. Furman, 776 F. Supp. 800, 806 (S.D.N.Y. 1991) (stating that Canon 9, which deals with appearance of impropriety, "does not confer a roving moral commission to disqualify attorneys based on conduct specifically treated in other Canons").

Here, as shown above, there was no violation of any Disciplinary Rule – and even if there had been such a violation, it was waived by ESDC and Forest City. In these circumstances, the lower court's perception of an appearance of impropriety was an insufficient basis, as a matter of law, upon which to premise the disqualification of Mr. Paget and his firm.

Second, in a motion to disqualify counsel, an appearance of impropriety, if it exists, must still be carefully weighed and balanced against a party's right to counsel of its choice and the possibility that the request for disqualification may be motivated by tactical considerations. As the Court of Appeals has stated: "Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party's right to representation by counsel of choice and danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation." Jamaica Pub. Serv. Co., 92 N.Y.2d at 638, 684 N.Y.S.2d at 462-63; cf. Board of Education v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (although lawyer's potential conflict gave appearance of impropriety because of "the public importance of the civil rights issue at the heart of the dispute," in absence of claim that trial will be tainted, "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases").

Although not absolute, a party's right to its counsel of choice "is a valued right and any restrictions must be carefully scrutinized." See S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 738 (1987). Moreover, given the importance of this right, a party seeking disqualification of an opposing party's counsel bears a heavy burden. This is especially so because "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client." Solow, 83 N.Y.2d at 310, 610 N.Y.S. 2d at 131; see also First Hudson, 2005 WL 3700724, at *2 ("[D]isqualification interferes with a party's right to retain counsel of his choice, and, in the current reality of litigation, disqualification motions are often utilized as a tactical tool. Therefore, motions to disqualify an attorney are subject to a high burden of proof"); Olmoz v. Town of Fishkill, 258 A.D.2d 447, 447, 684 N.Y.S.2d 611, 612 (2d Dep't 1999) ("A party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion"); Nyquist, 590 F.2d at 1246 (noting that court's reluctance to disqualify counsel despite misgivings about the attorney's conduct "probably derives from the fact that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons").

In light of these considerations, it was clearly error for the court below to fail to engage in the balancing required by the Court of Appeals in Jamaica Public Service, supra. Had it done so, it could not properly have ordered Mr. Paget's disqualification here.

On petitioners' side of the balance – putting aside the issue of petitioners' lack of standing and the other legal errors that infect the order appealed from – the sole consideration is the lower court's concern that ESDC will not be able to fairly consider the Atlantic Yards project if it continues to be represented by Mr. Paget, who formerly represented Forest City on the project. But this concern is clearly mitigated by the fact that petitioners have other means for protecting the integrity of the SEQRA review process, such as participation in public hearings and the availability of judicial review in an Article 78 proceeding. See Chem. Bank v. Affiliated FM Ins. Co., No. 87 Civ. 0150, 1994 WL 141951, at *19 (S.D.N.Y. April 20, 1994) ("absence of any real risk of trial taint or prejudice to [plaintiff]" compelled court "to find that [plaintiff] has pressed this motion [for disqualification] solely to obtain a tactical advantage").

On the opposite side of the balance, however, even petitioners do not dispute that Mr. Paget is one of the preeminent environmental lawyers in the United States, with special expertise in preparing environmental impact statements for large, complex projects such as Atlantic Yards, and has represented ESDC in

numerous major projects for nearly 30 years. (R. 888, 67 ¶ 39, 449 ¶ 3, 452 ¶ 12, 462-63 ¶ 5) A project of the magnitude of Atlantic Yards requires the advice of experienced counsel who is familiar with the intricacies of the SEQRA review process. Having worked with Mr. Paget on numerous major projects for nearly 30 years, ESDC has complete confidence in Mr. Paget's advice and his ability to deal with all types of exigencies. Obtaining a suitable replacement for such longstanding and specialized counsel will be difficult, if not impossible, and is clearly a hardship for ESDC. Cf. Solow, 83 N.Y.2d at 309-10, 610 N.Y.S.2d at 131 (noting that a current client may "face significant hardships when the chosen attorney is disqualified, thus depriving the client of the specialized knowledge of counsel of choice and forcing the client to familiarize a new attorney with the matter").

Moreover, the present disqualification motion is clearly being used as a tactical weapon in petitioners' steadfast campaign to oppose the Atlantic Yards project. Indeed, after the court below had issued its disqualification order, petitioners' counsel wasted no time asserting to the press that the order would bolster a future challenge to the environmental review process because Mr. Paget's involvement in the process, even briefly, "colors everything else." N. Confessore, Demolition Can Proceed for Brooklyn Arena, New York Times, Feb. 15, 2006, at B-4. Thus, even replacing Mr. Paget with new counsel apparently will not be

sufficient to satisfy petitioners that the SEQRA review process will be fair.

Similarly, no sooner did ESDC advise petitioners that it intended to file this appeal than petitioners issued a press release in which they publicly disparaged ESDC for exercising its right to appeal and excoriated it for seeking to retain the services of its counsel of choice, Mr. Paget. See Press Release, Develop Don't Destroy Brooklyn, Inc., [Empire State Development Corporation to Appeal Decision to Disqualify Conflicted Attorney David Paget from Review of Ratner's "Atlantic Yards"](#) (Feb. 16, 2006), supra.

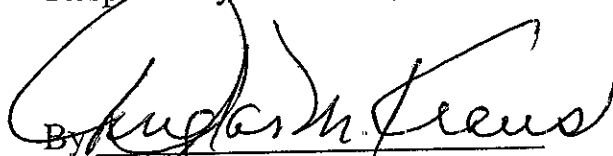
In sum, given the circumstances of this case – including petitioners' lack of any attorney-client relationship with Mr. Paget or his firm; the absence of any conflict, and the waiver by both ESDC and Forest City of any conflict that may have existed; Mr. Paget's expertise and experience in the SEQRA review process; his nearly 30 years history of representing ESDC on major projects; the complexity of the Atlantic Yards project; the substantial hardship to ESDC if it is required to retain new counsel; the availability to petitioners of an Article 78 proceeding to challenge the project if it is finally approved by ESDC; and petitioners' efforts to use disqualification as a tactical tool in their campaign against the Atlantic Yards project – this Court should reverse the lower court's order disqualifying Mr. Paget and his firm, and permit ESDC to continue to be represented in this matter by counsel of its choice.

CONCLUSION

For all the foregoing reasons, this Court should reverse the lower court's order disqualifying ESDC's outside environmental counsel and requiring ESDC to engage new counsel within 45 days.

Dated: New York, New York
February 21, 2006

Respectfully submitted,



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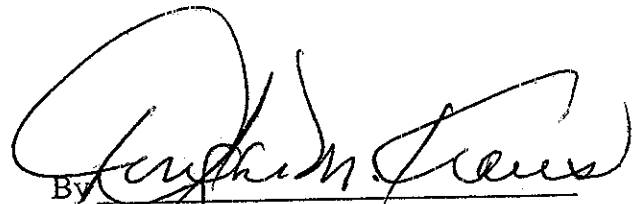
Pursuant to 22 NYCRR § 600.10 (d) (iv) the foregoing brief was prepared on a computer.

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Dated: New York, New York
February 21, 2006



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

----- x

DEVELOP DON'T DESTROY BROOKLYN,
 et al.,

Index No. 100686/06

Petitioners – Respondents,

- against -

STATEMENT PURSUANT
 TO
CPLR 5531

EMPIRE STATE DEVELOPMENT
 CORPORATION,

Respondent –Appellant,

-and-

FOREST CITY RATNER COMPANIES,

Respondent.

----- x

1. The index number of the case in the court below is 100686/06.
2. The full names of the original parties to this action are: Develop Don't Destroy Brooklyn; Daniel Goldstein; Atlantic Avenue Betterment Association; Fort Greene Association; Boerum Hill Association; Fifth Avenue Committee; East Pacific Block Association; Prospect Heights Action Coalition by its President Patti Hagan; Pratt Area Community Council; Society For Clinton Hill; Dean Street Block Association (4th and 5th) by its President Judy Sackoff; Prospect Heights Neighborhood Development Council; Eliselle Anderson; David Sheets, Ken Diamondstone; and Pacific Carlton Development Corporation ("Petitioners") and Empire State Development Corporation and Forest City Ratner Companies, Respondents. There has been no change in the parties during the pendency of this action.
3. This action was commenced in the Supreme Court, New York County.
4. This Article 78 proceeding was commenced by Order to Show Cause and

Verified Petition on January 19, 2006. Service of the Order to Show Cause was made on that date. Separate Orders to Show Cause were filed and served on February 8, 2006 by proposed intervenors Juan Barrera, Antonio Rodriguez, Antonio Gomes, and Faouzzi Najmi seeking leave to intervene as petitioners, and by Letitia James, Major R. Owens and Velmanette Montgomery seeking leave to appear as amici curiae. Each of the respondents served a motion to dismiss the Verified Petition on February 9, 2006. No answers were served.

5. This is an Article 78 proceeding in which Petitioners-Respondents sought (i) to enjoin the demolition of certain vacant and dilapidated buildings owned by Respondent Forest City Ratner Companies within the "footprint" of the proposed Atlantic Yards Arena and Redevelopment Project in Brooklyn, which demolition Respondent-Appellant ESDC had authorized in its capacity as the "Lead Agency" conducting the environmental review of the project pursuant to the State Environmental Quality Review Act, and (ii) to disqualify ESDC's outside environmental counsel David Paget, Esq. and his firm Sive, Paget & Riesel, P.C.

6. The appeal is from an Order and Judgment made by Hon. Carol Edmead, and entered on February 15, 2006.

7. The full record (reproduced) method of appeal is being used.

Dated: February 20, 2006

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& FLOM LLP

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