

At an IAS Part 74 of the Supreme Court of the State of New York, held in the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 1st day of March, 2010

P R E S E N T:

HON. ABRAHAM G. GERGES,

Justice.

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In the Matter of the Application of the
NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE DEVELOPMENT
CORPORATION to acquire title in fee simple absolute
to certain real property and a temporary easement
in certain real property, required for the

Index No. 32741/09

ATLANTIC YARDS LAND USE IMPROVEMENT AND
CIVIC PROJECT - PHASE I

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The following papers numbered 1 to 10 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1 - 4</u>
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	<u>5</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Answers</u> _____	<u>6 - 8</u>
<u>Transcript dated January 29, 2010</u> _____	<u>9</u>
<u>Proposed Order</u> _____	<u>10</u>

Upon the foregoing papers in this eminent domain proceeding, petitioner New York State Urban Development Corporation (UDC) d/b/a Empire State Development Corporation (ESDC) seeks leave to file acquisition maps for the condemnation of certain properties located in downtown Brooklyn for use as a mixed development project commonly referred

to as the Atlantic Yards Project (the Project). By motion returnable the same day as the petition, respondents Peter Williams Enterprises, Inc.; 535 Carlton Ave. Realty Corp.; Pacific Carlton Development Corp.; Daniel Goldstein; and Chadderton's Bar and Grill, Inc., d/b/a Freddy's Bar and Backroom (collectively referred to as respondents) move for an order: (1) dismissing the petition, with prejudice, pursuant to CPLR 3211 or 3212, on the ground that the Determination and Findings (D&F), made pursuant to Eminent Domain Proceeding Law (EDPL) § 204, dated December 8, 2006 (the 2006 D&F), can no longer serve as the predicate for the seizure of respondents' homes and businesses because (a) the Modified General Project Plan (MGPP), dated December 8, 2006 (the 2006 MGPP), upon which the 2006 D&F were based, was nullified and superceded by a new MGPP, dated September 17, 2009 (the 2009 MGPP), thus vitiating the 2006 D&F; (b) the 2006 D&F and the now superceded 2006 MGPP provide for the acquisition of all properties simultaneously, while the 2009 MGPP provides for the acquisition of properties in two stages; and (c) it is undisputed that the factual underpinnings of the determination of public use, benefit and purpose set forth in the 2006 D&F have materially changed during the more than three years that have passed; or, alternatively (2) dismissing the petition without prejudice based on procedural defects, failure to state a claim and lack of subject matter jurisdiction, pursuant to CPLR 3211 or 3212, because the petition does not comply with the strict requirements contained in EDPL Article 4 and CPLR Article 4, and is thus defective on multiple grounds, including: (a) the petition does not comply with EDPL 402(b)(3)(a), which mandates that the

petition contain a statement alleging compliance with the requirements of article two of the EDPL, because the article two predicate, i.e., the 2006 D&F, have been nullified, superceded and/or materially undermined as set forth above; (b) the petition is premature or unripe because respondents' EDPL 207 challenge to the 2006 D&F has not been finally determined in that respondents filed a timely "Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of a Related Appeal" (the Motion to Reargue) to the Court of Appeals, which was served on petitioner before this action was commenced; (c) the petition does not state the public use, benefit or purpose for which the property is required, as mandated by EDPL 402(b)(3)(d), since the words public use, benefit or purpose are not found in the petition; (d) the petition does not comply with EDPL 402(b)(3)(a) and (b)(3)(d) because the 2006 D&F are incomplete and because petitioner intentionally omitted the list of properties contained in the 2006 D&F in order to conceal the fact that the 2006 D&F were premised upon a single acquisition, which was recently changed to a staged acquisition, without any amendment to the 2006 D&F; (e) the petition allegedly served upon each respondent is incomplete and inconsistent with the petition filed in this court and differs from one respondent to the next because it does not contain true and complete copies of the proposed acquisition maps; (f) the notice of petition and petition seek inconsistent relief with regard to the number of days in which respondents can file a claim; and (g) a condition precedent to the relief requested in the petition as set forth in the 2009 MGPP has not been met since petitioner has not received assurances that the Project will be funded and

completed in accordance with the 2009 MGPP; (3) staying this action, pursuant to CPLR 2201, until such time as petitioner demonstrates that it has corrected the numerous deficiencies outlined above, including without limitation, demonstrating that the adjudication of respondents' current EDPL 207 proceeding or any subsequent proceeding to challenge any subsequent amended or modified EDPL 204 D&F is final; (4) granting leave to respondents to conduct pretrial disclosure, pursuant to CPLR 408, including without limitation, discovery concerning the recent revelations that firmly establish that petitioner has consistently misrepresented the timing of the Project; and (5) directing that a trial will be held, pursuant to CPLR 410, in order for the court to resolve any material factual disputes concerning the various issues raised by this motion and in respondents' verified answer, affirmative defenses and counterclaims. Respondents also file an answer in which they interpose 14 affirmative defenses and three counterclaims seeking substantially the same relief sought in their motion. Respondents Daniel Goldstein, Heron Real Estate Corp., and Pack It Away Storage Systems, Inc. (hereinafter collectively referred to as the Goldstein respondents), file an answer in which they request that in the event that the petition is granted, they should be given three years from the date of service of a notice of acquisition to file a claim and that advance payments should be made available within 90 days of the date that title vests.

Facts

The Atlantic Yards Project has a long and tortuous history, including numerous court challenges in several forums. As has been set forth in detail in the prior decisions, the

Project was conceived in 2002 by Bruce Ratner and several affiliated companies, the Forest City Ratner Companies (collectively referred to hereinafter as FCRC) and was publicly announced on December 11, 2003; the Project is intended to redevelop a 22 acre area located south of Atlantic Avenue near downtown Brooklyn. At sometime thereafter, FCRC joined with UDC and ESDC. Approximately 40% of the site is occupied by the Vanderbilt Rail Yard, owned by the Metropolitan Transit Authority (the MTA), which is situated below grade and provides an active storage and maintenance yard for Long Island Rail Road (LIRR) equipment and retired MTA buses. Approximately 63% of the site is located within the Atlantic Terminal Urban Renewal Area, which was so designated in 1968 because of its substandard and unsanitary conditions. The Project envisions the construction of a publicly owned arena to serve as the home for the New Jersey Nets professional basketball team, owned by Ratner (the Arena); a new subway connection; a platform over and reconfiguration of the rail yard; 16 buildings which will include residential units, office space, retail space and community facilities offering health and child care; and the creation of eight acres of publicly accessible open space.

On December 8, 2006, petitioner UDC adopted the Findings Statement pursuant to the New York State Environmental Quality Review Act (SEQRA); affirmed the 2006 MGPP under the Urban Development Corporation Act (the UDCA); and issued the 2006 D&F, premised upon the 2006 MGPP. The 2006 D&F stated that the principal public use, benefit and purpose of the Project was to eliminate the blighted conditions on the Project Site and

the blighting influence of the below-grade rail yard and alleged that the Project would also provide other public uses, benefits and purposes, including, inter alia, constructing the Arena that would allow the Nets to relocate to Brooklyn and that would provide a venue for community uses; providing 2,250 units of affordable housing; upgrading the LIRR yard to provide a state-of-the-art rail storage, cleaning and inspection facility that would enable the LIRR to better accommodate its new fleet of cars; constructing a new subway entrance; and providing eight acres of publicly accessible open space. The 2006 D&F further stated that the Project would provide certain economic benefits, including, among other things, net tax revenues in excess of the public contribution to the Project.

In June 2009, petitioner revealed its intention to modify the 2006 MGPP. On June 23, 2009, the ESDC directors adopted the 2009 MGPP, along with a 63 page “Technical Memorandum” that details the changes sought and obtained by FCRC, and authorized the publication of public hearing notices as required by the UDCA. On July 29, 2009 and July 30, 2009, ESDC held public hearings pursuant to sections 6 and 16 of the UDCA (Unconsol Laws §§ 6256 and 6266) to receive comments on the 2009 MGPP and on ESDC’s proposed disposition of certain parcels of real property in connection with the Project. ESDC accepted written comments through August 31, 2009. On September 17, 2009, the ESDC directors affirmed the 2009 MGPP.

Judicial Challenges

The Federal Challenge

On January 5, 2007, respondents challenged the 2006 D&F pursuant to EDPL 207 in federal district court, asserting primarily that the proposed condemnation of their properties violated the public use clause of the Fifth Amendment to the United States Constitution, since the government officials who had approved it were substantially motivated by a desire to confer a private benefit on Ratner and that the public uses identified by ESDC were pretexts for a private taking. By decision dated June 6, 2007, the District Court determined that respondents could not establish that the sole purpose of the Project was to transfer property to a private party, since there will be some tax gain, some jobs will be created, the area is blighted and the Project will create affordable housing (*Goldstein v Pataki*, 488 FSupp2d 254, 286-287 [2007]); that they could not establish a plausible grounds to infer an actual purpose to bestow a private benefit (*Goldstein*, 488 FSupp2d at 287-290); and found no merit to respondents' equal protection and due process claims (*Goldstein*, 488 FSupp2d at 290-291). The District Court accordingly dismissed the complaint for failure to state a claim upon which relief could be granted, without prejudice to respondents' state claims being re-filed in state court (*Goldstein*, 488 FSupp2d at 291).

By decision dated February 1, 2008, the Second Circuit rejected respondents' claim that all of the public uses advanced for the Project were pretexts for a private taking that violates the Fifth Amendment, finding that "that viewed objectively, the Project bears at least

a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements” (*Goldstein v Pataki*, 516 F3d 50, 58-59 [2008]); rejected respondents’ contention that the “taking had been effectuated ““under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit””” (*Goldstein*, 516 F3d at 60, quoting *Goldstein*, 488 FSupp2d at 282, quoting *Kelo v City of New London*, 545 US 469, 478 [2005]); and affirmed the judgment of the District Court dismissing the federal claims with prejudice and the state claim without prejudice (*Goldstein*, 516 F3d at 65). The Supreme Court denied certiorari (76 USLW 3674 [2008]).

The Pendent State Claims

On August 1, 2008, respondents re-filed their EDPL 207 claim in the Appellate Division, Second Department, asserting that the proposed taking of their properties is unlawful because it violates the public use clause of New York Constitution, article I, § 7; that the Project contravenes New York Constitution, article XVIII, § 6, because state funds are to be used to defray infrastructure costs associated with the construction of new housing units without restricting those housing units to use by low-income persons; and that the condemnation of their properties violates their due process and equal protection rights. On May 12, 2009, the Appellate Division, Second Department, denied the challenge (*Goldstein v UDC*, 59 AD3d 312 [2009]). As a threshold issue, the court held that the 30-day time period in which persons aggrieved by a condemnor’s determination may seek judicial review

pursuant to EDPL 207(A) does not operate as a condition precedent, so that respondents would be afforded the benefit of CPLR 205(a), which is a remedial statute that provides a litigant with a six-month grace period within which to recommence an action which has been dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or the entry of a final judgment on the merits (*Goldstein*, 64 AD3d at 177).

Turning to the merits, the court rejected respondents' contention that the state can only use its eminent domain power where the condemned property is to be held open for use by all members of the public (*Goldstein*, 64 AD3d at 178-181); held that where land is found to be substandard, its taking for urban renewal is for a public purpose, and there is an adequate foundation in the record to support a finding that the Project area is substandard (*Goldstein*, 64 AD3d at 181-184); recognized that the Project also serves the additional public purposes of creating an arena, publicly accessible open space, affordable housing, improvements to public transit, and new job opportunities (*Goldstein*, 64 AD3d at 182); found that respondents' argument that some of these public benefits may never actually be realized was conclusory and speculative (*Goldstein*, 64 AD3d at 183); held that the record did not support a finding that the Project's public benefits were incidental or pretextual in comparison with benefits to particular, favored private entities (*Goldstein*, 64 AD3d at 183-184); held that Article 6 of the Constitution does not require that all units of housing constructed will be occupied by persons of low income in order to receive public funding

(*Goldstein*, 64 AD3d at 184-185); and rejected respondents' due process and equal protection claims (*Goldstein*, 64 AD3d at 185-186).

On November 24, 2009, the Court of Appeals affirmed the denial of respondents' EDPL 207 claim (*Goldstein v UDC*, ___ NY3d ___, 2009 NY Slip Op 8677 [2009]). In that decision, the majority of the court affirmed the finding that CPLR 205(a) tolls the running of the 30-day period in which a condemnee can challenge a condemnation determination in the Appellate Division pursuant to EDPL 207(A) where that proceeding had been timely commenced but was dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or the entry of a final judgment on the merits (2009 NY Slip Op 8677 at 4-7) and held that ESDC is vested with condemnation power by the Legislature, pursuant to McKinney's Unconsolidated Laws of New York §§ 6260 and 6263, and has sought to exercise the power for the constitutionally recognized public purpose or use of rehabilitating a blighted area (2009 NY Slip Op 8677 at 8-11); that it is indisputable that the removal of urban blight is a proper and constitutionally sanctioned predicate for the exercise of the power of eminent domain (2009 NY Slip Op 8677 at 7); and that the creation of low income housing is not constitutionally required as an element of a land use improvement project that does not entail substantial slum clearance (2009 NY Slip Op 8677 at 11-12). Respondents then made their Motion to Reargue that decision, which was denied by the Court of Appeals on February 18, 2010, after the instant petition was submitted to this court for decision.

The Other State Challenges

By decision dated February 14, 2006, in an Article 78 proceeding commenced by Develop Don't Destroy Brooklyn, Inc. (DDDB), and others against ESDC and FCRC, the Honorable Carol Edmead denied an application to allow additional parties to intervene; granted an application by certain community representatives to file amicus curie briefs; denied an application to annul an Emergency Declaration made by ESDC, which approved the demolition of five parcels of property; denied an application to stay demolition of one of the subject properties; acknowledged the existence of an easement over one of the properties; granted an application to disqualify counsel; and granted respondents' cross motion to dismiss the remainder of the petition (*DDDB v ESDC*, New York Co Sup Ct, Index No 100686/06). By decision dated April 20, 2007, in a subsequent Article 78 proceeding commenced by DDDB and others against UDC, the Honorable Joan A. Madden denied an application for a temporary restraining order staying FCRC from proceeding with demolition of certain properties (*DDDB v UDC*, 2007 NY Slip Op 30825U [2007]). By decision dated January 11, 2008, Judge Madden denied petitioners' challenges to the Project pursuant to SEQRA, the UDCA and the Public Authorities Law (PAL) (*Matter of DDDB v UDC*, 239 NYLJ 15 [2008]). The Appellate Division, First Department, affirmed that decision on February 26, 2009 (59 AD3d 312 [2009]). On December 1, 2009, the Court of Appeals denied petitioners' motion for leave to appeal (___ NY3d ___ [2009]). On February 16, 2010, the Court of Appeals denied petitioners' motion seeking to reargue the denial of their

motion for leave to appeal (___ NY3d ___ [2010]).

By decision entered on May 22, 2007, in a declaratory judgment action challenging UDC's authority to condemn multiple dwellings in which plaintiffs resided as rent stabilized tenants, the Honorable Walter B. Tolub granted defendant's motion to dismiss the complaint for lack of subject matter jurisdiction. That decision was affirmed by the Appellate Division, Second Department, on October 16, 2007, with the court holding that since the condemned buildings are located in Kings County, the Appellate Division, Second Department, had exclusive jurisdiction over plaintiffs' challenges to defendant's constitutional and statutory authority to condemn their rent stabilized leasehold interests pursuant to EDPL 207 (*Anderson v UDC*, 44 AD3d 437 [2007]). By decision dated November 7, 2007, the Appellate Division, Second Department, denied petitioners' EDPL 207 challenge to the Project on the ground that respondent failed to establish that UDC did not make a specific finding that there existed a feasible method for relocation of the tenants in violation of UDCA § 10(g) (McKinney's Uncons Laws of NY § 6260) (*Matter of Anderson v UDC*, 45 AD3d 583 [2007], *lv denied* 10 NY3d 710 [2008]).

By decision dated September 23, 2008, in another Article 78 proceeding commenced by two rent regulated tenants in buildings located in the Project footprint against UDC, the Honorable Jane S. Solomon dismissed a petition seeking to void a Funding Agreement dated September 12, 2007 and entered into between ESDC, the Brooklyn Arena, LLC and Atlantic Yard Development Company, LLC, on the grounds that it permits the acquired property to

remain undeveloped for a period of more than ten years and that it purports to give respondent the option to re-acquire such property as remained undeveloped for four years, as well as an order requiring respondent to hold public hearings on the announced amendments to the Project, finding that petitioners lacked standing and that they did not prove that the Project would be abandoned, that the property would not be timely improved or that the property would be conveyed to a private user without giving the fee owner a right of first refusal as is required pursuant to EDPL 406 (*Anderson v UDC*, New York Co Sup Ct, Index No 102056/08).

By decision dated December 15, 2009, in an Article 78 proceeding commenced against the MTA and FCRC, the Honorable Michael D. Stallman denied a petition seeking to annul a June 24, 2009 resolution of the MTA Board, which approved the sale of property and development rights of the Vanderbilt Railyards to FCRC, based upon the allegation that the MTA violated the Public Authorities Accountability Act of 2005 (Public Authorities Law § 2895 *et seq.*) (PAAA) in failing to obtain an appraisal of the subject property before approval and that the PAAA's provisions concerning competitive bidding were not followed (*Matter of Montgomery v MTA*, 2009 NY Slip Op 52539U (New York Co Sup Ct 2009)). Therein, although Judge Stallman held that petitioners lacked standing to challenge the MTA's action, he rejected petitioners' claims on the merits in an effort to avoid a lengthy appeal.

The Instant Challenge

On December 23, 2009, the petition at issue herein was filed. On January 27, 2010, respondents served their answer with counterclaims. On January 28, 2010, respondents served their motion to dismiss; petitioner rejected the motion as untimely. On January 28, 2010, the Goldstein respondents served their answer. On January 29, 2010, oral argument was heard, the court reserved decision and the matter was submitted.

Respondents' Answer/Motion to Dismiss

The Parties' Contentions

Petitioner argues that it properly rejected respondents' motion to dismiss as untimely and that the motion should not be considered by the court. Petitioner further notes, however, that the contentions and objections raised in the motion are duplicative of those raised in the answer and asks the court to consider its reply to be submitted in opposition to both in the event that the court decides to accept the motion. Petitioner also argues that counterclaims are not properly interposed in a proceeding commenced pursuant to EDPL 402.

Respondents did not address these issues in their papers, but contended during oral argument that their motion is timely and should be considered by the court.

The Law

Numerous statutory provisions must be considered in addressing the issues raised by the parties. EDPL 402(b)(4) provides for the service of an answer:

“Upon the presentation of the petition and notice with proof of service thereof, a condemnee may appear and interpose

a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.”

CPLR 404(a) provides for the service of a motion to dismiss:

“The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court may permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry; and the petitioner may re-notice the matter for hearing upon two days’ notice, or the respondent may re-notice the matter for hearing upon service of the answer upon seven days’ notice.”

As is also relevant herein, EDPL 703 provides that “[t]he civil practice law and rules shall apply to practice and procedure in proceedings under this law except where other procedure is specifically provided by this law or rules governing or adopted by the appropriate court.” EDPL 705 provides that “[n]otwithstanding any inconsistent provisions of law, general or special, the provisions of this law shall be controlling and on and after the effective date of this law, any interest in real property subject to acquisition shall be acquired pursuant to the provisions of this law.” CPLR 406 provides that “[m]otions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time.”

In addressing the issue of the timeliness of a motion to dismiss in a proceeding commenced pursuant to Article 7 of the Real Property Actions and Proceedings Law

(RPAPL), the court held that despite the unfairness of the procedure on litigants opposing substantial motions in landlord-tenant proceedings, respondent correctly argued that any motion in a summary proceeding could be made on little or no notice if it was made returnable at the same time as the petition pursuant to CPLR 406 (*Goldman v McCord*, 120 Misc2d 754, 754-755 [1983]). The court in *Goldman* accordingly held that a motion for summary judgment that was served at 1:00 p.m. on the day before the petition was noticed to be heard was timely. This holding is in accord with the Third Preliminary Report of the Advisory Committee on Practice and Procedure (1959 NY Legis Doc No. 17, at 159), which provides that “[t]his rule shortens the time for notice of pre-hearing motions, so that they may be heard at the hearing on the petition” (*50 E. 191st St Assoc. v Gomez*, 148 Misc2d 560, 561 [1990]). In interpreting these provisions, it is also recognized that one court has noted that “it is not clear that the EDPL contemplates the usual pre-answer motion practice. EDPL 402(B)(4) does not specifically provide for a motion to dismiss and requires that new matter constituting a defense be set forth in the answer” (*In re Application of Rochester Urban Renewal Agency*, 110 AD2d 1086, 1087 [1985]).

Discussion

In accordance with the above quoted statutory language and case law precedent, the court holds that respondents can interpose an answer pursuant to EDPL 402(b)(4) and a pre-answer motion pursuant to CPLR 404(a). In the absence of any provisions in the EDPL governing the time for service of a motion, the court finds that CPLR 406 controls, so that

a motion is timely if made returnable on the same day as the petition. From this it follows that respondents' motion to dismiss is timely. The court further notes that although the law does not contemplate the simultaneous filing of both an answer and a motion to dismiss, as respondents herein did, both raise the same issues, in reliance upon the same facts, with only minor differences. Accordingly, the court will consider both in addressing the petition.

In so holding, the court rejects petitioner's assertion that counterclaims may not properly be pleaded in an EDPL 402 proceeding as specious. In reaching this conclusion, it is noted that the case relied upon by petitioner in so arguing, *Matter of City of New York (Grand Lafayette Props.)* (6 NY3d 540 [2006]), did not hold that counterclaims cannot be interposed in an eminent domain proceeding, but instead held that the counterclaims interposed therein were properly dismissed as time barred (*see generally In re Consolidated Edison Co.*, 143 AD2d 1012, 1013-1014 [1988] [leave to amend an answer to assert a counterclaim seeking a declaratory judgment pursuant to Article 3 of the EDPL was denied as being totally devoid of merit]). Further, if any demands for relief remain as pleaded in the counterclaims after the petition is granted or denied, the court has the discretion to sever them (*see generally Home Gas Co. v Miles*, 46 AD2d 562, 566 [1975] [any question of a prior de facto taking could be resolved in the counterclaim which was previously interposed and severed from the proceeding]).

The Vesting Petition

In addressing the issues now before the court, it is necessary to understand that:

“Under the Eminent Domain Procedure Law (EDPL), a two-step process is required before a condemnor obtains title to property for public use. First, under EDPL article 2, the condemnor must make a determination to condemn the property either by using the hearing and findings procedures of EDPL 203 and 204 or by following an alternative procedure permitted by EDPL 206. Second, pursuant to EDPL article 4, the condemnor must seek the transfer of title to the property by commencing a judicial proceeding known as a vesting proceeding. . . .

“EDPL article 2 sets forth a judicial review procedure, which allows a condemnee only 30 days within which to commence a proceeding directly in the Appellate Division for review of the condemnor’s section 204 determination (*see* EDPL 207). The scope of review is very limited – the Appellate Division must ‘either confirm or reject the condemnor’s determination and findings,’ and its review is confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with SEQRA and EDPL article 2; and (4) the acquisition will serve a public use (EDPL 207 [C]).”

(Matter of City of New York [Grand Lafayette Props.], 6 NY3d at 546). Hence, “[w]hile the Appellate Division may only consider four specific questions delineated by statute when reviewing a proposed acquisition after the first step (*see* EDPL 207 [C]), the question before the trial court in the second step is mainly limited to the value of the condemned property” (*Hargett v Town of Ticonderoga*, 56 AD3d 1016, 1017 [2008], *affd* 13 NY3d 325 [2009]).

As is also relevant to the instant dispute, EDPL 402(B)(3) provides that:

“The condemnor shall present to the court a petition verified by an authorized officer of the condemnor setting forth:

“(a) a statement providing either the compliance with the requirements of article two

of this law, including a copy of the condemnor's determination and findings or a statement providing the basis of exemption from article two;

“(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the condemnees of the property to be acquired;

“(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

“(d) the public use, benefit or purpose for which the property is required;

“(e) a request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor.”

Pursuant to EDPL 402(B)(5):

“At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its satisfaction that the procedural requirements of this law have been met, *the court shall direct the immediate filing and entry of the order granting the petition*, which order the condemnor shall file and enter together with the acquisition map and the bond or undertaking if required, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall

then be vested in the condemnor.”

(Emphasis added).

In interpreting these provisions, it has been held that “[t]he role of a trial court on an application pursuant to EDPL § 402(B) is limited and circumscribed, and the trial court is required to grant the Petition if all the procedural requirements have been met” (*Matter of MTA*, 2007 NY Slip Op 50541U, 2 [New York Co Sup Ct 2007], citing *City of Buffalo Urban Renewal Agency v Moreton*, 100 AD2d 20 [1984]). In discussing the scope of review in an EDPL Article 4 proceeding, it has been held that:

“EDPL 402 (B) (5) provides that, upon the return date of the petition, ‘upon . . . proof to its satisfaction that the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition . . . Upon the filing of the order and the acquisition map, *the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor*’ (emphasis added). Thus, it has been stated that ‘[t]he power of the condemnation court to entertain claims raised by the pleadings in a condemnation proceeding is limited to matters of procedural compliance not within the scope of review by the Appellate Division of the Supreme Court (EDPL 207, 402[B][5)]’ (*Matter of UAH-Braendly Hydro Assoc. v RKDK Assoc.*, 138 AD2d 493, 493 [1988]). ‘On the return of an application for permission to file an acquisition map and for an order to acquire the property . . ., the court must grant the petition if it finds that all of the procedural requirements of the statute have been met’ (*City of Buffalo Urban Renewal Agency v Moreton*, 100 AD2d 20, 22 [1984]; see *Matter of County of Dutchess v Kendall*, 130 AD2d 491, 492 [1987]).”

(*City of Syracuse Indus. Dev. Agency v ExxonMobil Oil*, 5 AD3d 1114, 1115-1116 [2004], appeal dismissed 3 NY3d 656 [2004]).

Discussion

A review of the petition at issue herein reveals that the requirements of EDPL 402(B)(3) have been met. More specifically, the petition contains a statement providing the basis of exemption from compliance with the requirements of article two of the EDPL, including a copy of its determination and findings; a copy of the proposed acquisition map to be filed and the names and places of residence of the condemnees of the property to be acquired; a description of the real property to be acquired and its location; a statement of the public use, benefit or purpose for which the property is required; and a request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor. Accordingly, pursuant to EDPL 402(B)(5), this court is required to direct the immediate filing and entry of the order granting the petition unless there is merit to any of the affirmative defenses or counterclaims interposed by respondents. Inasmuch as petitioner does not object to the filing of respondents' answer, the court will begin by addressing that pleading.

Strict Statutory Compliance

As a preliminary issue, respondents contend that an EDPL proceeding is a special proceeding created by statute that allows for the summary and compelled transfer of real property from one owner to another without any of the normal due process protections afforded by a plenary action. They therefore contend that a party seeking such an

extraordinary, truncated and expedited remedy must strictly satisfy the statutory requirements, since the modifications of procedural rights in special proceedings is in derogation of the common law, as is the case with summary proceedings under the RPAPL.

While the court appreciates respondents' concern for strict compliance with the law, it must also be recognized that while summary proceedings decided under the RPAPL may be informative in discussing general principles applicable to special proceedings, the instant proceeding is a vesting proceeding commenced pursuant to EDPL 402. Since EDPL 703 provides, as discussed above, that the CPLR applies to practice and procedure in proceedings under the EDPL "except where other procedure is specifically provided by this law or rules governing or adopted by the appropriate court," and EDPL 705 provides that "[n]otwithstanding any inconsistent provisions of law, general or special, the provisions of this law shall be controlling and on and after the effective date of this law, any interest in real property subject to acquisition shall be acquired pursuant to the provisions of this law," the court will look to general principles of law governing special proceedings only when specific procedures and precedents relating to EDPL proceedings cannot be found.

First Affirmative Defense: The Copies of the Petitions Served upon Respondents are Not the Same as the Petition Filed in Court

The Parties' Contentions

With these general principles in mind, respondents allege in their first affirmative defense that a complete and accurate copy of the petition was not served upon each respondent and that the petitions served differ materially from the petition filed with the court

in that the petitions served did not contain a complete and accurate set of acquisition maps. They further aver that while EDPL 402(B)(2) allows for notice which contains only those portions of the acquisition map affecting the owners of the subject property, it does not absolve petitioner of its responsibility to serve true, accurate and complete copies of the petition upon all respondents/condemnees.

Petitioner argues that it properly served each respondent pursuant to EDPL 402(B)(2).

The Law

EDPL 402(B)(2) provides, in relevant part, that:

“The condemnor shall, at least twenty days prior to the return date of the petition, serve a notice of the time, place and object of the proceeding upon the owner of record of the property to be acquired, as the same appears from the record of the office in which the acquisition map is to be filed. *Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner’s property.*”

(Emphasis added).

Discussion

As the language of the above quoted provision of the statute makes clear, petitioner need only serve that portion of the acquisition map affecting the owner’s property. Accordingly, respondents’ contention that the petition should be dismissed on the ground that each respondent was not served with the acquisition map for the entire Project is lacking in merit.

Second Affirmative Defense: The Petition is Premature

The Parties' Contentions

Respondents contend that the petition is premature pursuant to EDPL 401(A)(3), which allows for the commencement of proceedings only after entry of the final order or judgment on judicial review pursuant to EDPL 207. They argue that no final order or judgment has been entered in this matter because their Motion to Reargue is currently pending before the Court of Appeals. In that motion, respondents urge the court to hold the Motion to Reargue in abeyance pending determination of the appeal *Kaur v New York State Urban Development Corporation* (___ AD3d ___, 2009 NY Slip Op 8976 [2009]).

In opposition, petitioner argues that the Court of Appeals decision rendered in *Goldstein* (2009 NY Slip Op 8677) on November 24, 2009 constitutes a final order or judgment on judicial review that begins the three-year period provided for in EDPL 401(A)(3) in which a condemnor can commence a vesting proceeding. Petitioner further argues that the filing of a motion to reargue does not alter the finality of the Court of Appeal's decision. From this it follows that this proceeding is not premature in that it was filed within three years of November 24, 2009.

The Law

As is relevant to this issue, EDPL 401(A), time for acquisition, provides that:

“The condemnor may commence proceedings under this article to acquire the property necessary for the proposed public project up to three years after conclusion of the later of:

“(1) publication of its determination and findings pursuant to section two hundred four, or

“(2) the date of the order or completion of the procedure that constitutes the basis of exemption under section two hundred six, or

“(3) entry of the final order or judgment on judicial review pursuant to section two hundred seven of this chapter.”

In addressing a similar issue and holding that the decision of the appellate court on review of an initial EDPL 207 determination was a final order for purposes of beginning the running of the period within which acquisition could occur, one court rejected a condemnees’ argument that because EDPL 207(B) provides that an Appellate Division order is subject to review by the Court of Appeals, and because the condemnee had actually appealed the decision of the Appellate Division, there had not been a final order or judgment on judicial review. In that decision, the court in *In re UDC* (193 Misc2d 290, 295 [New York Co Sup Ct 2002] [footnote omitted]) reasoned that:

“CPLR article 56 governs appeals to the Court of Appeals. CPLR 5611, entitled ‘When appellate division order deemed final,’ states that ‘[i]f the appellate division disposes of all the issues in the action its order shall be considered a final one’ Appellate Division determinations of appeals of special proceedings are final even though they are appealable to the Court of Appeals as of right. (*See Cabrini Med. Ctr. v Desina*, 64 NY2d 1059, 1061, n [1985] [reversing Appellate Division’s affirmance of a Supreme Court order denying a permanent stay of arbitration].) As the Court of Appeals stated in *Da Silva v Musso*, (76 NY2d 436, 440 [1990] [holding that knowledge of pending appeal did not deprive purchaser of real property of bona fide purchaser status in absence of notice of

pendency]):

“It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties’ substantive rights, unless and until it is overturned on appeal. Furthermore, while an appeal from a final judgment or order may leave an inchoate shadow on the rights defined therein, those rights are nonetheless fully enforceable in the absence of a judicially issued stay pending disposition of the appeal.”

Discussion

This court finds that the holding in *In re UDC* (193 Misc2d 290) that a decision of the Appellate Division denying respondents’ EDPL 207 challenge to a petitioner’s proposed taking can be characterized as a “final order or judgment on judicial review” for purposes of EDPL 401 to be persuasive. The court, however, respectfully disagrees and adopts petitioner’s contention that the three-year period provided by EDPL 401(A) in which to commence a vesting proceeding begins to run from the date that the Court of Appeals hands down its decision under circumstances such as these, where the decision rendered by the Appellate Division was promptly appealed. This holding is necessary to avoid the possibility of the Court of Appeals invalidating a decision to take property in a condemnee’s EDPL 207 challenge after title has already vested in a condemnor. In so holding, the court also notes that in this case, it is irrelevant whether the three-year period in which to commence an EDPL Article 4 proceeding began to run on May 12, 2009, when the Appellate Division, Second Department, rendered its decision on the EDPL 207 challenge, or on November 24,

2009, when the Court of Appeals affirmed the decision, since the instant petition was filed on December 23, 2009.

Implicit in this holding is the rejection of respondents' contention that the Court of Appeals decision should not be deemed final until their Motion to Reargue is decided. Moreover, as was noted above, the Motion to Reargue was denied by the Court of Appeals on February 18, 2010, so that this argument has been rendered moot.

Third Affirmative Defense: The Petition is Untimely

The Parties' Contentions

In their third affirmative defense, respondents assert that the petition is untimely, since this proceeding was not commenced within three years of publication of petitioner's determination and findings pursuant to EDPL 204 on December 8, 2006, as required pursuant to EDPL 401(A)(1).

In opposition to this claim, petitioner again argues that the Court of Appeals rendered the decision in *Goldstein* (2009 NY Slip Op 8677) on November 24, 2009 and that that decision constitutes the "entry of the final order or judgment on judicial review pursuant to section two hundred seven of this chapter." Thus, since this proceeding was commenced within three years of the date that the decision was rendered, it is not time barred.

Discussion

As quoted above, EDPL 401(A) provides that a proceeding to acquire title to property may be commenced up to three years after conclusion of the *later* to occur of the publication

of the condemnor's determination, the date of the order or completion of the procedure that constitutes the basis of exemption or the entry of the final order or judgment on judicial review pursuant to EDPL 207. Accordingly, since respondents' argument ignores the clear language of the statute, it is found to be specious and the petition is held to be timely pursuant to EDPL 401(A)(3).

***Fourth Affirmative Defense: The Petition does
Not Designate the Condemnees as Respondents***

The Parties' Contentions

In their fourth affirmative defense, respondents argue that the petition is defective pursuant to CPLR 401. Accordingly, it must be dismissed because it does not designate the proposed condemnees as respondents.

In opposition to this contention, petitioner alleges that since this is an eminent domain proceeding, Article 4 of the EDPL controls and Article 4 of the CPLR does not apply. Further, since a condemnation proceeding is an in rem proceeding against the property sought to be acquired, it is not necessary to name the proposed condemnees as respondents.

The Law

It is well settled that a condemnation proceeding is an in rem proceeding against the land (*In re County of Nassau*, 24 NY2d 621, 627, n 1 [1969], citing *Watson v New York Cent. R. R. Co.*, 47 NY 157 [1872]; *Wabst v State of New York*, 11 Misc2d 971 [1958]). It has also been held that:

“A petition in proper form, filed as required by the

statute, is a jurisdictional prerequisite to the authority of the court to entertain a proceeding thereunder. The petition in condemnation proceedings must describe the property sought to be taken, defining the location and quantity required with such certainty that it may be identified and the extent of the petitioner's claim made known to the owner and a failure of the petition to thus describe the property or any uncertainty in this respect will vitiate the proceedings. It has been uniformly held that in proceedings of this character extreme accuracy is essential for the protection of the rights of all parties."

(*City of Plattsburg v Kellogg*, 254 AppDiv 455, 457 [1938]).

CPLR 401 provides, in relevant part, that "[t]he party commencing a special proceeding shall be styled the petitioner and any adverse party the respondent."

Discussion

While EDPL 402(B)(3) requires that a condemnor must clearly define the location and quantity of the property to be acquired with such certainty that it may be identified and the extent of the claim made known to the owner, and that extreme accuracy is essential (*see Northwest Quadrant Pure Waters Dist. v Payne Beach Assoc.*, 38 AD2d 668 [1971]; *City of Plattsburgh*, 254 AppDiv 455; *Massena v Niagara Mohawk Power*, 87 Misc2d 79 [1976]; *Babylon v Bergen*, 69 Misc 574 [1910]; *Onondaga Water Service v Crown Mills*, 132 Misc 848 [1928]), respondents do not cite to any provisions of the EDPL or controlling case law that requires a condemnor to name the parties holding title to the properties sought to be acquired as respondents in the caption. In fact, the language of EDPL 402(B)(3), which governs the content of a petition in eminent domain proceedings, contains no such requirement. Further, the cases holding that a condemnation proceeding is an in rem

proceeding also support this conclusion, i.e., that petitioners need only describe the property sought to be acquired in the petition and in the maps that must be filed in connection with the taking and to identify the owners in the petition. CPLR 401 does not compel a contrary conclusion since, as was discussed above, the provisions of the EDPL take precedence over the provisions of the CPLR.

***Fifth Affirmative Defense:
Respondents' EDPL 207 Proceeding is Not Complete***

The Parties' Contentions

In support of this defense, respondents argue that the petition does not comply with EDPL 402(B)(3)(a), which provides that: “[t]he condemnor shall present to the court a petition verified by an authorized officer of the condemnor setting forth: a statement providing . . . the compliance with the requirements of article two of this law,” since their EDPL 207 proceeding is not yet final.

In opposition, petitioner argues that the petition fully complies with the requirement of EDPL 402(B)(3)(a) in that paragraph 9 states that ESDC held a public hearing, upon public notice duly given, in compliance with EDPL Article 2; paragraph 10 states that ESDC issued its D&F in accordance with EDPL Article 2; and paragraph 11 describes the challenges to the D&F that were brought and dismissed in the federal and state courts. Petitioner thus concludes that the petition contains statements demonstrating ESDC’s compliance with the requirements of Article 2 of the EDPL.

Petitioner also reiterates its assertion that this proceeding complies with EDPL

402(B)(3) because *Goldstein* (2009 NY Slip Op 8677), which was rendered by the Court of Appeals on November 24, 2009, was a final order disposing of respondents' EDPL 207 challenge, notwithstanding the filing of a subsequent motion to reargue.

Discussion

This argument has been fully discussed and rejected above.

Sixth Affirmative Defense: The Petition Does Not State the Public Use, Benefit or Purpose for which the Property is Required

The Parties' Contentions

In this defense, respondents argue that the petition should be dismissed on the ground that it does not state the public use, benefit or purpose for which the property is required, as mandated by EDPL 402(B)(3)(d), since the terms "public use," "public benefit," and/or "public purpose" are not mentioned therein. Moreover, they aver that petitioner's failure to comply with this statutory mandate is not inadvertent because if petitioner had attempted to comply, in reliance upon the 2006 D&F, it would have been forced to materially misrepresent a host of claimed public uses, benefits or purposes that have since proven ephemeral, thus mandating dismissal. In the alternative, if petitioner had attempted to comply with EDPL 402(B)(3)(d) by setting forth its allegations of public use, benefit or purpose as existed at the time that the petition was verified on December 15, 2009, it would have faced certain dismissal because any truthful allegations of public use, benefit or purpose as of that date materially undermine the 2006 D&F.

In response, petitioner alleges that the petition complies with EDPL 402(B)(3)(d)

because paragraphs 4 and 5 expressly set forth the public use, benefit or purpose for which the property is required:

“ESDC requires the real property interests to be acquired herein for purposes related to the construction of ESDC’s Atlantic Yards Land Use Improvement and Civic Project (the ‘Project’), which involves the renewal and redevelopment of a blighted area in the Atlantic Terminal section of Brooklyn through the clearance, replanning and reconstruction of the area and the construction thereon of a major mixed-use development.

“Pursuant to ESDC’s Modified General Project Plan, the Project calls for the development of a new arena for the New Jersey Nets National Basketball Association Team, sixteen mixed-use buildings and a newly reconfigured Long Island Rail Road train yard to be developed in two or more phases. The properties that ESDC presently seeks to acquire pursuant to the Petition are necessary for the first phase of the Project, which involves construction of the arena and buildings surrounding the arena as well as construction, development and operation of the upgraded LIRR yard.”

Petitioner further avers that here is no requirement that the words “public use, benefit or purpose” be used in describing the Project. In addition, the D&F, attached as Exhibit C to the Petition, set forth in detail the Project’s public uses, benefits or purposes.

Discussion

The court agrees that the above quoted paragraphs of the petition adequately set forth the “public use, benefit or purpose” for which the property is required. In so holding, the court rejects respondents’ contention that the words “public use, benefit or purpose” must be used in the petition. Moreover, the petition includes a copy of the 2006 D&F, which also sets forth the public use, benefit or purpose which the Project is intended to serve.

***Seventh Affirmative Defense: The Public Use,
Benefit or Purpose of the Project has Changed***

The Parties' Contentions

In this affirmative defense, respondents argue that the petition does not comply with EDPL 402(B)(3)(d) because the public use, benefit or purpose described therein has changed materially from what was described in the 2006 D&F.

In opposition, petitioner again cites the above quoted paragraphs of the petition and refers to the fact that the 2006 D&F were annexed thereto to argue that the petition sets forth the Project's public uses, benefits and purposes. Petitioner further contends that respondents' allegations concerning the alleged changes in the public use, benefit or purpose of the Project are not properly raised in an EDPL Article 4 proceeding. Moreover, petitioner argues that even if the modifications were subject to judicial review, the 2009 MGPP did not change the elements of the Project that have already been determined to constitute a public use by both the Second Circuit and the Court of Appeals. More specifically, petitioner asserts that the 2009 MGPP and 2006 MGPP are virtually identical, as they both involve the same project site (2006 MGPP at 2, Exhibit A-2; 2009 MGPP at 2, Exhibit A-2); the same 17 buildings at the same locations (2006 MGPP, Exhibit A-1; Exhibit 3, Exhibit E); the same uses in these 17 buildings (*id.*; 2006 MGPP at 3-16; 2009 MGPP at 3-17); the same eight acres of publicly accessible open space (2006 MGPP at 16-17; 2009 MGPP at 17-18); compliance with the same set of comprehensive Design Guidelines for the 17 Project buildings and eight acres of open space (2006 MGPP at 6, 7, Exhibit B; 2009 MGPP at 6,7, Exhibit B); a new LIRR

yard with a new, direct portal to the Atlantic Terminal (2006 MGPP at 12-14; 2009 MGPP at 13-14); a new subway entrance at the southeast corner of Atlantic and Flatbush Avenues, on the Arena Block (2006 MGPP at 10-11, 35-37; 2009 MGPP at 10-12, 30, 37-38); and the same private developer (2006 MGPP at 1; 2009 MGPP at 1). Petitioner further argues that the principal change to the 2006 MGPP by the 2009 MGPP is that the Project site properties will be acquired in phases, instead of being acquired in their entirety at one time (2009 MGPP at 22), and that such a change in the phasing of property acquisition does not trigger the need for a new D&F under the EDPL, citing to *Leichter v UDC* (154 AD2d 258 [1989]), and does not re-open the public use issues that have already been decided by the Second Circuit and by the Court of Appeals.

Petitioner further argues that although respondents contend that the EDPL findings with respect to the Project were materially undermined by the 2009 MGPP, they fail to identify a single change that had such a result. Instead, their argument focuses on modifications to the business arrangement between FCRC and the MTA that were approved on June 24, 2009. In this regard, petitioner argues that while respondents did not contest this modification, a challenge made by other parties was rejected in *Matter of Montgomery* (25 Misc3d 1241). Moreover, petitioner asserts that the MTA business arrangement has no relevance to the validity of the 2006 D&F because those findings relate to the public purposes of the Project, which have not changed. They also note that FCRC's obligations to ESDC are dictated not by a transaction with the MTA, but by the 2009 MGPP and the

implementing agreements between FCRC and ESDC. The essential terms of the Development Agreement obligate FCRC to construct the Project as described in the 2009 MGPP and to use commercially reasonable efforts to do so by 2019 (2009 MGPP at 9).

The Law

Pursuant to EDPL 207:

“(A) Any person or persons jointly or severally, aggrieved by the condemnor’s determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor’s completion of its publication of its determination and findings pursuant to section two hundred four herein. . . .

“(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.”

It must also be noted that pursuant to EDPL 208:

“Except as expressly set forth in section two hundred seven, and except for review by the court of appeals of an order or judgment of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear and determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article.”

In interpreting these provisions, it has been held that a party’s challenge to a

petitioner's condemnation determination on the grounds of bad faith and/or lack of public purpose is properly raised and addressed in a proceeding commenced pursuant to EDPL 207 and cannot be raised in a proceeding pursuant to EDPL 402 (*see e.g. Matter of Town of Southold [Town Hall Expansion Project]*, 50 AD3d 1045, 1045 [2008], citing *Matter of City of New York [Grand Lafayette Props.]*, 6 NY3d 540; *Matter of 49 WB v Village of Haverstraw*, 44 AD3d 226 [2007]; *Matter of City of New Rochelle v O. Mueller, Inc.*, 191 AD2d 435 [1993]; *Matter of Village of Johnson City v Bolas*, 157 AD2d 1009 [1990]; *MTA v Pinelawn Cemetery*, 135 AD2d 686 [1987]; *City of Buffalo Urban Renewal Agency*, 100 AD2d 20). Stated differently:

“[P]ursuant to EDPL 207(A), persons aggrieved by a condemnor's determination and findings must seek judicial review in the appropriate Appellate Division within 30 days after ‘the condemnor's completion of its publication of its determination and findings’. [The Appellate Division] has exclusive original jurisdiction to hear and determine a condemnee's objections (*see*, EDPL 207[B]; *Matter of Farmington Access Rd. of Town of Farmington*, 156 AD2d 936; *Matter of Incorporated Vil. of Patchogue v Simon*, 112 AD2d 374). Having failed to comply with the requirements of EDPL 207 by filing a timely petition for review of the condemnor's determination in this court, the appellants ‘may not circumvent the command of the statute with respect to the procedures governing judicial review by raising [their] objection . . . within the context of an article 4 vesting proceeding’ (*Metropolitan Transp. Auth. v Pinelawn Cemetery*, 135 AD2d 686, 688, citing *Matter of Incorporated Vil. of Patchogue v Simon*, *supra*, at 375; *see also*, *Matter of Broome County [Havtur]*, 159 AD2d 790; *Matter of Farmington Access Rd. of Town of Farmington*, *supra*).”

(*City of New Rochelle*, 191 AD2d at 436).

Also relevant to the disposition of this issue is the *Leichter* case (154 AD2d 258). Therein, the Appellate Division, First Department, addressed the condemnees' contention that amendments to the 42nd Street development project as originally proposed had materially affected the public justification for its completion, so that the original hearings conducted by respondent and approved by the Court of Appeals as complying with EDPL requirements were insufficient with respect to the amended plan, thereby requiring new hearings pursuant to EDPL 203. In that case, the amendments involved an expansion of the proposed use of a site originally designated as a wholesale facility mart in the original plan to encompass a commercial office tower and a provision for the sequential acquisition of sites as they became available for development, rather than the simultaneous acquisition originally contemplated. In rejecting petitioners' contention that a de novo review was necessary, the court held that:

“The only question before this court is whether respondent's determination to proceed with its redevelopment plan was made in compliance with statutory procedures (EDPL 207[C][3]). As noted, the statute does not bar changes in a public project subsequent to the publication of the findings and determination of the condemning authority pursuant to EDPL 204. However, in view of the omission of specific procedures to be followed upon modification, it is the responsibility of the courts to fill the interstices in the statutory scheme. In this regard, we agree with Supreme Court that it is sufficient that the agency hold a hearing, limited to consideration of the amendments in the plan, during which the factors enumerated in EDPL 204(B) are open to discussion. This procedure is sufficient to promote the statutory purpose ‘to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain’ (EDPL

101). . . .

“Our holding is further supported by a consideration of the practicalities surrounding a project of this scale. As appellants point out in their brief, during the time that this project has been delayed due, in no small part, to attendant litigation, ‘the real estate market in Midtown Manhattan dramatically changed.’ In addition, several developers withdrew from the project for financial and other reasons. It is clear to this court that if respondent is required to start the hearing process anew, conditions will very likely have changed again by the time the amended plan emerges from the approval process with the attendant legal challenges, thereby extending the review procedure ad infinitum. The hearing requirements set forth in the Eminent Domain Procedure Law and the Urban Development Corporation Act are designed to solicit community involvement in the planning process, not to serve as a vehicle by which public development can be effectively foreclosed.”

(*Leichter*, 154 AD2d at 259-260).¹

Further, in commenting on the decision in *Leichter*, another court observed that:

“[T]he UDC Act envisions a single review of a proposed project which, upon affirmance by the UDC, will then be undertaken without unnecessary delay so as to require no further proceedings (UDC Act § 16[2]). Indeed, as the Court of Appeals has pointed out, the legislative intent behind this statute is the elimination of long and costly delays in urban development projects resulting from regulations imposed by

¹ The court in *Leichter* also rejected petitioners’ contention that respondent could not take advantage of the exemption afforded by EDPL 206(C) because the agency violated UDCA § 16(2)(f), which requires that the agency modify its plan in the manner provided for the initial filing of such plan in paragraph (a) of this subdivision, because that section contemplates only modifications in the plan which arise out of the initial public hearings. The court thus concluded that “[l]ike the Eminent Domain Procedure Law, the UDC Act is silent on the subject of the procedure to be followed when a plan is modified subsequent to its initial approval” (*Leichter*, 154 AD2d at 260). Although respondents do not raise any arguments under the UDCA, the court would reach the same result and find the claim to be lacking in merit if such a claim was raised.

various levels of government, and from local disputes regarding how a project is best to be carried out (*Matter of Waybro Corp. v Board of Estimate, supra*, at 356).”

(*Toh Realty v City of New York*, 154 AD2d 267, 268 [1989], *lv denied* 75 NY2d 705 [1990]).

The court also recognizes that pursuant to the doctrine of res judicata, a judgment on the merits by a court of competent jurisdiction is conclusive upon parties in a litigation and those in privity with them in any subsequent action with regard to issues of fact and questions of law necessarily decided in the earlier action (*see e.g. Gramatan Home Investors v Lopez*, 46 NY2d 481, 485 [1979]; *Watts v Swiss Bank*, 27 NY2d 270 [1970]). In contrast, the doctrine of collateral estoppel, or issue preclusion, “precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity” (*Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002], citing *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). “The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action (*see e.g. City of New York v College Point Sports Assn.*, 61 AD3d 33, 42 [2009], citing *Buechel*, 97 NY2d at 304; *D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*see e.g. City of New York*, 61 AD3d at 42, citing *Buechel*, 97 NY2d at 304; *Matter of Juan C. v Cortines*, 89 NY2d 659, 667 [1997]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]).