

Discussion

It has already been determined that the petition adequately sets forth the public use for which the subject property is needed. The court also finds, as argued by petitioner, that the public purpose to be served by the Project was not changed by the 2009 MGPP. Moreover, to the extent that the Project has changed, the above discussed holdings in *Leichter* (154 AD2d 258) and *Toh Realty* (154 AD2d 267) clearly establish that petitioner is not obligated to begin a de novo review proceeding (*see also Binghamton Urban Renewal Agency v Manculich*, 67 NY2d 434, 438 [1986], *appeal denied* 68 NY2d 808 [1986] [since EDPL 401(A)(2) provides for a limitations period of up to three years from the date of the order or completion of the procedure that constitutes the basis of exemption under section two hundred six, the three-year period commenced running when the ordinance adopting and approving the plan was approved and the requirements of EDPL 206(A) were satisfied, since no new consideration of the factors enumerated in EDPL 204 was evidenced in the subsequent amendment to the plan]). In this regard, it must also be noted that the numerous judicial challenges to the Project resulted in extensive delay, as was the case in *Leichter*. More significantly, it cannot be disputed that the economic conditions in which the Project was proposed in 2002 have changed drastically in that the world-wide economy is now in one of the worst downturns in history.

Further, to the extent that respondents' argument can be construed as challenging the public use, benefit or purpose of the Project, this challenge is time barred in that the claims

were not interposed in an EDPL 207 proceeding commenced in the Appellate Division within 30 days of September 17, 2009, the date that the 2009 MGPP was affirmed (*see e.g. Matter of City of New York [Grand Lafayette Props.]*, 6 NY3d 540; *Matter of Haverstraw v Ray River Co.*, 62 AD3d 1016 [2009]; *Matter of Town of Southold [Town Hall Expansion Project]*, 50 AD3d 1045; *Matter of 49 WB*, 44 AD3d 226; *Matter of City of New Rochelle*, 191 AD2d 435; *Matter of Broome County [Havtur]*, 159 AD2d 790; *Matter of Village of Johnson City v Bolas*, 157 AD2d 1009; *Matter of Farmington Access Rd. of Town of Farmington*, 156 AD2d 936; *Matter of Incorporated Vil. of Patchogue v Simon*, 112 AD2d 374; *MTA*, 135 AD2d 686; *City of Buffalo Urban Renewal Agency*, 100 AD2d 20).

In so holding, the court rejects respondents' assertion that they should be permitted to raise their arguments concerning the changes made to the Project in this proceeding because petitioner successfully convinced the Appellate Division, Second Department, and/or the Court of Appeals that their EDPL 207 challenge could not address any issues outside the record, i.e., any facts that became known after the petition was filed or that came into existence thereafter or, more specifically, that petitioner adopted the 2009 MGPP on September 17, 2009, which they argue fatally undermined the 2006 D&F. In this regard, respondents, who have been represented by counsel throughout these proceedings, were aware of the 30-day time period, since they timely interposed a proceeding in federal court to contest the 2006 D&F.

Moreover, in the decision that the Appellate Division, Second Department, rendered

on respondents' state claims on May 12, 2009, the court specifically addressed the issue of whether the 30-day time limit in EDPL 207 in which to challenge ESDC's determination precluded respondents from maintaining a challenge in state court after the Second Circuit dismissed their federal challenge. Thus, since this decision was rendered before the Project was modified on September 17, 2009, any claim by respondents that they were not aware of the time requirements of EDPL 207 is specious. The court therefore concludes that if respondents wished to challenge the Project on the ground that after the 2009 MGPP was adopted, the Project was no longer supported by an acceptable public use, purpose or benefit, they should have commenced a separate proceeding in the Appellate Division pursuant to EDPL 207 within 30 days of September 17, 2009. Having failed to do so, respondents' arguments concerning whether the 2009 MGPP is sufficient to support a constitutional public purpose are now time barred.²

Similarly, inasmuch as the question of the public use to be served by the project is a matter that could have been determined in a proceeding under EDPL Article 2, jurisdiction to hold such a hearing is limited to the Appellate Division or the Court of Appeals pursuant to the express mandate of EDPL 207(b) and 208 (*see e.g. In re Broome County*, 159 AD2d at 791, citing *Matter of Waldo's v Village of Johnson City*, 74 NY2d 718, 720 [1989]

² Even if a challenge to the 2009 MGPP could be characterized as an Article 78 challenge, such a proceeding is also time barred in accordance with the four-month Statute of Limitations set forth in CPLR 217(1) (*see e.g. Matter of City of New York (Grand Lafayette Props)*, 6 NY3d at 547; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031 [2006], *lv denied, motion dismissed* 7 NY3d 92 [2006]; *In re Acquisition of Real Prop. by the County of Tompkins*, 237 AD2d 667, 668 [1997]).

[because respondents' answer raised constitutional questions as to petitioner's authority to acquire lands for purposes of their public project in contravention of respondents' right to equal protection, jurisdiction to resolve such issues rested exclusively in the appropriate Appellate Division]; *In re Farmington Access Rd.*, 156 AD2d 936 [the Appellate Division has exclusive original jurisdiction to hear and determine a condemnee's objections pursuant to EDPL 207[B)].

As an alternative grounds for dismissing this affirmative defense as being without merit, it must also be recognized that the Second Circuit dismissed respondents' constitutional challenges to the 2006 D&F, as premised upon the 2006 MGPP, and that the Court of Appeals dismissed their challenge as predicated upon state law. Inasmuch as the public purposes to be served by the Project have not changed, the holdings of the Second Circuit and the Court of Appeals preclude another challenge of the public use, purpose or benefit of the Project pursuant to the doctrines of res judicata and/or collateral estoppel. As is relevant to this issue, in an action in which a respondent sought to raise claims of private purpose, bad faith and taint, the court held that:

“It is evident that the appeal by [respondent] addresses the same issues concerning private purpose, due process, bad faith and the taint of private monetary contribution to the proposed project which were specifically raised, considered and rejected in the prior proceeding in this court. Significantly, the Court of Appeals considered and rejected each of these points in affirming. Since a final conclusion bars all other claims arising out of the same transaction, even if phrased under a different theory or seeking a different remedy (*see, e.g., O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Matter of Reilly v Reid*, 45 NY2d

24, 27), we are of the view that [condemnee] is precluded from relitigating under any guise the private taking, bad faith and other issues heretofore raised and rejected (*see, Chesterfield Homes v City of New York*, 92 AD2d 578).”

(*Johnson City*, 157 AD2d at 1010).

Eighth Affirmative Defense: The 2006 D&F have been Proven False

The Parties' Contentions

In this affirmative defense, respondents again argue that the petition does not comply with EDPL 402(B)(3)(d), which requires it to state “the public use, benefit or purpose for which the property is required” because the original 2006 D&F have been proven to be false with the passage of time. They further aver that if any portion of the 2006 D&F “could arguably survive after excising all that has proven to be false over time,” the petition would still be defective and subject to dismissal because this proceeding is premised upon those determinations and findings, which petitioner has chosen not to amend, supplement or reissue. They thus conclude that since the 2006 D&F have “been vitiated by subsequent events,” including without limitation, petitioner’s adoption of a new 2009 MGPP, it can no longer serve as the predicate for an action under EDPL Article 4.

In opposition, petitioner reiterates the arguments that it made in opposition to the previous two affirmative defenses.

Discussion

In arguing that the factual predicates of the 2006 D&F have proven false, respondents restate that the Project has changed since those findings were approved, so that a new hearing

and D&F are required. As so stated, this affirmative defense is premised upon the same contentions discussed above. Accordingly, this defense has already been addressed and found to be lacking in merit.

***Ninth Affirmative Defense:
Petitioner's Decision to Acquire Property in Stages***

The Parties' Contentions

Respondents next argue that the petition fails to comply with CPLR Article 4 and EDPL 402(B)(3)(a), which requires “a statement providing either the compliance with the requirements of article two of this law” and/or EDPL 401(C), which provides that if property is “acquired for a public project in stages,” such staged acquisition must be proposed at the public hearing. In this case, however, petitioner’s decision to provide for a two stage acquisition was made when it adopted the 2009 MGPP, when the change was described in the 2009 Technical Memorandum. Accordingly, they conclude that petitioner should not be permitted to rely upon the 2006 D&F and the Technical Memorandum to support the adoption of the 2009 MGPP.

In opposition, petitioner asserts that since this is an EDPL Article 4 proceeding, CPLR Article 4 does not apply. Petitioner further avers that the petition complies with EDPL 402(B)(3)(a), as is discussed above with regard to petitioner’s entitlement to a vesting order and in discussing respondents’ fifth affirmative defense. Further, even if the argument was properly raised, the petition fully complies with EDPL 401(C). More specifically, paragraph 9 of the petition states that ESDC held a public hearing on August 23, 2006 concerning the

Project and the proposed acquisition by eminent domain of the property located within the Project site, that this public hearing met the requirements of EDPL 401(C) and that no additional EDPL public hearing or new D&F are now required.

The Law

The reasoning and holding in *Leichter* (154 AD2d 258) has been fully discussed above. Further, EDPL 401(C) provides that:

“In the event property is to be acquired for a public project in stages, the condemnor after conducting a required public hearing for the entire project need not conduct additional hearings for subsequent stages, provided that proceedings under this article with respect to the property necessary for the first stage were commenced within such three year period and provided further, that all proceedings under this article with respect to property for the project are commenced within ten years from the dates hereinabove set forth in paragraphs one, two and three of subdivision (A).”

In interpreting this provision, the Appellate Division, First Department, held that “the language and intent of the legislation . . . is not to provide a means of foreclosing development, but to assure that development is preceded at appropriate intervals by an environmental review process involving the affected community” (250 *W. 41st St. Realty v UDC*, 277 AD2d 47, 48 [2000], *lv denied* 96 NY2d 705 [2001], citing *Bryant v New York City Health & Hosps. Corp.*, 93 NY2d 592, 609-610 [1999]; *Matter of Leichter*, 154 AD2d at 261).

Discussion

As was fully discussed above, the holding in *Leichter* (154 AD2d 258) clearly establishes that petitioner is not required to commence a de novo approval process because the proposed Project changed since the date that the 2006 D&F were adopted. In this regard, it is emphasized that one of the changes in *Leichter* (154 AD2d 258) involved a decision to acquire the subject property in stages. Moreover, EDPL 401(C) states that additional hearings are not required if a condemnor decides to acquire property in stages, provided that the vesting proceeding is timely commenced. Thus, as discussed above, respondents' claim that this vesting proceeding cannot be maintained because petitioner decided to acquire title to the subject properties in stages is specious.

Tenth Affirmative Defense: Failure to List the Properties Being Acquired

The Parties' Contentions

In this affirmative defense, respondents argue that the petition does not comply with EDPL 402(B)(3)(a) and (d) in that it fails to attach a true and correct copy of the 2006 D&F, which intentionally omitted materially adverse information, i.e., the initial list of properties targeted for acquisition in a single stage. Respondents further argue that if petitioner had attached a complete and accurate copy of the 2006 D&F, it would have immediately revealed the material change from a one stage acquisition plan to a two stage acquisition plan, thus jeopardizing its attempt to obtain a quick order from the court granting its petition, notwithstanding this material and intentionally concealed defect.

In opposition, petitioner asserts that the petition fully complies with the requirements of EDPL 402(B)(3)(a) and (d). Petitioner further contends that the omission of a two-page schedule to the 2006 D&F that listed the properties to be acquired for the Project is not substantive, since respondents were not harmed by its omission. In this regard, paragraph 5 of the petition clearly indicates that the properties to be acquired in this proceeding are necessary for the first phase of the Project and, in addition, Exhibit A to the petition contains a Project Map provided to all of the respondents, which clearly identifies all of the properties in the Project site and the subset of those properties which ESDC seeks to acquire in this proceeding. Furthermore, as set forth in paragraph 10 of the petition, ESDC caused the complete 2006 D&F, with the property list schedule exhibit, to be published on December 11 and 12, 2006. ESDC also served a copy of the 2006 D&F with the property list schedule exhibit on each condemnee. Accordingly, respondents clearly had notice of the schedule, which conclusion is further supported by their participation in the above discussed judicial challenges.

Discussion

As discussed above, the petition complies with EDPL 402(B)(3). To the extent that this affirmative defense is predicated upon petitioner's decision to acquire the property needed for the Project in stages, the court has held that no additional hearings are required pursuant to the holding in *Leichter* (154 AD2d 258). Accordingly, this affirmative defense adds no additional facts or issues that have not already been discussed and is therefore found

to be lacking in merit for the same reasons.

In addition, the omission of a two-page list of the properties targeted for acquisition in a single stage is properly construed as error pursuant to CPLR 2001. Moreover, respondents clearly had notice of the properties to be acquired pursuant to paragraph 5, which indicates that the properties to be acquired in this proceeding are necessary for the first phase of the Project; pursuant to Exhibit A, which includes a Project Map that clearly identifies all of the properties in the Project site and the subset of those properties which ESDC seeks to acquire in this proceeding; and pursuant to the statement in paragraph 10, which provides that ESDC caused the complete 2006 D&F, with the property list schedule exhibit, to be published on December 11 and 12, 2006. Further, as is also alleged by petitioner, respondents undeniably had notice of the contents of the 2006 D&F, since the findings were challenged in both federal and state courts.

***Eleventh Affirmative Defense:
Inconsistency in the Notice of Petition and the Wherefore Clause***

The Parties' Contentions

In support of this affirmative defense, respondents argue that the petition does not comply with EDPL Article 4 because it seeks inconsistent relief, i.e., in paragraph 6 of the notice of petition, it seeks an order “directing that each condemnee shall have a period of one hundred twenty (120) days . . . to file a written claim for damages,” while paragraph (f) of the wherefore clause seeks an order “directing that each condemnee shall have a period of ninety (90) days . . . to file a written claim for damages.”

In response, petitioner contends that the petition fully complies with Article 4 of the EDPL and that the inadvertent error in requesting that the order to be entered provides for the service of claims within 90 days after service of the notice of acquisition in the wherefore clause, instead of 120 days as stated in the notice of petition, is immaterial. In this regard, there is no requirement under Article 4 of the EDPL that the petition set out the number of days for service of claims that the condemnor seeks to include in the condemnation order. Furthermore, the notice of petition and petition both contain a savings clause praying for “such other and further relief as this Court deems just and proper.”

Discussion

As discussed above, EDPL 402(B)(3) sets forth the requirements for a petition in a vesting proceeding. A review of the statute reveals that there is no requirement that a petition set forth the time in which a respondent can file a claim. Moreover, as is more fully discussed hereinafter, the time in which a claim can be filed is subject to the discretion of the court pursuant to EDPL 503, so that any request by petitioner for a specified time period is not dispositive of the issue. From this it follows that petitioner’s error in listing two different periods is without effect and can be corrected, since no prejudice inured to any of the condemnees (*see generally* CPLR 2001).

*Twelfth Affirmative Defense:
Petitioner's Failure to Satisfy a Condition Precedent*

The Parties' Contentions

In support of this affirmative defense, respondents allege that the 2009 MGPP provides that the acquisition of the subject properties by condemnation will not occur until such time as petitioner receives commitments, guaranties and other satisfactory evidence that FCRC will: (i) promptly commence construction of the Arena and all of the infrastructure necessary for it, (ii) complete such construction within agreed-upon time periods, and (iii) commence and complete construction of the upgraded rail yard in accordance with and subject to the schedule agreed to with the MTA. Respondents assert that notwithstanding this public commitment, petitioner commenced this proceeding on December 23, 2009, at almost precisely the same time that the Bond Offering Statement³ established that FCRC

³ The language of the Bond Offering Statement relied upon by respondents provides that:

“As one of the Vacant Possession Release Conditions, and as required under the Arena Lease Agreement, ArenaCo will be obligated to pay or cause to be paid the Additional Rent Amount (presently anticipated to be \$324.8 million, which amount may ultimately be reduced to reflect prior expenditures made for the Arena Project and included in the budget for the Arena Project on and after November 1, 2009) to the Issuer (for deposit with the PILOT Bond Trustee). . . .At the time of the issuance of the Series 2009 PILOT Bonds, ArenaCo will not have funds sufficient to pay the Additional Rent Amount, but ArenaCo expects to raise sufficient funds prior to the Arena Project Effective Date . . . Although ArenaCo expects that the necessary funds will be timely raised, there can be no assurance that the funds will be raised or that the amount of such funds will be sufficient to make the full payment of the Completion Cost.”

needs an additional \$324.8 million; that it cannot provide any assurance that the funds will be raised; and if the funds cannot be raised, the Project will unquestionably be “scotched.” Respondents thus conclude that because a condition precedent to the relief petitioner seeks has not been met, the petition should be dismissed and petitioner should be prohibited from seeking to confiscate respondents’ homes and businesses until petitioner provides compelling evidence that the Arena, rail yard and acres of parking lots will actually be built as is required by the 2009 MGPP.

In opposition, petitioner argues that respondents’ allegations concerning whether ESDC has received certain assurances called for by the 2009 MGPP is not appropriately raised in an EDPL Article 4 proceeding. More specifically, respondents’ assertion that ESDC has not complied with EDPL Article 4 because the Project developer must provide assurances that it will raise funds to construct the Project, or a part thereof, is without merit, as there is no such requirement in EDPL Article 4.

Petitioner further alleges that notwithstanding that it has no obligation to demonstrate that it received sufficient assurances that the Project will go forward as contemplated, ESDC reasonably determined that it had obtained satisfactory assurance that the Project developer will raise funds sufficient to construct the Arena and related components of the Project. In this regard, petitioner alleges that ESDC, FCRC and others participated in a master closing completed on December 23, 2009 (the Master Closing), during which more than 600 contracts and related documents were executed and delivered or placed in escrow. These

documents contain firm commitments that FCRC will promptly commence construction of the Arena and will complete such construction within agreed upon time periods, and will commence and complete construction of a new rail yard for the MTA. It also emphasizes that on December 23, 2009, the Brooklyn Arena Local Development Corporation successfully completed the issuance and sale of approximately \$511 million of tax-exempt bonds for the Arena, which demonstrates a significant commitment to the construction of the Arena, since upon the issuance of the bonds, FCRC became obligated to pay for the cost of issuance, as well as to pay interest at the rate of approximately 6.5% per annum. Further, until the Arena is complete and operating, FCRC will not be receiving income from the Project to offset this obligation. ESDC reasonably considered this obligation, among others, to provide sufficient assurance that the Arena will be promptly constructed.

Petitioner also explains that construction documents and significant security for the completion of the new rail yard for the MTA were provided at the Master Closing. FCRC delivered to an escrow agent a \$20 million letter of credit in favor of the MTA to secure its obligation to purchase the MTA-owned property on which the Arena will be built. FCRC also delivered to an escrow agent an \$86 million letter of credit in favor of the MTA to secure its obligation to build the new rail yard. These letters of credit are to be released from escrow and delivered to the MTA when ESDC acquires title to the properties that it is condemning in this proceeding. Petitioner also points out that respondents' statement that FCRC cannot provide any assurance that the funds will be raised is taken from the risk

factors portion of the 600 page Official Offering Statement, which was designed to advise investors of the downside risk of purchasing the securities.

Accordingly, ESDC considered the foregoing in determining that it had more than satisfactory comfort that the construction of the Arena would be completed, as did Goldman, Sachs & Co and Barclays Capital when they decided to underwrite the offering. Moreover, the bond market itself expressed confidence that the Arena would be completed by over-subscribing the offering. Petitioner therefore concludes that it is these Master Closing documents and transactions that constituted the commitments, guaranties and other evidence satisfactory to ESDC referenced in the 2009 MGPP and that ESDC filed this petition on December 23, 2009, only after the successful completion of the Master Closing on that day.

Discussion

Respondents point to no statutory or case law authority that allows a condemnee to oppose an EDPL 402 vesting proceeding in reliance upon a challenge to the financial arrangements made by the condemnor to finance the Project and/or to assure its completion (*see generally Matter of Byrne*, 101 AD2d 701, 701-702 [1984] [the court held that the proposed acquisition of certain real property for development of a safe boat refuge would serve a public use, benefit or purpose, despite the fact that federal funding had not yet been appropriated for the project, where Environmental Impact Statements had been filed and state funds had been committed for property acquisition and construction]). That such authority does not exist is supported by the fact that EDPL 402(B)(3) does not obligate a condemnor

to include any statements guaranteeing financing and/or completion of a proposed project in its vesting petition.

Further, to the extent that respondents are seeking to challenge the modifications to the business arrangement between FCRC and the MTA that were approved on June 24, 2009, they should have commenced a timely Article 78 proceeding in which they sought to do so. Such a challenge is now time barred, since an Article 78 proceeding must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner in accordance with CPLR 217(1) (*see e.g. Matter of City of New York [Grand Lafayette Props]*, 6 NY3d at 547; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031; *In re Acquisition of Real Prop. by the County of Tompkins*, 237 AD2d at 668).

Moreover, in the Article 78 proceeding that was commenced to challenge the June 24, 2009 resolution, Judge Stallman noted that “[t]he subject 2009 resolution approved modification of various business terms to essentially the same plan approved with FCRC on December 13, 2006, when the MTA Board authorized the MTA staff to negotiate and execute binding agreements with FCRC and adopted SEQRA findings” (*Matter of Montgomery*, 2009 NY Slip Op 52539U at 1). As is also relevant herein, Judge Stallman went on to hold that petitioners in that proceeding, who were not bidders for the Project, lacked standing to challenge the resolution, having failed to meet the two prong test set out in *Society of Plastics Industry, Inc. v County of Suffolk* (77 NY2d 761, 774 [1991]):

“A petitioner must show that (1) it has suffered specific injury in fact - itself, as distinct from that allegedly suffered as

a member of the public at large; and (2) the claimed injury falls within the zone of interests, sought to be protected by the statute, that the petitioner invokes.”

(*Matter of Montgomery*, 2009 NY Slip Op 52539U at 2 [2009]). This holding is also consistent with Judge Solomon’s denial of the challenge made by tenants to the September 12, 2007 Funding Agreement (*Anderson*, New York Co Sup Ct, Index No 102056/08). Any challenge made by respondents herein would suffer from the same infirmity.

Finally, it is also significant to recognize that the Second Circuit noted that “the Atlantic Yards Project: ‘may not be successful in achieving its intended goals. But “whether *in fact* the [Project] will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] *rationaly could have believed* that the [taking] would promote its objective””” (*Goldstein*, 516 F3d at 63-64, quoting *Hawaii Hous. Auth. v Midkiff*, 467 US 229, 242 [1984], quoting *Western & Southern Life Ins. Co. v State Bd. of Equalization*, 451 US 648, 671-672 [1981] [emphasis in *Midkiff*]). Similarly, the District Court noted that:

“Whether the Project will in fact [result in fewer units of affordable housing than predicted and whether the affordable units proposed from the Project will not remotely offset the impact of the luxury housing or fail to] achieve this or any other objective is not a matter that this court may consider. *Kelo*, 545 US at 488 (rejecting the argument that courts should require a ‘reasonable certainty’ that expected public benefits will accrue; reasoning that ‘[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans’).”

(*Goldstein*, 488 FSupp2d at 254).

The court also notes that even if petitioner is unable to complete the Project after having acquired title to the property:

“[T]he fact that a project may not ultimately come to fruition does not negate the power of eminent domain. Rather, ‘[p]ursuant to the established rule, as long as the initial taking was in good faith, there appears to be little limitation on the condemnor’s right to put the property to an alternate use upon the discontinuation of the original planned public purpose’ (*Vitucci v New York City School Constr. Auth.*, 289 AD2d 479, 480 [2001], *lv denied* 98 NY2d 609 [2002]).” .

(*Matter of City of Syracuse Indus. Dev. Agency (J.C. Penney Corp., Inc. MCarousel Ctr. Co.)*, 32 AD3d 1332, 1334 [2006]). In *Vitucci* (289 AD2d 479) the court held that there is little doubt that the City would be authorized to condemn property for a school and then decide to use the property for a different public purpose such as a library or a museum, since in general, the power of eminent domain may be exercised to take property as long as there is a legitimate public purpose for the taking. Accordingly, as long as the initial taking was in good faith, there appears to be little limitation on the condemnor’s right to put the property to an alternate use upon the discontinuation of the original planned public purpose.

Thirteenth Affirmative Defense: Unclean Hands

The Parties’ Contentions

Respondents fail to particularize this defense. In opposition, petitioner asserts that the allegation concerning the doctrine of unclean hands is not appropriately raised in an EDPL Article 4 proceeding and is not a defense to the petition. Moreover, there is no factual

support for this allegation.

The Law

“[W]hen equitable relief is sought . . . “moral considerations of fundamental importance require that the litigant come into court with clean hands”” (*Thompson v 76 Corp.*, 37 AD3d 450, 453 [2007], quoting *Tepfer v Berger*, 119 AD2d 668, 669 [1986], quoting *Pecorella v Greater Buffalo Press*, 107 AD2d 1064, 1065 [1985])⁴. “Unclean hands in participating in a course of conduct of deception and deceit is an effective bar to [an action]” (*Chun Wang v Chun Wong*, 163 AD2d 300, 302 [1990], *appeal denied* 77 NY2d 804 [1991], *cert denied* 501 US 1252[1991]). “The doctrine of unclean hands applies when the complaining party shows that the offending party is ‘guilty of immoral, unconscionable conduct and even then only “when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct”” (*Kopsidas v Krokos*, 294 AD2d 406, 407 [2002], quoting *National Distillers &*

⁴ Although it is well established that the equitable doctrine of clean hands does not strictly apply in actions at law (*see Rocks & Jeans v Lakeview Auto Sales & Serv.*, 184 AD2d 502, 503 [1992], citing *Board of Educ. v Rettaliata*, 78 NY2d 128 [1991]), it is equally well established that “[i]n determining what is ‘just compensation’, the courts apply equitable principles and ‘endeavor to weight the justice and fairness between the condemnor and the condemnee, and attempt to arrive at a valuation which they deem to be fair and equitable to both parties’” (*Municipal Housing Auth. v Harlan*, 24 AD2d 633, 635 [1965], citing *Jahr, Eminent Domain*, pp. 93-94). Accordingly, it cannot be successfully argued that the court cannot apply equitable principles in granting relief in an eminent domain proceeding (*see generally Seaboard A. L. R. Co. v United States*, 261 US 299, 304 [1923]; *Johnson v State*, 10 AD3d 596, 597 [2004]; *Vinciguerra v State of New York*, 22 AD2d 9 [1964]; *Huie v Campbell*, 281 AppDiv 275, 277 [1953]; *Champlain Stone & Sand Co. v State*, 66 Misc 434, 447 [1910]).

Chem. v Seyopp Corp., 17 NY2d 12, 15-16 [1966]; accord *Jara v Strong Steel Door*, 58 AD3d 600, 602 [2009]). “[A]ny willful conduct ‘which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean’ as long as the conduct pertains to the matter in litigation” (*Pecorella*, 107 AD2d at 1065, quoting 20 NY Jur, Equity, § 107; *Agati v Agati*, 59 NY2d 830 [1983]; *Seagirt Realty v Chazanof*, 13 NY2d 282, 285-286 [1963]). “The person seeking to invoke the doctrine of unclean hands has the initial burden of showing, prima facie, that the elements of the doctrine have been satisfied” (*Fade v Pugliani*, 8 AD3d 612, 614 [2004], citing *Kaufman v Kehler*, 5 AD3d 564 [2004]).

Discussion

As a threshold issue, the court agrees that respondents cannot oppose a vesting petition based on the doctrine of unclean hands. Further, their attempt to interpose such a defense is lacking in merit. In so holding, the court notes that respondents’ claim is fundamentally flawed in that they fail to allege or articulate any immoral or illegal conduct on petitioner’s part (*see e.g. National Distillers & Chem.*, 17 NY2d at 15-16; *Kopsidas*, 294 AD2d at 407; *Jara*, 58 AD3d at 602), or conduct which would be condemned and pronounced wrongful by honest and fair-minded men or women (*see e.g. Agati*, 59 NY2d 830; *Seagirt Realty*, 13 NY2d at 285-286; *Pecorella*, 107 AD2d at 1065).

To the extent that respondents’ claim appears to be premised upon its contention that FCRC has participated in the Project for the purpose of realizing significant profits, it must

be noted that neither Ratner nor any of the affiliated companies involved in the Project are parties to this vesting proceeding, nor will a desire to realize a profit be construed as sufficient to establish conduct that is immoral, illegal or wrongful to any fair-minded person. Finally, as discussed above, the Second Circuit found that “the mere fact that a private party stands to benefit from a proposed taking does not suggest its purpose is invalid because ‘[q]uite simply, the government’s pursuit of a public purpose will often benefit individual private parties’” (*Goldstein*, 516 F3d at 64, quoting *Kelo*, 545 US at 485).

Accordingly, this affirmative defense is found to be lacking in merit.

Fourteenth Affirmative Defense: Unjust Enrichment

The Parties’ Contentions

In support of this affirmative defense, respondents argue that the relief sought by the petition is barred because it will unjustly enrich FCRC.

In opposition, petitioner again asserts that respondents’ allegation concerning unjust enrichment is not appropriately raised in an EDPL Article 4 proceeding and is not a defense. Furthermore, there is no support for the assertion that the Project will unjustly enrich Ratner or FCRC. Moreover, such allegations were rejected by the Court of Appeals and by the Second Circuit and cannot be raised here based on principles of res judicata and collateral estoppel.

The Law

“‘The theory of unjust enrichment lies as a quasi-contract claim’” (*IDT v Morgan*

Stanley Dean Witter & Co., 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009], quoting *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Unjust enrichment involves a claim by a party that it performed services on behalf of another at his or her behest, resulting in that party receiving an unjust benefit (*see e.g. Fountoukis v Geringer*, 33 AD3d 756, 757 [2006]; *Clark v Daby*, 300 AD2d 732, 732 [2002], *lv denied* 100 NY2d 503 [2003]; *Liberty Marble v Elite Stone Setting*, 248 AD2d 302, 304 [1998]). “It is well settled that ‘[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered’” (*Sperry v Crompton Corp.*, 8 NY3d 204 [2007], quoting *Paramount Film Distrib. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). Unjust enrichment “rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. . . . The general rule is that ‘the plaintiff must have suffered a loss and an action not based upon loss is not restitutionary’” (*State v Barclays Bank of New York*, 76 NY2d 533, 540-541 [1990], quoting Restatement of Restitution § 128, comment f, at 531 [emphasis added]; *accord Edelman v Starwood Capital Group*, ___ AD3d ___, 2009 NY Slip Op 9309, 3 [2009]). Stated differently, “under a theory of unjust enrichment, ‘recovery is available not only where there has been an actual benefit to the other party but, in the instance of a wrongdoing defendant, to restore the plaintiff’s former status, including compensation for expenditures made in reliance upon defendant’s representations’” (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484

[1991], quoting *Farash v Sykes Datatronics*, 59 NY2d 500, 505 [1983]; accord *Spector v Wendy*, 63 AD3d 820, 822 [2009] [to prevail on a claim of unjust enrichment, a plaintiff must establish that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution]).

It is also well settled that a party may not recover in unjust enrichment where the parties have entered into a contract that governs the subject matter (*see e.g. Cox v NAP Constr. Co.*, 10 NY3d 592, 607 [2008], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; accord *Goldman*, 5 NY3d at 572; *Gateway I Group v Park Ave. Physicians*, 62 AD3d 141, 149 [2009]), or where a party has an adequate remedy at law (*see e.g. Samiento v World Yacht*, 10 NY3d 70, 81 [2008]).

Discussion

The court again finds that respondents cannot oppose a vesting petition based on the doctrine of unjust enrichment. Further, in view of the above discussion of the elements of a cause of action sounding in unjust enrichment, it is clear that this defense is also without merit. Most significantly, respondents do not allege that they performed any services at the behest of petitioner. From this it follows that there can be no claim by respondents for restitution.

Again, to the extent that respondents seem to be arguing the FCRC will be unjustly enriched by the financial agreements underlying the construction of the Project, neither Ratner nor any of the companies affiliated with by him are parties to this vesting proceeding.

Similarly, as discussed above, the District Court and the Second Circuit both held that the fact that the Project will confer a private benefit upon Ratner and/or FCRC does not serve to compel a finding that the taking does not serve a public purpose so that it cannot withstand constitutional scrutiny (*see Goldstein*, 516 F3d at 64, quoting *Kelo*, 545 US at 485; *Goldstein*, 488 FSupp2d at 254). Finally, inasmuch as all of the agreements relating to the financing and construction work to be performed by FCRC are governed by written agreements, any claim premised upon unjust enrichment cannot stand (*see Cox*, 10 NY3d at 607; *Samiento*, 10 NY3d at 81; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 388; *Goldman*, 5 NY3d at 572; *Gateway I Group*, 62 AD3d at 149).

Respondents' Counterclaims

The First and Second Counterclaim

In support of their three counterclaims, respondents allege that pursuant to the 2006 D&F, 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; to provide 2,250 units of affordable housing and a state-of-the-art rail storage, cleaning and inspection facility for the LIRR; and to provide net tax revenues in excess of the public contribution to the Project. They further note that the 2006 D&F did not provide for the condemnation of respondents' properties in stages.

Respondents then allege that in June 2009, after it believed that all litigation hurdles had been cleared, petitioner revealed that it intended to modify the 2006 MGPP. Further, at

the time that UDC voted to adopt the 2009 MGPP, it knew, or should have known additional significant facts: (1) in a memorandum, dated September 17, 2009, Dennis Mullen (Mullen Memo) the then-designated, but not confirmed, Chairman of the UDC Board, requested that the Board adopt the 2009 MGPP, and approved an amendment of UDC's funding agreement with FCRC⁵ so as to accelerate the state's last cash payment of \$25 million, for a total of \$100 million, to pay soft costs and demolition costs, which were previously disallowed in earlier funding agreements signed in 2007; (2) a report of the New York City Independent Budget Office dated September 10, 2009 concluded that the Project/Arena will cost the City a minimum of \$39.5 million (a figure that balloons to \$220 million when opportunity costs are considered), the state will gain \$25 million in new tax revenues (only \$9 million when opportunity costs are considered), the MTA will gain \$6 million (but will lose \$16 million when opportunity costs are considered), and FCRC will receive \$726 million in government subsidies and benefits for the Arena alone; (3) the deal between FCRC and the MTA had been materially altered to reduce the initial cash payment from \$100 million to \$20 million; to restructure and extend the full acquisition of the balance of the MTA property beyond 2030; to allow FCRC to abandon the planned further acquisition at any time, in its sole discretion, with virtually no penalty; to extend the payments for the acquisition of the MTA air rights to the year 2030; and to reduce the size of the replacement rail yard from nine tracks with a 76 car capacity to seven tracks with a 56 car capacity; (4) the City had or would

⁵ Although respondents' counterclaims refer to Ratner, individually, it is presumed that the claims are intended to refer to Ratner and FCRC, collectively.

agree to amend its funding agreement with FCRC to accelerate its scheduled payment of \$15 million, for a total of \$205 million, plus other unquantifiable payments for “extraordinary infrastructure costs”; (5) the 2009 Technical Memorandum anticipated that the Project would total 7,961,000 square feet, yet the Project had since been reduced to include only 5,145,000 square feet, a reduction of approximately 35%; and (6) although the 2009 MGPP anticipates that as many as 2,250 affordable housing units will be built over the next 30 years, the development agreement between UDC and FCRC provided that every unit of affordable housing would be contingent upon governmental authorities making affordable housing subsidies available.

Respondents thus conclude that at the time of the UDC Board meeting on September 17, 2009, its members knew or should have known that the MTA deal had been radically restructured, so that the alleged benefit to the public engendered by the 2005 deal between the MTA and FCRC had been utterly gutted by the new deal in 2009. More specifically, under the terms of the new deal, FCRC is only required to pay \$20 million for the rights to the MTA’s property required for the construction of Phase I and is not required to make any additional payments to the MTA until June 2012, at which time it must make an additional payment of \$2 million. Thereafter, FCRC must make further payments of \$2 million on June 1, 2013, 2014 and 2015. Commencing on June 1, 2016, the annual payments to the MTA increase to \$11 million per year and continue for 15 years until 2030. The MTA also agreed to a redesigned and reduced scope of the replacement yard for the LIRR and required that

construction of the replacement yard commence by June 30, 2012 and be completed by September 1, 2016. The new agreement with the MTA also provides that it will convey the parcel necessary for the construction of the Arena upon the payment of the initial \$20 million. In addition, the conveyance of the MTA air rights will only occur upon the payment of the subsequent amounts associated with each parcel.

Respondents accordingly conclude that the result of the new MTA agreement has direct impacts on the timing of the completion of Phase II and the potential that it will be completed at all. The structure of the deal assures that the final payment for the air rights over the rail yard will not be made until June 2030, when the construction of Phase 2 will begin. The deal is also structured so that FCRC can decide to abandon the project at virtually any time, mitigate its potential financial loss and limit its up front investment. In this regard, FCRC can decide as early as June 1, 2012 to abandon Phase II and avoid the first of the additional payments, or it could walk away from the obligation to complete the permanent replacement rail yard and forfeit the \$86 million letter of credit, which is far less than the estimated cost of \$147 million to complete the downgraded rail yard. If FCRC decides not to build Phase II, the rail yard will not be covered by a platform and the blight that supposedly dominates the Project area will continue without any plan for redevelopment. Further, both the 2006 MGPP and the 2006 D&F contemplated that the Project would be completed in 2016, with the vast majority of the purported benefits of the Project being realized in Phase II, including the majority of the housing, the publicly accessible open space,

the majority of the community facilities and the majority of the economic benefits associated with construction jobs, tax revenue and permanent employment. Respondents further point out that the Mullen Memo revealed, for the first time, that the construction of affordable housing is wholly contingent on the availability of government subsidies and assert that utilizing finite government subsidies does nothing to increase the overall number of available affordable housing units in the City of New York, so that the claim of affordable housing was wholly eviscerated by the Mullen Memo.

Respondents further aver that it was not until mid January 2010 that UDC made the Master Closing documents available, although they were executed more than a month before the return date of the petition. A review of the voluminous and complex documents reveals that the deadlines imposed by petitioner on FCRC allow six years to build the Arena; three or four years to start construction of the first tower; five or six years to start construction of the second tower; ten years to start construction of the third tower; 12 years to build Phase I, which can be much smaller than officially promised; 15 years to start construction of the platform over the rail yard; and 25 years to finish the project, which can be much smaller than officially promised. Further, the damages FCRC faces in most cases, i.e., less than \$10 million for an Arena that is up to three years late and \$5 million for each of three buildings if they are late, does not represent a lot of money, especially given that the developer just got a cash flow boost of \$31 million to buy land.

Respondents accordingly conclude that the public use, purpose and benefits claimed

by the 2006 D&F have been materially undermined by no later than September 17, 2009, when the 2009 MGPP was approved, since the determination and findings relied upon by petitioner were made in 2006, premised upon the 2006 MGPP. Respondents further assert that since the 2006 MGPP has been replaced and superceded by the 2009 MGPP, UDC has a legal obligation to issue a new or amended determination and findings pursuant to EDPL 204, since the findings of public use, purpose or benefits are in substantial doubt. In this regard, although respondents further aver that although they attempted to raise the material alterations to the grounds cited as creating a public use, benefit or purpose in the 2006 D&F, including the effect of the new 2009 MGPP, in their EDPL 207 challenge to the 2006 D&F, the court did not allow them to do so.

Thus, in their first counterclaim, respondents argue that since the underpinnings of the 2006 D&F have been vitiated by petitioner's decision to amend and supercede the 2006 MGPP with the 2009 MGPP, the 2006 D&F are a nullity and can no longer serve as the basis for the condemnation of respondents' properties, so that they are entitled to a judgment denying the petition and nullifying and setting aside the 2006 D&F. In their second counterclaim, respondents rely upon the same assertions to argue that they are entitled to a judgment, pursuant to CPLR 3001, declaring that the legal viability of the 2006 D&F have been vitiated by subsequent events and thus may no longer serve as the predicate for the condemnation of their properties.

Petitioner's Contentions

In opposition to these contentions, petitioner alleges, as was discussed above with regard to the seventh, eighth and ninth affirmative defenses, that with immaterial exceptions, the 2009 MGPP sets forth “land use improvement project” and “civic project” findings for the Project that are identical to those set forth in the 2006 MGPP, citing to the 2006 MGPP at 34-40 and the 2009 MGPP at 34-41. It thus contends that the 2009 MGPP did not change the “land use improvement project” and “civic project” elements of the Project that have been determined to be a public use by the Court of Appeals (2009 NY Slip Op 8677) and by the Second Circuit (516 F3d 50).

Petitioner further argues that respondents’ claim that the MTA agreement could allow FCRC to delay completion of the Project does nothing to diminish the validity of the D&F regarding the Project’s public uses, since the benefits of the Project will be realized as the Project proceeds, i.e., blighted conditions in the area will be eliminated step-by-step, as substandard buildings are taken down and Project-related improvements are constructed in their place. It also notes that the many civic benefits afforded by the Arena, the LIRR yard and subway entrance will be provided at the earliest stages of Project construction and all the Project benefits will come to fruition at the point of Project completion. Whatever the pace may be for the delivery of the many public benefits of the Project, the nature of those benefits remains the same. Similarly, respondents’ allegation that the MTA Agreement may induce FCRC to abandon the portion of the Project over the rail yard does not undermine the 2006

D&F, since the 2009 MGPP, like the 2006 MGPP, calls for the completion of the Project in its entirety. Moreover, the first-phase properties sought in the instant proceeding are to be developed in accordance with the 2009 MGPP, thus eliminating the substandard and insanitary conditions on the first-phase properties and providing significant civic facilities, irrespective of any hypothetical risk that future phases of the Project might not be completed.

Petitioner also interposes four affirmative defenses with regard to each counterclaim: (1) counterclaims may not be pleaded in an EDPL 402 proceeding; (2) the counterclaims are barred by EDPL 208; (3) the counterclaims are barred by the applicable Statute of Limitations; and (4) the counterclaims are barred by res judicata and collateral estoppel in that the claims are inconsistent with the final decisions rendered by the New York State Court of Appeals and the Second Circuit.

Discussion

In support of their counterclaims, respondents set forth a detailed version of the facts to support their conclusion that the Project has changed, so that a de novo review process is mandated. All of the facts and claims interposed, however, are duplicative of the arguments raised and rejected in finding that all of respondents' affirmative defenses are lacking in merit. Accordingly, these counterclaims are similarly found to be specious.

Third Counterclaim: Declaratory Judgment

Respondents' Contentions

In support of their third counterclaim, respondents argue that the petition is

inconsistent with the 2009 MGPP because ESDC failed to receive “commitments, guaranties and other evidence satisfactory to ESDC that FCRC will . . . promptly commence construction” in reliance upon the same facts alleged in their twelfth affirmative defense. They argue that they are therefore entitled to a judgment dismissing the petition and declaring, pursuant to CPLR 3001, that petitioner is prohibited from seeking to confiscate their homes and businesses until it provides compelling evidence that the Arena, rail yard and acres of parking lots will actually be built as is required by the 2009 MGPP. Respondents also request that any resolution of the petition be postponed until they have had the opportunity to review the many volumes of crucial documents, conduct discovery pursuant to CPLR 408, and then conduct a trial to resolve disputed issues of fact pursuant to CPLR 410.

Petitioner’s Contentions

In addition to relying upon the above discussed arguments, petitioner contends that respondents’ request for discovery of the Master Closing documents is inappropriate since the documents, with immaterial exceptions, have been made available to the public under the Freedom of Information Law. More fundamentally, the documents are totally irrelevant to the issues that are properly subject to review in this proceeding because they have no bearing on ESDC’s compliance with the EDPL.

Discussion

This counterclaim, being virtually identical to the twelfth affirmative defense, is dismissed for the reasons discussed above in finding the affirmative defense to be without merit.

The court also finds respondents' request for discovery and a trial to be lacking in merit. In this regard, the Second Circuit addressed and rejected respondents' demand for discovery, premised upon their claim that one or more of the government officials who approved the Project was actually and improperly motivated by a desire to confer a private benefit on Ratner, in reliance upon the purported excesses in the costs of the plan as measured against its benefits and their disagreement with various plausible assumptions underlying the Project's budget, reasoning that:

“Allowing such a claim to go forward, founded only on mere suspicion, would add an unprecedented level of intrusion into the process. *See Kelo*, 545 US at 488 (remarking that the ‘disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced.’). Prior to *Kelo*, it was well settled that ‘it is only the taking’s purpose, and not its mechanics that must pass scrutiny under the Public Use Clause.’ *Midkiff*, 467 US at 244.

“Accordingly, we must reject the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman* (348 US 26 [1954]), *Midkiff*, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives

of the various government officials who approved it. *See Kelo*, 545 US at 483 (characterizing more than a century of Public Use Clause jurisprudence as having ‘wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power’). . .

“We do not read *Kelo*’s reference to ‘pretext’ as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns.”

(*Goldstein*, 516 F3d at 62-63).

The court adopts this reasoning and denies respondents’ request for discovery and a trial for the same reasons. In so holding, the court notes that the cases cited by respondents, *Valvo v UDC* (71 Misc2d 335 [1972]) and *Mets Parking Incorporated v UDC* (58 NY2d 1094 [1983]) do not compel a contrary conclusion, since those cases pertain to the sufficiency of a public hearing conducted pursuant to UDCA § 16(2)(c).

Respondents’ Motion to Dismiss

The Motion

A review of respondents’ motion to dismiss reveals, as noted above, that the claims and demands interposed therein are duplicative of the claims and demands for relief interposed in their answer, except for their request that the court issue an order staying the instant proceeding. In support of their request for a stay, respondents rely upon CPLR 2201, which provides that “the court in which an action is pending may grant a stay of proceedings

in a proper case, upon such terms as may be just.” More specifically, they argue that the instant proceeding should be stayed until such time as petitioner demonstrates that it has corrected the numerous deficiencies discussed above, including without limitation, demonstrating that the adjudication of respondents’ current EDPL 207 proceeding or any proceeding to challenge any subsequent amended or modified EDPL 204 determination and findings is final.

In this regard, respondents’ argument that their Motion to Reargue is currently pending before the Court of Appeals has been rendered moot. They further argue that two actions are pending in Supreme Court, New York County, which challenge UDC’s 2009 MGPP, including a motion for a preliminary injunction; the court in these actions has indicated that it will either rule on the merits or on the preliminary injunction by the end of February because UDC and FCRC have indicated that there is no further demolition work scheduled until March. Respondents thus conclude that it would be both unwise and unfair to grant the relief sought by the petition while the other actions challenging the Project as a whole remain pending.

Discussion

This demand for relief relies upon essentially the same facts advanced by respondents in their second and fifth affirmative defenses, which have already been rejected as lacking in merit, adding the reference to the pendency of challenges to the 2009 MGPP in New York County Supreme Court. The court declines to stay this proceeding pending resolution of the

actions commenced in New York County. In so holding, the court notes that EDPL 401 makes no reference to pending challenges to a proposed project plan in discussing when a vesting petition can be filed. Moreover, in view of this court's holding, in reliance upon *Leichter* (154 AD2d 258) and *Toh* (154 AD2d 267), that a Project may be changed without triggering the need for a de novo review, it is highly questionable that the pending challenges are meritorious. This court's finding that petitioner has made an adequate showing that the public purpose of the Project has not changed since the 2006 D&F were adopted also undermines respondents' apparent belief that the pending proceedings will be successful. The court also notes that respondents offer no details with regard to the arguments raised in those proceedings.

Accordingly, the court declines to stay this vesting proceeding.

***The Goldstein Respondents' Request to
Set the Time in Which they Can File their Claims***

The Parties' Contentions

In their answer, the Goldstein respondents argue that the 120 day period of time for each condemnee to file a claim, commencing from the date of service of a notice of acquisition, as requested by petitioner, is inadequate. Respondents instead request that they be given three years from the date of service of a notice of acquisition to file a claim. In so arguing, the Goldstein respondents assert that EDPL 503(A) and Court of Claims Act, Article II, § 10 provide for a three-year period in which to file a claim in acquisitions of real property by or in the name of the people of the State of New York. They argue that it therefore

follows that since Unconsolidated Laws § 6254(1) provides that petitioner-condemnor is a governmental agency of the state, constituting a political subdivision and public benefit corporation, petitioner is acquiring property in the instant proceeding in the name of the people of the State of New York.

The Goldstein respondents further aver that EDPL 503(C) and 22 NYCRR § 202.61(d) require that a trade fixture schedule or inventory be annexed to each trade fixture claim and that 120 days is not enough time to prepare such a claim with a schedule, since trade fixture schedules are complex documents that are time consuming to prepare. Additionally, there are only a limited number of experts who are qualified to prepare the schedules and many of the experts are already engaged in other condemnation proceedings. Respondents also argue that in prior applications where this court had discretion to fix the time for filing claims pursuant to EDPL 503(B), it has typically allowed claimants a period of one year (*see e.g. Matter of City of New York (Fifth Amended Brooklyn Center Urban Renewal Project, Phase 2* [Kings Co Sup Ct, Index No 33132/08]).

These respondents further argue that petitioner's request to limit condemnees' time to file a claim in order to seek just compensation to 120 days is particularly unfair, since petitioner makes no mention of a time-frame in which it will make written offers. In this regard, they contend that in practical terms, they cannot know if they will pursue claims for additional compensation pursuant to EDPL 304(3) until offers are made.

During oral argument, petitioner asserted that since respondents have known about

this proposed taking for years, 120 days should provide them with adequate time to file a claim.

The Law

The filing of claims is governed by EDPL 503. Pursuant to EDPL 503(B):

“In a claim for damages arising from the acquisition of real property under subdivision (B) of section five hundred one herein, a condemnee shall, *within the time specified by the court*, file a written claim, or notice of appearance with the clerk of the court having jurisdiction of the matter and a copy of the same shall be served upon either the condemnor’s chief legal officer or upon such other official designated in the notice of acquisition.”

(Emphasis added; *see generally Grandinetti v MTA*, 74 NY2d 785, 787 [1989]). EDPL 501(B) pertains to all claims arising from the acquisition of real property in supreme court.

Pursuant to EDPL 503(C):

“In the event that a claim is made for compensation for fixtures or for any interest other than the fee in the real property acquired, a copy of such claim together with a schedule of fixture items, where applicable, shall also be served by such claimant upon the fee owner of the real property, and the condemnor’s chief legal officer or upon such other official designated in the notice of acquisition.”

Pursuant to 22 NYCRR § 202.61(d):

“All appraisals of fixtures submitted on behalf of the claimants and the condemnor for which claim is made shall be filed and distributed as provided by these rules with respect to appraisal reports and shall set forth the appraisal value of each item in the same numerical order as in the inventory annexed to the claim.

“(1) Where the condemnor puts in issue the existence of any item in the inventory, the appraisal submitted on its behalf shall so state.

“(2) Where the condemnor puts in issue the description of any item in the inventory, the appraisal submitted on behalf of the condemnor shall state its appraiser’s description of such item and his or her estimate of value.

“(3) Where the condemnor puts in issue the compensability of any item in the inventory, the appraisal report submitted by the condemnor shall so state and shall state the ground therefor, as well as its appraiser’s estimate of the value of such item for consideration in the event that the court should determine that it is compensable.”

Discussion

Applying the above provisions of law, the court finds that it is reasonable that respondents shall be permitted to file claims pertaining to real property no later than September 1, 2010, and that they shall be permitted to file fixture claims no later than April 1, 2011. In so holding, the court finds that respondents’ reliance upon EDPL 503(A) is misplaced, since that provision governs claims filed in the court of claims pursuant to EDPL 501(A), i.e., claims arising from the acquisition of real property by or in the name of the people of the State of New York. The court accordingly rejects respondents’ assertion that UDC is acting in the place of the state in this proceeding, so that EDPL 503(A) applies.

The Goldstein Respondents’ Request for Advance Payments

The Parties’ Contentions

The Goldstein respondents further contend that the petition does not provide a time

frame for making advance payments available. They accordingly request an order directing petitioner to make advance payments within 90 days of the date that title vests.

During oral argument, petitioner alleged that advance payments would likely be made within 20 to 30 days of vesting, provided that title is clear.

The Law

It is well settled that “[t]he policy behind EDPL article 3 is to ensure that the condemnor, at all stages prior to or subsequent to an acquisition . . . shall make every reasonable and expeditious effort to justly compensate persons . . . by negotiation and agreement” (*Matter of New York City Tr. Auth.*, 160 AD2d 705, 709 [1990], citing EDPL 301). EDPL 302 provides, in pertinent part, that “[r]eal property to be acquired by the exercise of the power of eminent domain shall be appraised on behalf of the condemnor by an appraiser.” EDPL 303 provides that:

“The condemnor shall establish an amount which it believes to represent just compensation for the real property to be acquired. The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor’s highest approved appraisal. *Wherever practicable, the condemnor shall make the offer prior to acquiring the property* and shall also wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property.”

(Emphasis added).

The purpose of the provisions in the EDPL pertaining to payment of just

compensation are intended “to insure that condemnors quickly and justly compensate individual owners whose property has been acquired under the power of eminent domain” (*In re Vill. of Port Chester*, 2004 NY Slip Op 51654U, 8 [2004], quoting Chapter 839, Laws of 1977 Legislative Bill Jacket at p 9, Ten Day Bill Budget Report On Bills, para 2). The court therein went on to state that:

“[W]hile there may be no express language in EDPL §§ 301-304 stating when the advance payments should be made it is clear from the Legislative History [‘to insure that condemnors quickly and justly compensate individual owners whose property has been acquired under the power of eminent domain’] and case law (*see e.g., Rose v State of New York, supra*, at 24 NY2d 89 [1969]; *Matter of the City of New York, supra*, at 71 Misc2d 1022-1024 [1972]; *City of New Rochelle v Sigel, supra*, at 65 Misc2d 963 [1970]; *Matter of County of Nassau*, 87 Misc2d 1004, 1005 [1976]; *Matter of Cullen Bryant Park and Preserve, supra*, at 87 Misc2d 1004 [Nassau Sup 1976]; *Matter of Town of North Hempstead, supra*, at 70 Misc2d 351 [1972]) that such payments should be made sooner rather than later.”

(*In re Vill. of Port Chester*, 2004 NY Slip Op 51654U at 12).

As is also relevant to the Goldstein respondents’ request for relief:

“The Eminent Domain Procedure Law provides no specific time requirement for advance payments to be made. Therefore, since the claimants offered no proof that the condemnor was not complying with EDPL 301 and 303, and since the condemnor acknowledged its obligation to make advance payments and has begun to do so, the motion to direct the condemnor to make advance payments was properly denied.”

(*In re Vill. of Port Chester*, 294 AD2d 510, 510-511 [2002]). Further:

“There is no requirement that petitioner ‘plead or prove,

as a prerequisite to the acquisition of property by eminent domain, that it negotiated in good faith with the [property] owner[s]' (*Oswego Hydro Partners L.P. v Phoenix Hydro Corp.*, 163 AD2d 829, 829, citing *Matter of Consolidated Edison Co. of NY [Neptune Assoc.]*, 143 AD2d 1012, 1014). If a property owner believes that an offer is inadequate, the remedy is to commence an action . . . pursuant to EDPL article 5.”

(*National Fuel Gas Supply v Town of Concord*, 299 AD2d 898, 899 [2002]).

Discussion

Inasmuch as a condemnor is not obligated to plead or prove that it negotiated in good faith with a condemnee in making an advance payment as a prerequisite to the acquisition of property by eminent domain (*see generally National Fuel Gas Supply*, 299 AD2d at 899), the EDPL provides no specific time requirement for advance payments to be made (*see generally In re Vill. of Port Chester*, 294 AD2d at 510-511), and petitioner represented during oral argument that advance payments will be made promptly after title vests, the court declines to issue an order directing petitioner to make all advance payments by a date certain. The court holds, however, that in the event that advance payments are not made within a reasonable period of time, it will entertain a motion seeking to compel petitioner to make such payments (*see generally Matter of City of New York v South Beach Bluebelt*, 2009 NY Slip Op 51066U, 7 [2009]).

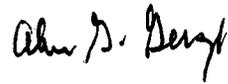
Conclusion

All relief requested by 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 is denied. The relief requested by respondents Daniel Goldstein, Heron Real Estate Corp., and Pack It Away Storage Systems, Inc., is granted to the extent of permitting all respondents to file claims for real property no later than September 1, 2010 and permitting all respondents to file fixture claims no later than April 1, 2011. The petition is granted and the vesting order submitted by petitioner is signed simultaneously herewith.

The foregoing constitutes the order of this court.

E N T E R,



J. S. C.

HON. ABRAHAM G. GERDES
J.S.C.