

**Penn Community Defense Fund v New York State  
Urban Dev. Corp.**

2023 NY Slip Op 33049(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 159154/2022

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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PENN COMMUNITY DEFENSE FUND, 251 WEST  
30TH STREET RESIDENTIAL TENANTS  
ASSOCIATION, CITY CLUB OF NEW YORK, and  
RETHINKNYC,

Index No. 159154/2022

Petitioners

- against -

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION d/b/a EMPIRE STATE  
DEVELOPMENT and NEW YORK STATE PUBLIC  
AUTHORITIES CONTROL BOARD,

Respondents

-----x  
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AAG MANAGEMENT, INC., 421 SEVENTH  
AVENUE LLC, and 155 WEST 33 LLC,

Index No. 159184/2022

Petitioners

- against -

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION d/b/a EMPIRE STATE  
DEVELOPMENT and NEW YORK STATE PUBLIC  
AUTHORITIES CONTROL BOARD,

Respondents

-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Petitioners in each of the proceedings captioned above move  
to supplement the record in support of their petitions to  
invalidate respondent New York State Urban Development

Corporation's General Project Plan (GPP) for the area surrounding Penn Station in New York County. Since the motions are identical in each proceeding, the court consolidates the proceedings for determination of the two motions.

C.P.L.R. §§ 403(a), 409, and 7804(d) require that the support for petitions in special proceedings, including proceedings pursuant to C.P.L.R. Article 78 such as these proceedings, be by affidavits and admissible evidence. E.g., Gonzalez v. City of New York, 127 A.D.3d 632, 633 (1st Dep't 2015); Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008); Uncle Sam Garages, LLC v. Capital Dist. Transp. Auth., 171 A.D.3d 1260, 1261 (3d Dep't 2019); FR Holdings, FLP v. Homapour, 154 A.D.3d 936, 938 (2d Dep't 2017). Only two of the documents that petitioners seek to offer for the truth of the documents' contents are conceivably admissible.

The first, a "Business Terms Framework," between respondent New York State Urban Development Corporation, conducting business as Empire State Development (ESD), and intervening respondent Vornado Realty Trust, Aff. of Charles Weinstock (June 12, 2023) Ex. A, is admissible only if the court considers ESD's production of the document pursuant to petitioners' Freedom of Information Law requests, N.Y. Pub. Off. Law § 87(2), to fit within C.P.L.R. § 4540-a. That rule authenticates a document created by a party that it produces in response to a disclosure request.

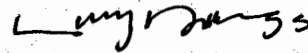
Petitioners concede, however, that this "Business Terms Framework" is merely a preliminary proposal, of no effect, and that petitioners do not rely on it for the court to grant their petitions.

The court may not consider the second admissible document, a "Compatibility Report" by Amtrak, New Jersey Transit, and the Metropolitan Transportation Authority (MTA) railroads, Weinstock Aff. Ex. G, published on the MTA's website, LaSonde v. Seabrook, 89 A.D.3d 132, 137 n.8 (1st Dep't 2011); L & O Realty Corp. v. Assessor, 71 A.D.3d 1025, 1026 (2d Dep't 2010); Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dep't 2009), because the report post-dates ESD's approval of the GPP July 21, 2022, that petitioners ask the court to invalidate. The court may consider only the record before ESD when it approved the GPP. Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000); Plekhanov v. New York City Dept. of Hous. Preserv. & Dev., 203 A.D.3d 521, 522 (1st Dep't 2022); United Fedn. of Teachers v. City of New York, 154 A.D.3d 548, 549 (1st Dep't 2017). "Consideration of evidentiary submissions as to a change in circumstances after the agency's determination is not permissible . . . ." 620 W. 182nd St. Hqts. Assoc., LLC v. Department of Hous. Preserv. & Dev. of the City of N.Y., 149 A.D.3d 558, 559 (1st Dep't 2017). Moreover, ESD's Neighborhood Conditions Study in the record July 21, 2022, already addresses the issues that the railroads'

Compatibility Report addresses concerning unsafe conditions in Penn Station.

For the reasons explained above, the court denies petitioners' motion to supplement the record in each proceeding.

DATED: August 21, 2023



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**