SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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In the Matter of

MADISON SQUARE GARDEN, L.P.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Index No. 104644/05

-against-

NEW YORK METROPOLITAN TRANSPORTATION AUTHORITY, and JETS DEVELOPMENT, LLC,

Respondents.

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In the Matter of

NEW YORK PUBLIC INTEREST RESEARCH GROUP/ STRAPHANGERS CAMPAIGN, INC., GENE RUSSIANOFF, COMMON CAUSE, INC., RACHEL LEON, TRI-STATE TRANSPORTATION CAMPAIGN, INC., JON ORCUTT, LOCAL 100 OF THE TRANSIT WORKERS UNION a/k/a TWU LOCAL 100, ROGER TOUSSAINT, *et al.*, on their own behalf and on behalf of all straphangers and taxpayers in the City and State of New York similarly aggrieved,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Index No. 105292/05

-against-

NEW YORK METROPOLITAN TRANSPORTATION AUTHORITY, PETER S. KALIKOW in his capacity of Chair/Commissioner of the Metropolitan Transportation Authority,

Respondents.

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In the Matter of

BETSY F. GOTBAUM, as Public Advocate for the City of New York,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Index No. 105346/05

-against-

NEW YORK METROPOLITAN TRANSPORTATION AUTHORITY,

Respondent.

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In the Matter of

WALTER MANKOFF, ANNA HAYES HEVIN, JOE RESTUCCIA, SIMONE SINDIN, HELL'S KITCHEN NEIGHBORHOOD ASSOCIATION, and Assemblyman RICHARD N. GOTTFRIED (64th Assembly District), Assemblyman SCOTT STRINGER (67th Assembly District), and Assemblyman ADRIANO ESPAILLAT (72ND Assembly District),

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Index No. 105667/05

-against-

NEW YORK METROPOLITAN TRANSPORTATION AUTHORITY,

Respondent.

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HERMAN CAHN, J.:

These related actions, which are consolidated for disposition, all seek to set aside the determination of the New York Metropolitan Transportation Authority (MTA) selecting Jets

Development, LLC (Jets) to develop the area known as the John D. Caemmerer West Side Yards (West Rail Yards), located on the west side of Manhattan, west of 11th Avenue, between 30th Street and 33rd Street. There are four proceedings, in which the parties have submitted a total of 12 motions, which are consolidated for disposition.

The Motions and Proceedings:

In *Matter of Madison Square Garden v New York Metropolitan Transportation Authority and Jets Development, LLC* (index no. 104644/2005) (*MSG v MTA*), there were four motions submitted. The first is the Article 78 petition. Motion sequence number 002 is a motion by petitioner Madison Square Garden, L.P. (MSG) for a preliminary injunction enjoining the MTA and Jets from entering into any agreement for the disposition of the development rights over the West Rail Yards. Motion sequence no. 003 contains an amended petition that raises two issues not theretofore raised. Motion sequence no. 004 is a motion by Transgas Energy, LLC (Transgas) for amicus curiae status in order to bring to the court's attention additional evidence.

In *Matter of New York Public Interest Research Group v New York Metropolitan Transportation Authority* (index no. 105292/2005), there are three motions submitted. In motion sequence number 001, petitioners seek intervenor status in the *MSG v MTA* proceeding. In addition, the motion seeks to set aside

the MTA's selection of the Jets to develop the West Rail Yards, and asks the court to retain jurisdiction over the MTA in any future offerings of the property. In motion sequence number 002, the Speaker of the City Council and several members of the City Council seek leave to appear as amici curiae and file a brief in support of petitioners. In motion sequence number 003, the Jets seek leave to intervene as respondent.

Matter of Gotbaum v New York Metropolitan Transportation Authority (index no. 105346/2005) involves two motions. In motion sequence 001, petitioner, the Public Advocate, seeks intervenor status in *MSG v MTA*, and seeks to set aside the MTA offer to the Jets to develop the West Rail Yards. The Jets seek leave to intervene as respondent, in motion sequence no. 002.

In *Matter of Mankoff v New York Metropolitan Transportation Authority* (index no. 105667/2005), motion sequence numbers 001 and 002 both seek to set aside the decision of the MTA to award the Jets the right to develop the West Rail Yards. In motion sequence number 003, the Jets seek leave to intervene as respondent.

PRELIMINARY STATEMENT

These consolidated proceedings arise out of a very publicized proposal for the N.Y. Jets football team to build a stadium on the site of the West Rail Yards. The advocates of the plan envision a convention corridor, including an expansion of

the Javits Convention Center, which would enable New York City to host many trade shows and other events that it is currently unable to accommodate. The stadium has been called the centerpiece of the City's bid to host the 2012 Olympics Games, and the City has argued strenuously in favor of allowing the Jets' proposal to go forward.

The State is also strongly in favor of the Jets' proposal to build the stadium because, it and the City maintain, this addition would bring a large amount of additional revenue to the City and State, and would revitalize an area of Manhattan that has been underutilized until now.

The proposal for the stadium has engendered strong opposition, and much public debate and discussion, as evidenced by the petitions submitted by City and State taxpayers, public interest groups, and public officials. Newspapers have published many articles and editorials discussing the pros and cons of the project, and have disseminated information regarding anticipated consequences of building the stadium. Emotions regarding the stadium are running high on the part of both those in favor and those opposed.

The issue facing the court, however, is not whether the project is desirable, or whether a majority of New Yorkers approve or disapprove of the proposal. The question is whether the MTA was within its authority to approve the transfer of the

development rights to the Jets in the manner that it did. If the MTA Board acted within its authority, then the matter must be relegated to the political process for decision. If the MTA's Board however, acted arbitrarily or capriciously in approving the transfer, the transfer should be set aside.

FACTS

The MTA owns the West Side Yards, an area that is used by the Long Island Railroad (LIRR), an MTA subsidiary, as a commuter rail yard and locomotive storage yard with support facilities. Over the last 20 years, long before the possible Olympics were thought of, the MTA attempted to arrange for the sale of the property, without success.

During the summer of 2003, the Jets approached the MTA about a potential long-term lease of the West Side Yards. On March 25, 2004, the MTA, the Jets, and the New York State Urban Development Corporation d/b/a Empire State Development Corporation (ESDC) entered into a Memorandum of Understanding (MOU) in which the parties agreed that the Jets would pay the MTA for the value attributable to the use of air space above the West Side Yards, and the ESDC agreed to override local zoning in order to permit the Jets to construct a football stadium. The MOU was not a legally binding agreement. Both the print and broadcast media reported the existence and terms of the MOU. At that time, no other entity had expressed interest in the property.

Talks continued, with the Jets working with the MTA and LIRR. In January 2005, Peter S. Kalikow, MTA Chairman, proposed that if the MTA and the Jets could not reach a mutually agreeable price for the site, the MTA Board should agree to binding arbitration between the Jets and the MTA.

On February 4, 2005, MSG submitted a two-page letter proposal offering to develop the West Side Yards. MSG had been previously involved in a joint proposal with the Jets for the site, which MSG had abandoned. After receiving MSG's proposal, the MTA decided not to go forward with the arbitration, and instead, on February 22, 2005, issued a Request for Proposals (RFP) for the West Side Yards. The MTA placed the RFP on its website, discussed it in public session at its February Board meeting, and ascertained that it had received media attention.

On March 21, 2005, the MTA received five proposals in response to the RFP. Two of them were rejected for failure to comply with the mandatory $25,000 deposit. The other three proposals were from the Jets, MSG, and Transgas.

The Jets' Proposal:

The Jets proposed building the New York Sports and Convention Center (NYSCC) on a platform over the LIRR rail yards. It would be the centerpiece for the development of a multi-use sports, entertainment, and convention facility that would serve as the home of the New York Jets football team, as well as an

extension of the Jacob K. Javits Convention Center. The Jets' proposal provided for a $250 million payment for the West Side Yards and for the on-site development rights, with $50 million to be paid at closing, and payments of $50 million per year over the next four years. The Jets also proposed providing a $25 million fund for capital replacement and for inspections, repair, and maintenance relating to the platform. The Jets alternately suggested paying a discounted price in full at the time of closing, using a 9.5% discounted rate, which payment would total approximately $210 million. The Jets were prepared to close on May 2, 2005. Upon inquiry, the Jets clarified that they were prepared to close irrespective of whether the Public Authorities Control Board had actually approved the project.

The Jets also included with this proposal an expression of interest from six real estate developers, unconnected with the Jets, to purchase certain transferable development rights (TDRs) from the MTA for approximately $440 million additional. The Jets expected that the ESDC would provide a zoning override in accordance with the MOU, but did not condition their proposal on that zoning change.

The MSG Proposal:

MSG proposed building a mixed-use community consisting of 5,800 housing units, public park, elementary school, a 750-room hotel, restaurants and office, retail, recreational, and

community space. It provided for a $400 million cash payment up front for all development interests, and a commitment to construct a platform over the rail yards, estimated to cost $360 million. The MSG plan calls for building residential and commercial space of over 6.8 million square feet. MSG anticipated nearly 10 months of negotiations with the MTA over the contract in the pre-construction phase, and planned for construction in three phases, to start in August 2007, and to be completed in 2018. The MSG proposal would effectively use the air space required for TDRs. The MSG proposal did not provide for the construction of a bus garage to relocate the existing Quill Bus Depot. It also did not provide for the construction of a sports and entertainment facility, i.e. a stadium.

MSG had expressed interest in the West Rail Yards in the late 1980s, and again a few years later. In 2002 and early 2003, MSG, together with the Jets explored the possibility of jointly developing a state-of-the-art facility that would have housed the Jets, Knicks, and Rangers. MSG discontinued the project in early 2003.

The Transgas Proposal:

The Transgas proposal provides for a payment of $200 million to the MTA, and funding of $500 million in capital projects chosen by Transgas. The proposal was subject to numerous pre-conditions, including that the MTA enter into a 40-year power

purchase agreement with Transgas, that Con Edison enter into a 40-year contract with Transgas to purchase not less that 2 million pounds per hour of steam, and the right to construct a $2 billion electricity and steam co-generation plant in Brooklyn. The MTA has no control or input over such plans, and was, therefore, not in a position to negotiate such a proposal. In addition, the requirement that the MTA enter into such a contract would mean that the MTA would be paying money to finance capital projects that are not a priority for the MTA, and for which Transgas and its partners would be the likely vendors. Consequently, the Transgas proposal was rejected. Transgas has not challenged the denial of its proposal.

MTA Actions:

The MTA held briefing sessions on March 29-30, 2005, at which board members were presented with materials about the proposals to enable them to evaluate the proposals. On March 31, 2005, the MTA Board held a meeting where members of the public expressed their views regarding the three proposals. There were 41 public speakers, including MSG's lead counsel.

The Board unanimously determined that the Jets' proposal constituted the most beneficial plan for the MTA, in the long run. In reaching this conclusion, the Board considered estimates by the New York City Economic Development Corporation and the New York State Economic Development Corporation, which indicated that

over the next 30 years, the Jets' proposal would add over $60 billion in revenue to the City and State, and approximately $1 billion in revenue to the MTA. It also considered the more aggressive construction schedule of the Jets' proposal, and the impact on the value of the Eastern Rail Yards, also owned by the MTA, located across 11th Avenue from the West Rail Yards. While rejecting that portion of the Jets' proposal that involved selling the TDRs to potential developers, the Board took into account that it would be retaining potential TDRs, which might have a value in the future of up to $1 billion.

DISCUSSION

MSG v MTA:

The MTA has broad authority to dispose of real estate "whenever it determines that it is in the interest of the authority" to do so. Public Authorities Law §§ 1265 (7) and 1267 (5). In doing so, the MTA is required to "obtain terms most beneficial to the public." *Square Parking Sys. v Metropolitan Transp. Auth.*, 92 AD2d 782, 785 (1st Dept 1983). In assessing which terms are most beneficial, the MTA can take into account not only the dollar figure being offered, but the long-term benefit to the MTA and to the public it serves. *Creole Enterprises, Inc. v Giuliani*, 236 AD2d 272 (1st Dept 1997); *Matter of New City Jewish Center v Flagg*, 111 AD2d 814 (2d Dept), *affd for reasons stated* 66 NY2d 980 (1985). In order to

successfully challenge the MTA's determination, the challenger would have to demonstrate that there was no rational basis upon which the MTA reached its conclusion. *Municipal Testing Laboratory, Inc. v New York City Transportation Auth.*, 233 AD2d 105, 106 (1st Dept 1996). If there is a rational basis for the Board's action, even if the court or the public might have arrived at a different conclusion, the MTA Board's decision must be affirmed.

Ultimately, the issue of which plan should be accepted, or whether all of them should be rejected, must be decided by the MTA Board. Those issues are public policy issues which are best left to the Board appointed by the elected officials with that authority, as long as there is no arbitrary or capricious decision.

Was the determination of the MTA arbitrary and capricious?

An analysis of the MSG arguments and the MTA powers leads to the conclusion that the MTA did not act in an arbitrary and capricious manner.

MSG contends that the MTA acted arbitrarily and capriciously in selecting the Jets' bid, and that the bidding process was rigged in favor of the Jets. It maintains that the MTA did not obtain the most beneficial terms, or act in its own interest as it is required to do. MSG argues that the MTA admitted that MSG's proposal was superior to that of the Jets, and that the MTA

acted arbitrarily and capriciously in basing its decision on improper considerations. It further contends that the Jets' bid was not in compliance with the RFP, and should have been disqualified, and that in making the award, the MTA considered criteria that were not contemplated by the RFP. MSG also maintains that the bidding process was a sham, based upon MTA's February 4, 2005 demand letter, the compressed time frame for a response to the RFP, the requirement that proposals be based upon a "where is/as is" basis, as well as other purported inequities.

While MSG focuses on the dollar figure that it offered, compared to the dollar figure in the Jets' proposal, in arguing that the MTA acted arbitrarily and capriciously, that dollar figure is not the sole criterion that the MTA was required to consider. Rather, in seeking to assess the relative value of each proposal, the MTA could consider other factors such as the long-term projections of increased ridership, the time table anticipated for construction, the effect of each proposal on the value of the Eastern Rail Yards, and the potential value of future TDRs, so long as those considerations did not lack a rational basis. MSG challenges the reasonableness of these considerations, calling them mere pretexts to justify a predetermined outcome.

MSG contends that its proposal would create more permanent jobs, and ultimately generate more direct tax revenue than the

Jets' proposal. Further, its mixed-use community is the type of development that the MTA itself recommended in its 1989 Master Plan, and what the MTA's independent appraiser described as the property's "highest and best use."

The MTA counters that the Jets' proposal would create more revenue for the City and State, as well as to the MTA. While each side has experts on whom it relies, the court cannot find that the MTA acted arbitrarily and capriciously by choosing to accept the estimates made by the New York City Economic Development Corporation and the New York State Economic Development Corporation, which gave favorable estimates regarding the Jets' proposal. *See* Simpson Aff., ¶¶ 8-15; Kalikow Aff., ¶¶ 10-11; Vrooman Aff., ¶¶ 8-9; Sedore Aff., ¶ 9; Werner Aff., ¶ 9; Krsulic Aff., ¶¶ 33-44, Exs. N, O; Weisbrod Aff., ¶¶ 14-15. The court also notes that while the independent appraiser based its appraisal on the property being used for mixed use, that does not mean that the appraiser considered such use to be the only appropriate use for the property, or that the MTA is limited to considering that use only, if another proposal that is beneficial to the MTA is presented. If the Jets' proposal was deemed by the MTA Board to be more beneficial for the MTA than the mixed-use proposal made by MSG, the Board was justified in accepting it.

No. 7 Subway Line:

MSG challenges the MTA's representations with respect to the

No. 7 subway line. MSG contends that the RFP did not include the subway as part of the criteria set forth, and that, in any event, the funding for the No. 7 line extension is not dependent on the stadium being built. MSG maintains that the extension is necessary to any development of the area.

While there have been some conflicting allegations regarding the presence of funding for the No. 7 subway line extension, at oral argument it was generally agreed that the funding would not be affected if the stadium were not built. However, the MTA believes that funding and construction will take place more quickly, if the Jets proposal is approved. The sooner the construction takes place, the sooner the MTA will obtain added revenue from the extension of the No. 7 line. Further, the MTA maintains that the revenue stream which must support the financing for the extension is much more valuable if a stadium is built compared with a mixed-use project. Again, while it is possible to disagree with the MTA's conclusions, MSG has not demonstrated that those conclusions lack a rational basis.

In addition, MSG's claim that the RFP did not refer to the No. 7 line extension is incorrect. The RFP specifically noted that "a component of the rezoning and development plan contemplates the extension of cross town subway service in the form of the No. 7 subway extension to 34th Street and 11th Avenue by 2010." Krsulic Aff., Ex. F (RFP § II, § III.A).

Future Value of the Eastern Yards:

MTA maintains that MSG's proposal would diminish the future sale value of the Eastern Rail Yards because the construction under the MSG plan would be protracted until after MTA envisions selling the Eastern Rail Yards. MSG argues that not only did the RFP impose no restrictions on this type of use, but the Eastern Rail Yards have recently been rezoned primarily for commercial, not residential, use, so MSG's use of the West Rail Yards would be compatible, rather than competitive, with the eventual use of the Eastern Rail Yards.

Once again, MSG is attacking the MTA's conclusions without demonstrating that there was no rational basis to the conclusion. While MSG does not think that there would be competition between the two sites, it has not shown that the MTA's concern that two mixed-use areas neighboring each other would give rise to such unprofitable competition. Even if the use contemplated for the Eastern Rail Yards involves more commercial and less residential use, that does not rule out the basis for the MTA's concern. Further, the MTA's concern about the construction time table is an issue that MSG has not shown to be without basis. If construction is still ongoing, and in fact not nearing completion, at a time when the MTA contemplates selling the Eastern Rail Yards, the adverse effect on the value of the property might be significant.

MSG's argument that the RFP did not impose any restrictions based on the Eastern Rail Yards, is disingenuous. While no restrictions may have been placed on the use, the RFP did state that the proposals would be looked at in light of the interests of the surrounding community. The Eastern Rail Yards, located across 11th Avenue from the West Rail Yards, are clearly part of the surrounding community. Obviously, the MTA would be especially concerned about that portion of the surrounding community which it or its affiliate/subsidiary owns. Thus, this argument, too, is unpersuasive.

TDRs:

MSG asserts that the TDRs, to which the MTA gives considerable value, are phantom air rights that do not currently exist, and are not likely to ever exist. This, too, is a matter of disagreement among experts. While MSG maintains that there are never likely to be TDRs, MTA's expert opined that such air rights are likely to have a future value of up to $1 billion. *See* Krsulic Aff., ¶ 34, Ex. N. The MSG proposal envisions MSG using all of the square footage that would be available after the rezoning upon which MSG's proposal depends.

The MTA argues that MSG's proposal relies on a rezoning which may or may not take place. In fact, if the area is not rezoned to accommodate the 6.8 million square feet of development that the MSG proposal contemplates, the project would never be

built.

The MTA also argues that the question of the value of the TDRs is not something that surfaced only with the Jets' proposal. The November 2004 appraisal specifically addressed the issue of air rights, and concluded that the value of the transferable air rights would be $330 million in present value. Mastro Aff., Ex. 11, at 111. The fact that TDRs have been a valuable, recognized right in New York City negates MSG's position that they have no potential value. *See Penn Central Transp. Co. v City of New York*, 42 NY2d 324, 336 (1977), *affd* 438 US 104 (1978); *Matter of Fisher v Giuliani*, 280 AD2d 13 (1st Dept 2001).

The Quill Bus Depot:

Another issue that MSG does not address is the fact that its proposal does not provide adequate space for the relocation of the existing Quill Bus Depot. This was one of the issues included in the RFP. MSG responds that its bid was found to be a qualifying bid, and MSG implies that, therefore, that issue was not a concern. However, the fact that the MSG bid was qualified does not mean that the MTA could not consider the effect of the failure of the proposal to make provisions for relocation of the Quill Bus Depot. Additionally, any dissatisfaction that the MTA had with the Jets' provision for the bus depot is something that the MTA was free to negotiate with the Jets, and does not preclude the MTA from weighing the issue in making its

determination.

Miscellaneous Arguments:

MSG contends that, in defending its position, the MTA has used post-determination rationalizations to support its decision. The MTA acted appropriately in considering all the factors that were before it in determining which proposal was superior, even if some of those factors were not expressly set forth in the RFP. The MTA does not, and did not, say that those factors were requirements in order to be selected; however, that does not mean that a public board should blind itself to factors contained in proposals that were not anticipated, but may have an effect on the desirability of a particular plan.

MSG contends that the MTA acted arbitrarily and capriciously in failing to disqualify the Jets' bid as non-compliant with the RFP because it was contingent on the ESDC and the Public Authorities Control Board (PACB) approving an override of local zoning. Both in the papers submitted, and at oral argument, the Jets expressly denied that allegation, and represented to the court, on the record, that its proposal was not contingent on either eventuality, and that it was prepared to close without any rezoning. The fact that the actual building of the stadium would require such an override does not mean that the Jets' offer to buy is contingent on that rezoning. In fact, any proposal would require rezoning in order for the proposal to become a reality,

including that of MSG. The MTA required a "where is/as is" bid because it did not want to take the risk of the zoning change failing. The fact that this risk continues to rest with the Jets is precisely what the RFP intended, and in no way compromises either the proposal, or the MTA's selection of the Jets' proposal.[1]

Was the RFP process unfairly designed to favor the Jets?

MSG contends that the MTA designed the RFP so as to favor the Jets. It points to the demand letter of February 4, 2005, the short time frame for filing the proposal, the "where is/as is" condition of sale, the MTA's failure to provide information regarding the environmental liabilities that developers face, the difference in the security deposit that bidders other than the Jets were required to post, assurances that the Jets were given, and differences regarding the relocation of the Quill Bus Depot.

Initially, it must be noted that public officers, such as the members of the MTA Board, are entitled to a presumption of regularity. *Matter of Werter v Board of Regents of Univ. of the State of New York*, 18 AD2d 1032 (3d Dept 1963). Petitioner's

[1] MSG continues to assert that the Jets' offer is contingent, and in a series of letters to the court, has introduced a term sheet between the MTA and the Jets which, it claims, proves that the Jets' bid is contingent. As was stated at oral argument, the term sheet is, by its express terms, nonbinding. Further, the contingencies set forth in the term sheet would allow the MTA to refuse to close; they would not enable the Jets to choose not to proceed. Thus, this too fails to demonstrate that the Jets' proposal is contingent.

suspicions that something was done improperly, without evidence, is not enough to warrant reversal of the MTA's determination. *See Conduit & Found. Corp. v Metropolitan Transportation Auth.*, 66 NY2d 144, 148 (1985).

MSG's objections regarding the February 4, 2005 demand letter are irrelevant to the RFP. That demand letter resulted from MSG's unsolicited bid, and was not made in the context of the RFP. In fact, it appears that the unsolicited bid, combined with the response to the demand letter, caused the MTA to issue the RFP, which it would otherwise not have done. MSG has failed to demonstrate how the demand letter, or the allegedly short time frame allotted to respond to it, affected the MTA's ultimate determination.

MSG contends that the "where is/as is" term in the RFP unfairly favored the Jets. However, MSG has not offered any evidence that this type of provision is unusual. While various petitioners have suggested that the MTA should have had the property rezoned before releasing an RFP, the different usages proposed would have required different zoning. Therefore, if the MTA had, in fact, had the property rezoned, that would have further limited the potential for proposals. Additionally, the "where is/as is" term did not enable the Jets to make their proposal more easily. The area is not zoned for a stadium, and the Jets need PACB approval in order to go forward with

construction. The RFP required the Jets to accept a risk that they apparently had not originally anticipated.

The court is not insensitive to MSG's complaint concerning what might otherwise be considered an unreasonably short period of time (27 days) to respond, within the context of such a complex project. However, given the actual circumstances herein, MSG fails to demonstrate in what way the 27-day deadline benefitted the Jets over MSG. Both MSG and the Jets were familiar with the property, and with its availability, for a long time. MSG had, in fact, submitted an unsolicited proposal prior to the RFP. Further, MSG has not suggested any changes in the way it would have formulated its proposal had it had more time. Thus, its complaint that there was too short a time period is without any substance, whether related to economic or environmental responses to the RFP.[2] Even if MSG were correct that it did not receive information as early as the Jets, about which there is a serious question, MSG has not demonstrated that it was in any way adversely affected. Finally, with respect to the bus depot, MSG bases its argument on speculation. That is also insufficient to challenge the MTA determination.

[2] The court notes that there is pending a petition relating to the sufficiency of the Environmental Impact Statement. The within decision does not rule on the issues raised in that proceeding.

Amended Petition

In its amended petition, MSG contends that the MTA's decision to retain excess air rights is an action subject to immediate SEQRA review. In arguing that a SEQRA review is required immediately, MSG notes that SEQRA has a broad definition of "action," which should be liberally construed. It relies particularly on *Matter of Fisher v Giuliani* (280 AD2d 13, *supra*), in which the Appellate Division, First Department, ruled that, before enacting zoning changes, the City was required to undertake an environmental review of development rights transfers that could occur if special permits were later issued, even though environmental review would be required when the applicant sought the special permit. However, that situation was different from the one at issue here. Here, no zoning change is being implemented at this time. Therefore, the City has not engaged in any activity, and no SEQRA review is now required.

MSG asserts that the change in the MTA's budget assumptions requires a supplemental Environmental Impact Statement (EIS), because the MTA did not receive the money it requested for three major projects that would affect the ability of Long Island fans to get to the proposed stadium. However, there is no way of knowing whether those projects will eventually be funded, nor was the MTA required to conduct a new EIS when the information that MSG now raises was not before the agency at the time that the

determination was made.

MSG also contends that data regarding hazardous waste testing was not provided in a timely manner. Not only is there evidence that this information was supplied, and that MSG had the information by December 2004, but MSG has not stated how the failure to provide the information, had it not been provided, affected MSG's proposal. Therefore, this issue, too, is uncompelling.

In conclusion, MSG has failed to demonstrate that the MTA acted arbitrarily or capriciously in choosing the Jets' proposal, or that MSG was damaged by the manner in which the RFP was conducted.

The MTA and the Jets have agreed in open court not to close on the property, until June 2, 2005. They are now temporarily stayed from closing until the close of business June 7, 2005, in order to afford the petitioners an opportunity to seek a further stay, if they be so advised, from the Appellate Division.

Transgas seeks amicus curiae status

Transgas, which submitted a proposal pursuant to the RFP, seeks amicus curiae status to submit additional information that otherwise may not be brought to the court's attention. Transgas asserts that there is a serious threat to the Amtrak rail system, and the public's safety, unless an injunction is issued to require an independent engineer and Amtrak's engineer to approve

any planned construction. Transgas estimates that it will take at least 180 days after Amtrak receives the design and construction plans for Amtrak to assess the safety of the plans.

MTA responds that both it and the Jets are well aware of Amtrak's tunnels under the site, and have and will continue to take into account the safety and integrity of those tunnels. Further, if Amtrak has a concern, it can certainly raise it.

The court grants Transgas amicus curiae status. However, the concerns raised by Transgas have been adequately addressed. Further, if there is any real danger to Amtrak tunnels that is not being addressed, Amtrak can seek appropriate intervention.

New York Public Interest Research Group v MTA:

Petition challenging MTA determination and seeking intervenor status in *MSG v MTA*

Petitioners include not-for profit corporations concerned with mass transportation services in New York, individuals who use mass transit and are taxpayers in New York, a good-government group, and a union representing transit workers. Petitioners seek a judgment declaring that the MTA acted arbitrarily and capriciously in the RFP process; declaring that all of the bids submitted should have been rejected; annulling the vote of the MTA Board; permanently enjoining the MTA from proceeding to contract with any bidder or any bid resulting from the February 22, 2005 RFP; ordering the MTA to reissue an RFP for the West Side Yards; retaining jurisdiction over the MTA in future RFPs

relating to the West Side Yards; declaring that the MTA violated State Finance Law § 123. Petitioners also contend that they should be permitted to intervene in *Hell's Kitchen Neighborhood Assn. v New York City Dept. of City Planning*, Index No. 117957/04, which is concerned with the adequacy of the Environmental Impact Statement. However, since that matter is not being considered with these proceedings, it will not be here considered.

Petitioners seek to intervene because they maintain that MSG will not adequately represent their interests, yet they may be bound by the judgment to be rendered herein. While they seek to prevent the MTA from selling the development rights to the Jets, unlike MSG, they do not want the MTA to select MSG's proposal. Rather, they seek to have a new RFP issued, arguing that the RFP was substantively and procedurally defective.

The first issue that must be addressed is standing. The MTA contends that petitioners lack standing under both Article 78 and the State Finance Law. Petitioners contend that they have standing to bring this Article 78 proceeding under the standards set forth in *Saratoga County Chamber of Commerce, Inc. v Pataki* (100 NY2d 801, *cert denied* 540 US 1017 [2003]).

In *Saratoga*, the Court of Appeals allowed citizen-taxpayers to challenge actions of the Governor regarding permitting casino gambling on Indian reservations. The Court based its decision on

the fact that the plaintiffs were not only challenging the wisdom of the way in which an expenditure was being made, which would be "patently insufficient" to allow standing (*id.* at 813), but claimed that it was illegal for the government to spend money on the activity at all. Additionally, if the citizen-taxpayers were not granted standing to challenge the Governor's action, "an important constitutional issue would be effectively insulated from judicial review." *Id.* at 814.

Here, petitioners have not alleged that the action taken by the MTA, i.e., seeking to sell the development rights, is illegal. *Matter of Transactive Corp. v New York State Dept. of Soc. Servs.*, 92 NY2d 579, 587 (1998). Nor have they demonstrated that there is no one else who can challenge the MTA's determination. *Saratoga, supra.* Any bidder or potential bidder who was harmed by the procedure or outcome would have standing, as demonstrated by the fact that MSG has standing. Thus, in order to demonstrate that they have standing, petitioners would have to show that they suffered an injury-in-fact within the "zone of interests" sought to be protected by the statute under which the agency acted, and that the injury is different in kind or quality from that suffered by the public at large. Since none of the petitioners responded to the RFP, none of them can show any personal injury based on a claim that the MTA acted arbitrarily and capriciously. Accordingly, they do not have

standing to bring the Article 78 proceeding.

Petitioners maintain that they nonetheless have standing under State Finance Law § 123-b. State Finance Law § 123-b provides:

> 1. Notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation.

Petitioners maintain that the MTA's actions constitute a wrongful disbursement of property of the state, and is thus actionable. They distinguish *Transactive*, arguing that in that case, the taxpayers were seeking to challenge a purely non-financial state action, while here the MTA's action bears a nexus to the financial activities of the state.

Standing under State Finance Law § 123-b has been narrowly construed, and allegations that the public authority's actions were arbitrary and capricious are not those for which standing has been granted by the statute. Rather, petitioners must allege that it was illegal or unconstitutional for the MTA to dispose of

the West Side Yards. Merely demonstrating that the procedure used was faulty is insufficient. As discussed in *Transactive*, *supra*, State Finance Law § 123-b does not confer standing to challenge the procurement procedures followed by an agency; it confers standing only where the agency acted outside its authority in issuing an RFP. As the Court of Appeals stated at 92 NY2d at 589: "[a] rule of law which extended standing to all and any taxpayers to contest the manner in which State agencies award contracts might seriously disrupt State operations. . . . '[I]t is one thing to have standing to correct clear illegality of official action and quite another to have standing in order to interpose litigating plaintiffs and the courts into the management and operation of public enterprises' (*Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992)." Consequently, petitioners do not have standing to challenge the determination of the MTA.

Although this court need not reach the merits of the underlying claim that the RFP process was improper, because there are so many petitioners and entities seeking to intervene who raise the same issue, the court will address it briefly.

In order to successfully challenge the RFP process, a challenger must demonstrate that the agency acted in an arbitrary and capricious manner. Here, the relatively short deadline is raised as proof of the impropriety of the RFP process. Although

the argument was skillfully and persuasively made, standing alone, it is unpersuasive. The MTA had the property available for development for over 20 years. During that time, there were few inquiries, and almost none of them were serious. In any event, the MTA is not obligated to issue an RFP when disposing of real property (*see* Public Authorities Law § 1267; *Square Parking Sys. v Metropolitan Transp. Auth.*, 92 AD2d 782, 785 [1st Dept 1983]).

The MTA was aware of the interest in the development voiced by both the City and State governments, and their attempt to win the Olympic Games for 2012. It knew that time was an important factor, and that the West Side Yards was not a site that had generated much development interest during the entire 20+ year period during which it was available. It knew that MSG and the Jets had jointly investigated the possibility of developing the West Side Yards. Under these circumstances, the MTA could reasonably have concluded, and apparently did conclude, that allowing a longer period of time to respond to the RFP could be counterproductive, and could jeopardize the viability of the proposal.

While the challengers all point to the lack of bids from local developers or from developers throughout the world as evidencing the unfairness of the procedure, not one has submitted any evidence that any developer would have been interested in

pursuing a project on this site had there been more time to respond. No affidavit or other indication as to even one developer was submitted. Absent such evidence, any contention that the short dates precluded more lucrative offers is pure speculation. Thus, the petitioners in all the related actions have failed to demonstrate that there was any injury from the allegedly improperly short time frame.

City Council Speaker and City Council members seek amici curiae status

The City Council Speaker and several members of the City Council seek leave to appear as amici curiae and have submitted a brief in support of the petition. Their amicus brief raises the additional argument that the MTA acted arbitrarily in selecting a bid that relies on subsidies to be obtained through Payments In Lieu Of Taxes (PILOTs), which, according to the City Council, are illegal subsidies. However, the issue of the legality or propriety of the PILOTs is not properly before the court at this time. The City has not finalized its plan for funding, so any challenge is premature. The application to submit an amicus brief, is granted.

Jets seek leave to intervene

The Jets seek leave to intervene, as a necessary party respondent. Such leave is granted. The intervention does not affect the outcome of this proceeding.

Matter of Gotbaum v MTA:

Petitioner brings this proceeding and seeks to intervene in *MSG v MTA*

Petitioner is the Public Advocate of the City of New York, who seeks leave to intervene in *MSG v MTA*, and other declarative relief similar to that sought by the parties who argue that the MTA exceeded its authority in awarding the project to the Jets. The MTA argues that the Public Advocate does not have the capacity or standing to bring this proceeding.

Petitioner contends that she has standing to bring this Article 78 petition because she is an independently elected official with the capacity to sue; the Public Advocate is intended to be "a 'watchdog' over City government and a counter-weight to the powers of the Mayor" (*Green v Safir,* 174 Misc 2d 400 [Sup Ct, NY County, 1997])*;* she is expressly empowered to commence a proceeding pursuant to the New York City Charter § 1109; and there is an injury-in-fact in the zone of interests because she is charged with investigating and acting upon complaints of misfeasance by government officials affecting New York City residents, and ensuring the efficient delivery of essential transportation services to such residents.

The powers of the Public Advocate are delineated in section 24 of the New York City Charter. The Charter vests the Public Advocate with various responsibilities, including the monitoring

of public information, the review of complaints relating to city services and programs, and the investigation and resolution of such complaints, "[i]n addition to other duties and responsibilities" (Charter of the City of New York, § 24 [f]). The Public Advocate also possesses authority to petition for "a summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city," which inquiry "shall be conducted before and shall be controlled by the justice making the order . . . ." (*Id.*, § 1109; *see, Green v Giuliani*, 187 Misc 2d 138 [Sup Ct, NY County 2000].)

There is no express legislative pronouncement precluding the Public Advocate from commencing a proceeding such as this. However, while "authority of a government agency to bring suit does not require 'that in every instance there be express legislative authority,'" capacity to sue with respect to a given matter must, at least, be inferred from the agency's stated powers and responsibilities (*Community Bd. 7 v Schaffer*, 84 NY2d 148, 156 [1994]). As indicated, the Public Advocate's general powers and responsibilities are mainly of an investigative nature. Thus, while it has been held that the Public Advocate has "capacity to sue" (*Green v Giuliani, supra*), such capacity has heretofore been recognized within the context of efforts to gain access to information, consistent with that office's investigatory and public reporting function (*id.; Green v Safir,*

supra).

Absent an express legislative grant of the power to sue for substantive relief, or a sufficient inference from the office's enabling ordinance, the court will not conclude that the instant proceeding for declaratory and injunctive relief is within the authority of the Public Advocate.

In any event, the substance of petitioner's claims repeat the issues raised in the other petitions, and fail to demonstrate that the relief requested is warranted.

The proceeding initiated by the Public Advocate is therefore dismissed.

Jets move to intervene

The Jets move, without opposition, to intervene as a necessary party respondent. That request is granted. It does not affect the court's determination.

Matter of Mankoff v MTA:

Petitioners seek to set aside the MTA's selection of the Jets to develop the West Side Yards

Petitioners are citizens of the Hell's Kitchen neighborhood, and three members of the State Assembly. They bring this petition contending that good cause exists to believe that the MTA violated its statutory and fiduciary duties and public trust in connection with the bid process. Essentially, petitioners

raise the same issues as do the other petitioners in these related proceedings. Further, as with the petitioners in the prior two proceedings discussed, petitioners lack standing. They have failed to allege facts to support a finding that they suffered from an injury-in-fact falling within the zone of interests sought to be protected by the statute under which the MTA acted, and that the injury is different in kind or quality from that suffered by the public at large.

Petitioners Gottfried, Stringer, and Espaillat seek standing as legislators. However, in order to successfully establish standing on that basis, they are required to demonstrate "a particularized injury or establish[] the absence of adequate political remedies." *Saratoga County Chamber of Commerce, Inc. v Pataki*, 275 AD2d at 156. These petitioners have not established that their position differs from that of the general public because of their status as legislators, or that the MTA's actions precluded the Legislature from acting. *Id.* at 157.

None of the petitioners have demonstrated that they have standing. Consequently, the petition must be dismissed.

Jets seek leave to intervene

The Jets move, unopposed, for leave to intervene as a necessary party respondent. As with the other petitions, the motion is granted. The determination of the court is not affected thereby.

CONCLUSION

Accordingly, it is hereby

ORDERED that in *Matter of Madison Square Garden, L.P. v New York Metropolitan Transportation Authority and Jets Development, LLC* (index no. 104644/2005), motion sequence number 002 seeking a preliminary injunction, motion sequence number 003 (amended petition), and motion sequence number 004 seeking amicus curiae status, are denied; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that in *Matter of New York Public Interest Research Group v New York Metropolitan Transportation Authority* (index no. 105292/2005), motion sequence number 001 is denied, motion sequence numbers 002 and 003 are granted, and the petition is denied and the proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that in *Matter of Gotbaum v New York Metropolitan Transportation Authority* (index no. 105346/2005), motion sequence number 001 is denied and the petition is denied and the proceeding is dismissed, and motion sequence number 002 is granted; and it is further

ORDERED AND ADJUDGED that in *Matter of Mankoff v New York Metropolitan Transportation Authority* (index no. 105667/2005),

motion sequence number 003 is granted, and motion sequence numbers 001 and 002 are denied, and the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Respondents in the first named action are stayed from closing the purchase and sale transaction until the close of business June 7, 2005.

This constitutes the decision and judgment of the court.

Dated: June 2, 2005 ENTER:

_____/s/_____
J.S.C.