SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In re the application 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 an order pursuant to Article 78 of the C.P.L.R.,

-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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AFFIRMATION

Index No. 105292/05

MICHAEL A. CARDOZO, an attorney duly admitted to practice in the Courts of this State, affirms pursuant to CPLR 2106 as follows:

1. I am the Corporation Counsel of the City of New York, attorney for The City of New York (the "City"). New York City Charter §394. I am fully familiar with the facts herein based on my review of records maintained by the City and the New York City Economic Development Corporation ("EDC") and my conversations with employees and officials of the City and EDC.

2. Both the City and the State of New York are committed to bringing the New York Sports and Convention Center ("NYSCC") to fruition as the future home to the New York Jets, the 2012 Olympic Games and the 2010 Super Bowl, as more fully set forth in the City's papers submitted in opposition to Madison Square Garden, L.P.'s ("MSG") request for a preliminary injunction in related proceedings (Index No. 104644/05; the "MSG proceeding"), which papers are incorporated by reference herein.

3. The Mayor's and the Governor's conception of the NYSCC as an essential part of a comprehensive plan for development of Manhattan's West Side, important to long-term economic growth, has been voiced repeatedly, including by the City and the State as parties to a Memorandum of Understanding dated March 25, 2004 ("MOU") (*see* Exhibit A to the Affidavit of EDC Senior Vice President Ann Weisbrod ("Weisbrod Aff.") submitted in opposition to MSG's request for injunctive relief).

4. Pursuant to the MOU, the City and the State each have agreed to contribute $300 million toward the platform and roof of the NYSCC to ensure the project's completion so that it may be used, along with an expanded Javits Convention Center, as part of a "convention corridor" which will, in the future, attract trade shows, conventions and events that cannot now be accommodated in New York City.

5. The NYSCC project has political opposition, emblematic of which is the instant amicus curiae application brought by the Speaker of the City Council, nine other Council members and two state senators to which, on the City's behalf, I respond.

6. Most of what putative amici have to say is redundant of MSG's Article 78 petition arguing that the 14 – 0 vote of the Metropolitan Transportation Authority ("MTA") Board to accept the Jets Development, LLC's ("Jets") proposal to construct the NYSCC above

the property owned by an MTA affiliate was somehow unlawful. (It was not.) So as not to burden the Court further, I will leave it to the MTA and the Jets to traverse that ground.

7. The City must, however, respond to the attempt by proposed amici to delay and amplify proceedings and distort the record by asserting, quite irrelevantly and incorrectly, that the City's determination to help fund the project is in any manner unauthorized or unlawful. The Speaker and his political allies have asserted in POINT II of their brief and in the accompanying affidavit of Council member Christine C. Quinn, dated April 27, 2005, that the City's consideration of using PILOTs (payments in lieu of taxes) to fund, in part, the NYSCC is prohibited.[1] That assertion not only is incorrect, but it also is legally irrelevant to the issue before the Court regarding the correctness of the MTA's acceptance of the Jets' proposal.

The Manner In Which The City Will Fund Its MOU Obligation Is Not Before This Court

8. How the City (and the State) ultimately will fund their commitments to the NYSCC project has no bearing on the issues now before the Court. The MOU (Weisbrod Aff., Exhibit A) contains no requirement that funding come from any particular funding source(s). The MTA's request for proposals[2] neither addressed nor required proposers to address public funding resources. The Jets' proposal (*see* Exhibit 33 to the Affirmation of Randy M. Mastro submitted in support of MSG's petition and motion for preliminary injunction) was not conditional on any particular funding source being utilized. And most significantly, the MTA Board's resolution adopting the Jets' proposal (Krsulic Aff, Exhibit S) was not contingent upon the availability of any particular fund(s).

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[1] Property developers pay PILOTs as contracted-for payments made pursuant to agreements made by the New York City Industrial Development Agency ("NYCIDA"), created under the laws of New York State. *See* General Municipal Law ("GML") §917.

[2] The MTA's request for proposals is attached as Exhibit F to the Affidavit of Roco Krsulic, sworn to April 21, 2005 ("Krsulic Aff."), submitted by the MTA in the MSG proceeding.

9. Based upon the authorities cited in POINT II of the City's Memorandum of Law dated April 25, 2005 in support of its motion to dismiss the complaint in the MSG proceeding, until the City commits to a source of funds, PILOT or otherwise, to pay for its share of the improvements, there is no claim ripe for adjudication as to the aptness of the funding source. *Accord Park Ave. Clinical Hosp. v. Kramer*, 26 A.D.2d 613 (4th Dep't 1966), *aff'd*, 19 N.Y.2d 958 (1967) (challenge to New York State Labor Relations Act section held premature, as likelihood of utilizing said section was uncertain where, despite union filing of petition for certification as collective bargaining agent, union had not yet been certified nor had negotiations begun); *Loft Corp. v. City of New York*, 260 A.D.2d 549, 551 (2nd Dep't 1999) (damages claim that newly promulgated regulations yielded unconstitutional taking ruled unripe until city "makes a final determination as to a specific development plan with respect to any given parcel"); *see Programming and Sys., Inc. v. New York State Urban Dev. Corp.*, 93 A.D.2d 733, 734 (1st Dep't 1983), *aff'd* 61 N.Y.2d 738 (1984) (lessee's petition to halt plans to redevelop a neighborhood until after the preparation of an environmental impact statement is premature, as respondent contends that, "although there has already been a public hearing, there have been no definitive plans and that the approach to the problem is still in a state of flux").

10. When it comes time to actually fund the City's MOU obligations, the City's present plan is to fund it through PILOT payments. Of course, subsequent events may change this plan, so that the funding could come from other sources. That issue has nothing to do with whether the MTA approval of the Jets' proposal is lawful, and is precisely why the legality of the PILOT payments is not ripe for adjudication.

The Proposed Pilot Payment Arrangement Is In Any Event Lawful

11. Professed amici's PILOT arguments are incorrect as well as unripe. While the Speaker and his colleagues remembered to accompany their April 27th legal filing with a lengthy press statement, they forgot to mention in that filing (and obviously did not take into account) my appearance the previous day, at the Council's specific request, before the City Council's Finance Committee. At that time, I gave testimony demonstrating that contract rights to receive future PILOTs are not revenues of the City that are subject to payment into the general fund and subsequent appropriation, but rather may be directed in accordance with the Mayor's powers with respect to non-surplus personal property. A copy of my April 26, 2005 testimony before the Finance Committee is attached hereto as Exhibit A.

12. As my testimony demonstrates, the City, through the Mayor, has the power to convey rights to personal property in the manner it deems appropriate, including rights to contracted-for payments under NYCIDA contracts. *See* Gen. City L. §20(2); City Charter §8; *Creole Enterprises, Inc. v. Giuliani*, 167 Misc. 2d 810, 818 (Sup. Ct. N.Y. Co. 1995), *aff'd*, 236 A.D.2d 272 (1st Dep't 1997), *leave to appeal denied*, 90 N.Y.2d 802 (1997

13. Moreover, GML §917, which establishes the NYCIDA, makes plain that the Mayor is responsible for interacting with the NYCIDA on behalf of the City. While the GML defines "governing body" for other industrial development agencies within the State as "the board or body in which the general legislative powers of the municipality are vested," GML §854(5), which governs the New York City Industrial Development Agency, provides in contrast that the "governing body...shall mean the Mayor of the City," GML §917(k). Further, the statute gives the Mayor a key role in the appointment of fourteen members of the fifteen-member NYCIDA. Thus, the overly broad pronouncements of putative amici concerning legislative

powers generally (Amici Brief at 18) are inapplicable since both State law (§917(a)) and the City Charter (§8) empower the Mayor to act on behalf of the City when the Mayor directs the use of PILOTs for the City's benefit.

14. GML §874(3), providing that payments in lieu of taxes be remitted to each "affected tax jurisdiction" within thirty days of receipt, does not support putative amici's argument. The thirty-day restriction does not apply to the NYCIDA. GML §917, which establishes the NYCIDA, states specifically in subdivision (c) that it shall only have the powers and duties conferred upon industrial development agencies as of January 1, 1973, with certain exceptions. The duty to remit PILOTs within 30 days was not enacted until 1992.

15. Moreover, Section 874(3) was added to the GML to address two specific problems not relevant in present circumstances: (1) the withholding from municipalities by local IDAs of PILOT money for extended periods of time; and (2) what was seen as a misallocation of PILOTs by IDAs between affected and overlapping tax jurisdictions.[3] However, the practices §874(3) was enacted to address do not occur in New York City and so are not implicated by the Mayor's direction of PILOTs on the City's behalf.

16. Finally, although it appears doubtful that the provision applies to the NYCIDA, nevertheless, even if §874(3) is read to apply to the NYCIDA, that provision's intent and purposes are fulfilled when PILOT agreements are directed pursuant to the instructions of

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[3] *See, e.g., Glens Falls City Sch. Dist. v. City of Glens Falls Indus. Dev. Agency*, 196 A.D.2d 334, 337-338 (3rd Dep't 1994) (holding purpose of 1992 amendments "was to ensure the prompt payment of the moneys due under PILOT agreements" and purpose of 1993 amendments "was to require proportional allocation of PILOT payments [among affected jurisdictions] unless the affected tax jurisdictions agree otherwise"); Ch. 772, L. 1992, Governor's Bill Jacket; Memorandum in Support, Comptroller's Report to the Governor, Budget Report on Bill, Letter by Senator Johnson (bill sponsor); Ch. 772, L. 1992, Senate Debate Transcripts 872, 878-879, 882, 884.

the City's "governing body," which, under this statute, is the Mayor, who acts on behalf of the City.

Conclusion

17. Thus, not only is the issue of the City's use of PILOTs to fund, in part, the NYSCC not before this Court until such time as the City actually commits to utilize PILOTs for that purpose, even if it were, the City's use of PILOTs to fund the NYSCC would not be prohibited in any manner.

Dated: New York, New York
May 2, 2005

MICHAEL A. CARDOZO

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Testimony of Corporation Counsel Michael A. Cardozo
before the Finance Committee
April 26, 2005

Mr. Speaker, Chairman Weprin, members of the Finance Committee, good afternoon. My discussion here today will be limited to the proposed legislation, Intro. 584-A, not about the financing arrangements of the Hudson Yards. I have some brief prepared remarks about Intro. 584-A, after which I will be happy to take your questions. Before beginning, however, I would like to emphasize that my statements today should not be taken as the equivalent of a legal brief. A discussion of the law in a forum such as this can be no more than a summary of complex legal issues. While the Law Department generally declines to testify at hearings on the legality of a proposed law, and believes its arguments in that regard should be made only in a judicial forum should the law be challenged, we have agreed to testify here today on the understanding this will not be viewed as a precedent for the future.

The proposed local law would prohibit all "City funds, including but not limited to PILOTs," from being "expended without an appropriation by the Council or other specific legal authorization in accordance with the Charter of the City of New York." The bill contains legislative findings outlining the argument that it is unlawful for the Mayor to direct the use of PILOT payments on behalf of the City. These legislative findings are based on a misunderstanding of the governing state and local laws. Both State law and the City Charter, as I will explain, empower the Mayor to act on behalf of the City when the Mayor directs the use of PILOTs for the City's benefit. The enactment of Intro. 584 therefore would be contrary to the Mayor's powers under State law and an impermissible curtailment of the Mayor's powers under the City Charter. As you know, the Mayor's Charter powers cannot be altered without a referendum, and the powers granted to the Mayor by State law cannot be changed without state legislation.

In general, real property under the control of certain state entities, including industrial development agencies, or "IDAs," is exempt from real property taxation.[1] Instead, property owners wishing to develop such property may be required by the state entities to make payments in lieu of taxes, commonly known

[1] *See* Gen. Mun. L. §874(1).

as PILOTs, as part of their agreements with IDAs.[2] By exempting property from real property taxation and, when appropriate, substituting the reduced PILOT schedule, IDAs spur economic development. In the case of New York City, the New York City Industrial Development Agency, the "NYCIDA," enters into economic development arrangements with developers throughout the five boroughs which may provide, among other things, for the developers to pay PILOTs.

General Municipal Law §917, which establishes the NYCIDA, treats the NYCIDA differently from IDAs in other jurisdictions. Notably, the statute makes clear that the Mayor is responsible for interacting with the NYCIDA on behalf of the City, and so has the power to direct the use of PILOTs on the City's behalf. While the "governing body" for other IDAs within the State is defined by the General Municipal Law as "the board or body in which the general *legislative* powers of the municipality are vested,"[3] in the case of New York City, the statute provides that that the "'governing body' . . . shall mean the *Mayor* of the City."[4]

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[2] *See id.* §858(15).

[3] *Id.* §854(5) (emphasis added).

[4] *Id.* §917(k) (emphasis added).

Further, the General Municipal Law gives the Mayor a key role in the appointment of fourteen members of the fifteen-member NYCIDA board.[5]

Another provision of State law, General City Law §20, gives the City the power to convey non-surplus personal property. Agreements to pay and receive PILOTs are contractual rights, a form of personal property. Moreover, it is the Mayor who is empowered to exercise that right to receive and dispose of such non-surplus personal property, including PILOTs. Section 8 of the City Charter sets forth the "reserve power" of the Mayor, which permits the Mayor to "exercise all the powers vested in the city, except as otherwise provided by law." The New York courts have recognized that the power to convey personal property on the City's behalf is not "otherwise provided by law," and so rests with the Mayor under this "reserve power." For example, in the *Creole Enterprises* case, the appellate division affirmed that the reserve power justified the City's disposition, through the Mayor alone, of the WNYC radio stations to the WNYC Foundation several years ago.[6]

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[5] *Id.* §917(d).

[6] *See Creole Enterprises, Inc. v. Giuliani*, 167 Misc. 2d 810, 818 (Sup. Ct. N.Y. Co. 1995), *aff'd*, 236 A.D.2d 272 (1st Dep't 1997), *leave to appeal denied*, 90 N.Y.2d 802 (1997).

The sponsors' apparent basis for Intro. 584 is the argument that no revenue of the City may be expended without appropriation. This is generally true to the extent that such monies are "revenues of the city," paid into the general fund.[7] However, as I have explained, contractual rights to receive PILOTs in the future, directed by the Mayor pursuant to economic development agreements, are not "revenues of the city." They are instead contract rights that can be transferred or otherwise disposed of by the Mayor. As recently as last year, in the $2.5 billion LGAC case that I personally successfully argued on behalf of the City, the New York Court of Appeals -- our State's highest court -- ruled that contractual rights to a future revenue stream can be assigned by the Mayor.[8] The right to receive PILOT payments are contract rights, not revenue, and they are therefore not subject to payment into the general fund and subsequent appropriation.

Intro. 584 also appears to rely on §874(3) of the General Municipal Law, which states that PILOTs received by an IDA "shall be remitted to each affected tax jurisdiction within thirty days of receipt." But that section was added to the General Municipal Law to address two specific problems not relevant to New York City: (1) the withholding from municipalities by local IDAs of PILOT money for

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[7] City Charter §109.

[8] *Local Gov't Assistance Corp. v. Tax Asset Receivable Corp.*, 2 N.Y.3d 524 (Ct. App. 2004).

extended periods of time; and (2) what was seen as a misallocation of PILOTs by IDAs between affected and overlapping tax jurisdictions. However, unlike the situation in other localities, where, for example, a county with an IDA has overlapping taxing jurisdiction with the local school district, the NYCIDA is unique in that it shares no jurisdiction with any taxing jurisdiction other than the City. Further, the structure of the NYCIDA allows the Mayor, through his substantial representation on the NYCIDA board, to prevent the NYCIDA from retaining PILOTs for itself rather than using them for the City's benefit. Thus, the problems §874(3) was enacted to address simply do not occur in New York City and so are not implicated when the Mayor exercises his legal authority to direct the use of PILOTs on the City's behalf.

In any event, even if §874(3) could be read to apply to the NYCIDA, that provision's intent and purposes are fulfilled when the use of PILOT agreements are directed pursuant to the instructions of the Mayor on behalf of the City. As I have stated, the "governing body" of New York City with respect to PILOTs is the Mayor, who is empowered to direct those PILOT agreements on the City's behalf. Indeed, a 1992 letter from Mayor Dinkins to Governor Cuomo concerning the legislation that added §874(3) specifically stated that the City is "confident that the

current agreement between the City and NYCIDA [which is the same agreement that is in effect today] complies" with State law.

Finally, it should be noted that IDA PILOTs have been used in this manner—*i.e.,* directed by the Mayor on the City's behalf—for a variety of projects as diverse as the Midtown Community Courthouse, the In-Place Industrial Park Program and the Health Pass Program, which assists small businesses in providing health insurance to their employees. As the 1992 Memorandum of Understanding that has directed the use of PILOTs in the City under three different Administrations states: "[T]his arrangement . . . has operated to the satisfaction of all parties involved, who wish to extend it for an indefinite term . . . ."

That concludes my statement. I would be happy to respond to your questions concerning the legality of Intro 584-A.