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

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In the Matter of 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,

Index No. 105292/05

IAS Part 49 (Cahn, J.)

Petitioners,

For an order pursuant to Article 78 of the CPLR,

-against-

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

Respondents.

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REPLY MEMORANDUM OF LAW OF PETITIONERS

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PRELIMINARY STATEMENT

Respondents concede that the Metropolitan Transportation Authority ("MTA") has a fiduciary duty to "secure the 'most beneficial' terms for the sale of the site." (Respondents April 28, 2005 Memorandum of Law, page 16 ("MTA Memo of Law"). The record before the court clearly establishes that the biased and truncated process the MTA used to solicit bids for the John D. Caemmerer West Side Yards (the "Rail Yards") violated this legal duty. As a result of its flawed process, the MTA accepted a bid for a fraction of the $923,400,00 value placed on the Rail Yards by the MTA's own appraisers.

The MTA also acknowledges that the results of its Request for Proposals ("RFP") must be vacated if the Court determines that the Authority acted "arbitrarily or capriciously." (*See*, MTA Memo of Law, p. 11.) Yet Respondents have provided no rational explanation for their decision to set an unprecedented deadline for the RFP of 27 days. They have also failed to explain why critical information on potential environmental liability was not provided to potential bidders until a mere ten days before proposals were due. Finally, the MTA's answer concedes its normal practice is to evaluate proposals "within a 60 to 90 day time frame" (*See*, MTA's Answer to Petition of MSG, ¶293), yet no rational explanation is offered as to how or why 10 days was sufficient to adequately analyze and evaluate proposals for the Rail Yards.

In short, the MTA concedes the legal standards and principles that govern its duties as a Public Authority and fails to contest the facts which establish that they breached those duties.

Contrary to the MTA's unsupported assertions, Petitioners are an independent group of taxpayers, civic groups and a labor union whose sole interest is ensuring that the MTA sell the

Rail Yards through a fair, open, and competitive process which results in the best possible terms for the public. Petitioners respectfully submit that the proposals of Madison Square Garden, L.P. ("M.S.G.") and Jets Development, L.L.C. (the "Jets"), were both grossly inadequate. Neither the $210 million offered by the Jets or the $400 million offered by MSG were close to the appraised value of the Rail Yards.

The petition should be granted, the MTA's decision to award the Rail Yards to the Jets set aside and the MTA ordered to conduct a new RFP process in a lawful manner.

I. PETITIONERS HAVE STANDING.

Petitioners have standing – both under longstanding common law principles and pursuant to State Finance Law § 123-b – to seek judicial review of the MTA's sale of the Rail Yards property to the Jets.

A. Common Law Standing Requirements Are Satisfied.

Relying mainly on Transactive Corp. v. New York State Dept. of Social Services, 92 N.Y.2d 579, 684 N.Y.S.2d 156 (1998), Respondents argue that Petitioners lack standing to seek judicial review of the MTA's disposition of the Rail Yards site. A more recent, and more thorough, annunciation of standing principles was issued by the Court of Appeals in Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654 (2003). The Saratoga opinion makes clear that New York's standing principles are not nearly as narrow as Respondents suggest.

Most saliently, Saratoga re-affirms the longstanding principle that standing should be broadly and liberally granted in cases brought by citizen- taxpayers seeking judicial review of

government transactions of "fundamental and . . . immense public significance." Saratoga, 100 N.Y.2d at 814, 766 N.Y.S.2d at 661 (distinguishing Colella v. Board of Assessors, 95 N.Y.2d 401, 718 N.Y.S.2d 741 (2000), which is heavily relied upon by Respondents, on the ground that no issues of public importance were at stake). The line of cases cited by Petitioners in support of their assertion of standing (*See*, Straphangers Petition, ¶ 18), including Albert Elia Building Company, Inc. v. New York State Development Corp., 54 A.D.2d 337, 388 N.Y.S.2d 462 (4th Dep't 1976), therefore remains good law, and citizen-taxpayers have common law standing to sue, to assert the public's rights when major public policy matters are at stake, as is the case here.[1] National Fuel Gas Distribution Corp. v. City of Jamestown, 280 A.D.2d 885, 720 N.Y.S.2d 419 (4th Dep't 2001) (post-dating the Transactive Corp. decision and citing Albert Elia Building Company, Inc. for authority on the issue of standing).

Respondents should be familiar with the Saratoga case since they cite it in their papers. (*See*, MTA Memo of Law, page 8.) And even the Colella case, cited by both the MTA and Jets for the proposition that Petitioners lack standing to challenge the lawfulness of their deal, draws a clear distinction between cases such as the present one and cases involving "challenges to the determinations of local government officials having no appreciable public significance beyond the immediately affected parties, by persons having only the remotest legitimate interest in the matter." 95 N.Y.2d at 410-411, 718 N.Y.S.2d 272. Unquestionably, the sale of the Rail Yards – on the cheap, in violation of the MTA's fiduciary duties, and by means of a fundamentally

[1]It is undisputed that the following Petitioners are citizen-taxpayers: Gene Russianoff, Roger Toussaint, Jon Orcutt and Rachel Leon. It is also undisputed that Petitioner Local 100 is an unincorporated labor organization whose membership includes New York taxpayer-citizens. (*See*, Straphangers Petition, ¶¶ 7, 9, 11-13.)

flawed process that prevented meaningful competition – presents issues of "immense public significance." Saratoga, 100 N.Y.2d at 814, 766 N.Y.S.2d at 661. Petitioners, who consist of transit riders and advocates, citizen-taxpayers and established watchdog groups, along with transit workers and their labor union, have more than merely the "remotest legitimate interest in the matter."

Generally (*i.e.*, where no major issues of broad public concern are at stake), two requirements must be met to establish common law standing to challenge a governmental action: (1) the petitioner's interests must be arguably within the zone of interest sought to be promoted or protected by the relevant statute or law; and (2) the petitioner must show injury in fact distinct from that of the general public. *E.g.*, Bernstein v. Feiner, 13 A.D.3d 519, 521, 787 N.Y.S.2d 357, 359 (2nd Dep't 2004). Petitioners, which include individuals who regularly ride the MTA's trains, buses and subways, recognized advocacy groups, and the transit workers who operate and maintain most of that mass transportation system, will suffer more than people who don't use mass transit and don't work in the subways, as a result of the MTA's improper, cut-rate sale of the Rail Yards. Therefore, sufficient injury exists to confer standing on Petitioners. *See generally, e.g.*, Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Commission of the City of New York, 259 A.D.2d 26, 31-32, 695 N.YS.2d 7, 11 (1st Dep't 1999) (holding that neighborhood residents and civic organization had standing to challenge the City's granting of a concession to operate a golf course in a local park, since "[i]t is clearly a reasonable assumption that local residents will use the park facilities much more frequently than members of the general public"); *see also*, Chester Civic Improvement Ass'n v. New York City Transit Authority, 122 A.D.2d 715, 716-17, 505 N.Y.S.2d 638, 639-40 (1st Dep't 1986)(neighborhood

association and its members made a sufficient showing of harm to establish standing where they alleged that the building of a bus depot in their neighborhood might adversely affect the local environment); Application of Metropolitan Museum Historic District Coalition v. De Montebello, 3 Misc.3d 1109, 787 N.Y.S.2d 679, 2004 WL 1326706 (Sup. Ct., N.Y. Cty. 2004) (neighborhood residents and association held to have standing to challenge expansion of nearby museum).

Petitioners' interests also fall within the relevant zone of interest to be protected. The paramount interest to be protected by the laws requiring fair competition in government contracting is that of the public.[2] *See, e.g.,* Jerkens Truck & Equipment, Inc. v. City of Yonkers, 174 A.D.2d 127, 132-33, 579 N.Y.S.2d 417, 421 (2nd Dep't 1992); *see also,* Albert Elia Building Company, Inc., *supra,* 54 A.D.2d 337, 340, 388 N.Y.S.2d at 342 ("the preparation of specifications, advertising of bids and awarding contracts for a public project is a matter of acknowledged public interest"); *cf.*, Corbett v. New York State Thruway Authority, 204 A.D.2d 543, 611 N.Y.S.2d 658 (2nd Dep't 1994) (environmental groups and residents of Staten Island held to lack standing to seek the nullification of a contract that was awarded for the rehabilitation of the Tappan Zee Bridge because the competitive bidding laws petitioners relied upon are aimed at promoting competition, not protecting the environment, so that the health and safety claims petitioners asserted fell outside the relevant law's zone of interest). Similarly, longstanding common law principles, as well as a variety of statutes, impose fiduciary duties upon corporate

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[2]While it is true that the MTA was not required by law to dispose of the Rail Yards property through an RFP process, once it decided to employ the RFP process, it was required to conduct that process consistent with CPLR § 7803. *See generally, e.g.*, Moore v. D'Ambrose, *infra;* Greer v. Bane, *infra. See also, Memorandum of Kalikow*, annexed to Russianoff aff. as Exhibit 4.

directors – including directors of public benefit corporations, like the MTA – in order to protect the interests of the corporation's shareholders, which in the case of public benefit corporations, means the public (or, in the case of the MTA, the users of mass transit). *See, e.g.*, Elkin v. Capital District Regional Off-Track Betting Corp., 9 A.D.3d 674, 780 N.Y.S.2d 220 (3rd Dep't 2004); Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185 (1919); N-PCL § 717.

Indeed, Petitioner Local 100 has an undeniable interest in protecting the well-being of its members, whose jobs are directly impacted by the MTA's financial decisions and health.[3] By selling the Rail Yards for substantially less money than it would have received had a legitimately competitive bidding process been followed, the MTA's financial position has been weakened, to the clear detriment of Local 100's members.[4] As such, Local 100 has standing to challenge the MTA's decision to sell the Rail Yards to the Jets. District Council No. 9, International Broth. of Painters & Allied Trades v. Metropolitan Transportation Authority, 115 Misc.2d 810, 454 N.Y.S.2d 663 (Sup. Ct., N.Y. Cty. 1982), *aff'd*, 92 A.D.2d 791, 813, 460 N.Y.S.2d 973, 666 (1st Dep't 1983) ("District Council # 9 is the collective bargaining representative of painters who would receive wages and benefits if their employers become successful bidders on public works projects; but, they cannot hope for these benefits if the work is withdrawn from competitive bidding. Likewise, their union stands to lose members, dues and bargaining power if public work dwindles."); Law Enforcement Officers Union, District Council 82 v. Abrahamson, 179 Misc.2d 296, 684 N.Y.S.2d 811 (Sup. Ct., Albany Cty. 1998) (corrections officers' union held to

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[3]To defeat Respondents' standing argument, Petitioners must merely establish that one of them has standing. Saratoga, *supra*, 100 N.Y.2d at 813, 766 N.Y.S.2d at 660.

[4]*See*, Toussaint aff., ¶¶ 10-11; Supplemental Russianoff Aff, ¶¶ 12-13.

have standing to bring an Article 78 proceeding challenging the doubling up of inmates in cells because its members faced "greater risk of injury" and had to deal with the "added disruption" caused by double celling; union's interests fell within Article 78's zone of interests because its members' terms and conditions of employment were adversely affected by the policy being challenged as arbitrary and capricious); Civil Service Employees Ass'n, Inc., Local 1000 v. O'Rourke, 173 Misc.2d 929, 931, n.1, 660 N.Y.S.2d 929 (Sup. Ct., Westchester Cty. 1997), *aff'd*, 240 A.D.2d 572, 659 N.Y.S.2d 794 (2nd Dep't 1997).

In sum, Petitioners have standing, both under the more liberal standard applicable where issues of "immense public significance" are present, Saratoga, *supra*, 100 N.Y.2d at 814, 766 N.Y.S.2d at 661, and under the more broadly applicable zone of interest test.

B. Standing Also Exists Pursuant to State Finance Law § 123-b.

Respondents argue that Petitioners lack standing under State Finance Law § 123-b, citing Transactive Corp., *supra*. In Transactive Corp., however, no claim was made that the state officials had wasted public funds or improperly disposed of publicly-owned property in violation of their fiduciary duties, or that a sham, non-competitive bidding process was held, resulting in the sale of a major piece of public property for substantially less than its fair market value. The issue in Transactive Corp. was whether a subcontractor, on a proposal which was rejected because its price was 18% higher than the winning proposal's price, had standing to have the contract nullified on the ground that the contracting agency should have placed greater weight on non-price selection criteria and less weight on price. *See*, Transactive Corp. v. New York State Dept. of Social Services, 236 A.D.2d 48, 52, 665 N.Y.S.2d 701, 704 (3rd Dep't 1997, *aff'd on*

other grounds, Transactive Corp., *supra.*

The holding in Transactive Corp. is not nearly as sweeping as Respondents claim and is certainly not dispositive of the present case. More recent Court of Appeals' decisions have made clear that Transactive Corp. merely stands for the proposition that taxpayer standing, pursuant to State Finance Law § 123-b, does not extend to challenges of purely non-financial state action. Saratoga, *supra*, 100 N.Y.2d at 813, 766 N.Y.S.2d at 660 (explaining that Transactive Corp. held State Finance Law § 123-b does not provide standing "to challenge nonfiscal activities"); Rudder v. Pataki, 93 N.Y.2d 273, 281, 689 N.Y.S.2d 701, 705 (1999) (under Transactive Corp., nonfiscal claims must "demonstrate a sufficient nexus to fiscal activities of the State to allow for section 123-b standing"); *see also*, Cheevers v. State, 2002 WL 1559722, *2 (Sup. Ct., Albany Cty.)(recognizing taxpayer standing where the claim asserted bore a "sufficient nexus to fiscal activities of the State"). Here, however, the government action being challenged is the sale of property with an estimated fair market value of nearly one billion dollars. Obviously, this bears a nexus to the financial activities of the State.

Respondents' assertion that State Finance Law § 123-b does not apply to public benefit corporations such as the MTA is simply untrue. *See*, Stein v. Metropolitan Transportation Authority, 110 Misc.2d 1027, 1029, 443 N.Y.S.2d 340, 342 (Sup. Ct., Nassau Cty.). By its own terms, State Finance Law § 123-b expressly exempts the issuance of bonds and notes by any "public benefit corporation" from taxpayer lawsuits. The fact that other types of transactions are not exempted from § 123-b's reach indicates that the Legislature intended, as a general matter, to make public benefit corporations subject to taxpayer challenges, under a "long-settled principle of statutory construction." Weingarten v. Board of Trustees of the New York City Teachers'

Retirement System, 98 N.Y.2d 575, 583, 750 N.Y.S.2d 573, 578 (2002).

Respondents also argue that General Municipal Law § 51 does not apply to public authorities, which is untrue as public authorities like the MTA are State entities, not municipal agencies. In any event, Petitioners have not invoked the General Municipal Law, making Respondents' discussion of that statute completely irrelevant, along with their equally pointless discussion of cases addressing various provisions of the State Finance Law that have no bearing on this case or the question of standing.[5]

Pursuant to State Finance Law § 123-b, the individual Petitioners, and Local 100 (an unincorporated member association whose members are citizen-taxpayers), have standing to challenge the legality of the MTA's sale of the Rail Yards. Thus, even if they were unable to establish injury in fact, Petitioners would still have standing to bring this Article 78 proceeding. Saratoga, *supra*, 100 N.Y.2d at 813, 766 N.Y.S.2d at 660; Bernstein, *supra*, 13 A.D.3d at 521, 787 N.Y.S.2d at 359.

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[5]*See*, Affirmation of Claude M. Millman, ¶¶21-25, for Respondent Jets' exposition on irrelevant statutory and case law; *see also*, MTA's Memo of Law at 9-10 (citing irrelevant cases).

II. RESPONDENTS HAVE VIOLATED THEIR FIDUCIARY DUTY TO SECURE THE MOST BENEFICIAL TERMS POSSIBLE FOR THE SALE OF THE RAIL YARDS

Respondents concede that the MTA has a fiduciary duty to "secure the 'most beneficial' terms" for the sale of the Rail Yards. (*See*, MTA Memo of Law, p. 16, citing Square Parking Systems, Inc. v. Metropolitan Transportation Authority, 92 A.D.2d 782, 459 N.Y.S.2d 774 (1st Dep't 1983). In Square Parking, the court held that "as a public body," the MTA Board was "required to obtain the terms most beneficial to the public" in disposing of real estate assets.

Respondents' sole defense to the claim that they breached this duty is the naked assertion that: "Petitioners fail to offer any evidence that the MTA did not obtain the most beneficial terms." (*See*, MTA Memo of Law, p. 16).

In fact, the unrebutted record before the Court demonstrates that the process set up by the MTA, to fulfill its fiduciary duty, failed to produce either the quality or quantity of bids required to maximize the value of the Rail Yards.

Among other things, Petitioners have shown that:

1. The MTA set an unprecedented 27 day deadline for proposals to undertake the complex task of constructing a platform over the 13 acre Rail Yards site and plan a major construction project on that platform.[6]
2. The RFP required bidders to indemnify the MTA for potential environmental liabilities, but provided no information about the exposure builders might face until 10 days before the deadline for proposals (*See*, Kruslic aff., ¶14).

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[6]Petitioners challenged the MTA to identify any other case in which it has issued an RFP with such an absurdly short deadline: "upon information and belief, the MTA has never in its history imposed such a short deadline for the role of any other major real estate asset" (*See*, Straphangers Petition, ¶ 39). The MTA's voluminous submissions in this proceeding have failed to identify any other RFP of 27 days or less.

3. While the MTA claims that: "In order to obtain the highest possible exposure with respect to the RFP, the MTA placed the RFP on the MTA website..." (*See*, MTA Memo of Law in Opp to MSG Petition, page 9). The actual listing on the MTA's website was titled: http://www.mta.info/mta/procurement/final_**jetsstadium**.pdf (*See*, Mastro Aff., Exhibit 75, emphasis added).

4. At the conclusion of the unprecedented 27 day RFP period, only two proposals were deemed responsive by the MTA: the offers of the Jets and MSG. Thus, while the MTA claims it "opened up the process so that all interested parties could submit proposals" (*See*, MTA Memo of Law, page15) it failed to produce a single responsive proposal from any real estate developer. The only proposals evaluated were submitted by the two companies that already had begun work on their bids before the RFP was issued.

The result of the MTA's RFP process confirmed its inherent defects and deficiencies. On March 31st, MTA board members were asked to select the better of two bad bids – one for $210 million plus the potential value of currently non-existent air rights, and one for $400 million. Rather than rejecting these insulting proposals for the MTA's most valuable piece of prime real estate–valued by the MTA's own appraisers at $923,400,000 – the MTA Board selected the $210 million proposal of the Jets. It is difficult to imagine a clearer case of the failure to fulfill a public authority's duty to "secure the most beneficial terms" for a valuable public asset.

The MTA's breach of duty must be considered in the context of decades of RFP's for sales of major public assets in New York. The MTA knows how to sell public assets in a manner that will maximize value. For a start, New York agencies and authorities have consistently provided bidders more than 27 days to submit proposals for the development of significant real estate assets. (*See*, Russianoff aff, ¶¶ 5-9). For instance, the RFP for the sale of the New York Coliseum site provided a deadline of 90 days after the publication of the RFP. *(See,* Russianoff aff., ¶6; Watt aff., Exhibit G).

Public agencies commonly rely on a two-stage process to maximize the value of bids for public assets. When the Hudson River Park Trust, sold the rights for Pier 57 on the Hudson River, it issued a Request for Expression of Interest ("RFEI"), which allowed developers to assess the complex possibilities for development on the pier and advise the Trust if they were interested in bidding. The RFEI provided over four months for a response. (*See*, Supplemental Russianoff aff, ¶7). The Trust then issued an RFP with a five week deadline. Id. The Empire State Development Corporation ("ESDC") first put out a Request for Qualifications with a six-week deadline when it sought bids for the re-development of the Farley Post Office Building. Two months later after the submissions in response to the RFQ, ESDC issued an RFP for qualified bidders and gave them three months to submit proposals (*See,* Supplemental Russianoff aff, ¶8) .

The MTA's duty to maximize the proceeds of the sale of the Rail Yards is not an abstract issue. As set forth in detail in the Russianoff and Toussaint affidavits, the MTA is facing a fiscal crisis. In spite of fare increases, tax increases and budget cuts, further service cuts are inevitable, and maintenance efforts are being slashed to the bone. (*See*, Russainoff aff, ¶¶ 10-19, Supp. Russianoff aff., ¶¶11-15, Toussaint aff, ¶3).

The vital interests of the riding public and of the taxpayers of the state of New York require the Court to order the MTA to fulfill its fiduciary duty and to initiate a new RFP process designed to obtain the best possible terms for the Rail Yards.

III. THE RFP PROCESS THAT WAS USED WAS ARBITRARY AND CAPRICIOUS.

A government body's determination is arbitrary and capricious where it lacks a "rational basis supported in fact," Remmers v. DeBuono, 241 A.D.2d 587, 588, 660 N.Y.S.2d 159, 161 (3rd Dep't 1997), or "a sound basis in reason," Car Barn Flats Residents' Ass'n v. New York State Div. of Housing and Community Renewal, 184 Misc.2d 826, 833, 708 N.Y.S.2d 556, 561 (Sup. Ct., N.Y. Cty. 2000) (citing Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Scarsdale and Mamaroneck, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833 (1974)). Moreover, where a government agency takes an action that marks a substantial or dramatic departure from its own precedent or past practices, the agency must provide a legitimate, clear explanation for its change in approach and its failure to provide a valid rationale renders its decision arbitrary and capricious. *See, e.g.,* Richardson v. Commissioner of New York City Dept. of Social Services, 88 N.Y.2d 35, 39-40, 643 N.Y.S.2d 19, 21 (1996); Lafayette Storage & Moving Corp. v. Lincoln Storage of Buffalo, Inc., 77 N.Y.2d 823, 826, 566 N.Y.S.2d 198, 199 (1991); Matter of Charles A. Field Delivery Service, Inc., 66 N.Y.2d 516, 520, 498 N.Y.S.2d 111, 115 (1985); Brusco v. State Div. of Housing and Community Renewal, 239 A.D.2d 210, 212, 657 N.Y.S.2d 180, 182 (1st Dep't 1997); Long Island College Hospital v. Whalen, 68 A.D.2d 274, 416 N.Y.S.2d 841 (3rd Dep't 1979).

Speculation does not provide a rational basis for a government decision. *See* Sled Hill Café, Inc. v. Hostetter, 22 N.Y.2d 607, 612-13, 294 N.Y.S.2d 407, 501 (1968). Nor do "unsupported assumptions." Hague v. Sedita, 56 Misc.2d 203, 205, 288 N.Y.S.2d 212, 215 (Sup. Ct., Erie Cty. 1968).

When challenged, the government respondent must defend its actions based upon the facts which existed and reasons given at the time it made its decision. After-the-fact rationalizations, and subsequent factual discoveries and developments, do not serve to validate an action that was invalid at the time it was taken. *See, e.g,* Matter of Martin, 70 N.Y.2d 679, 518 N.Y.S.2d 789 (1987); Wright v. Town of LaGrange, 181 Misc.2d 625, 632-34, 694 N.Y.S.2d 862, 867-68 (Sup. Ct., Dutchess Cty. 1999).

While it is true that the MTA is not statutorily required to use a competitive RFP process when it sells real property, it is equally true that once it announced it would issue an RFP for the sale of the Rail Yards property, it was required to do so in a manner consistent with CPLR §7803. *See generally, e.g.,* Moore v. D'Ambrose, 57 A.D.2d 394, 398, 394 N.Y.S.3d 662, 665 (1st Dep't 1977), *rev'd on other grounds*, 46 N.Y.2d 816, 414 N.Y.S.2d 121 (1978) ("Arbitrary action cannot elude judicial reach by the plea that it was no more than the use of proper administrative discretion. The moment it is shown to be arbitrary, it ceases to be discretionary.") (internal quotation marks omitted); *see also, e.g.,* Greer v. Bane, 158 Misc.2d 486, 492, 600 N.Y.S.2d 607, 612 (Sup. Ct., N.Y. Cty. 1993) ("An agency's actions are not sacrosanct merely because the agency has discretion in the matter, since an arbitrary exercise of discretion is subject to judicial review.") The MTA, in fact has conceded this point (*See,* Memo of Kalikow annexed to Supp. Russianoff aff. as Exhibit 4). Thus, the MTA's suggestion that it has "broad authority to dispose of real estate" any way it sees fit is incorrect. (*See,* MTA Memo of Law, page 14).

The MTA's RFP process was arbitrary and capricious because it was irrational and as it represented a dramatic departure from the usual way real estate RFPs are handled by the MTA - without any rational justification existing for why this sudden change in approach was necessary

or warranted. The decision to award the property to the Jets was also improper because it was made without regard to the facts. The contract must therefore be nullified and the MTA directed to conduct a proper, lawful RFP process.

A. The Process Was Not Rational

It is undisputed that the MTA has never before required responses to an RFP for the sale of real estate within a 27 day period.[7] In other words, this is the tightest deadline the MTA has ever imposed for the submission of proposals regarding the sale of an MTA real estate asset. The only justification for this unprecedented 27 day deadline offered by the MTA, is the fact that the Board already happened to have a meeting scheduled for March 31, 2005. (*See,* Krsulic aff., ¶41). An objective assessment of how much time was needed for an interested bidder to prepare a responsive proposal, therefore, had absolutely nothing to do with the amount of time that was in fact provided. Thus, the 27 day response period is a text-book case of arbitrary decision-making.

Furthermore, any developer interested in submitting a proposal in reality had only 10 days in which to respond because the MTA did not release environmental records needed to prepare a responsive proposal 10 days before proposals were due. (*See*, Kruslic aff., ¶14). Ten days time to respond to a complex RFP is patently unreasonable and therefore arbitrary and capricious. *See, e.g.*, McArdle v. Board of Estimate of the City of Mt. Vernon, 74 Misc.2d 1014, 347 N.Y.S.2d 349 (Sup. Ct., Westchester Cty. 1973), *aff'd*, 45 A.D.2d 822, 357 N.Y.S.2d

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[7]*See,* Straphangers Petition, ¶ 39. While, in its answer, the MTA alleges a general denial of the allegations contained in ¶ 39 of the petition, "[s]uch a denial is insufficient as a matter of law to establish a triable issue of fact" in an Article 78 proceeding. Howell v. Benson, 105 Misc.2d 757, 758, 432 N.Y.S.2d 835, 836 (Sup. Ct., Albany Cty. 1980) (citations omitted).

349 (2nd Dep't 1974)(Holding that a 10 day RFP is arbitrary and capricious). Respondents do not dispute this. (*See,* MTA Memo of Law, page 15).

Confirming the objective unreasonableness of this period is the admission of the Jets that the organization spent 61,000 hours preparing its bid. (*See*, Jets Bid, Mastro aff, Exhibit 33, page 5.1-1). It would take 282 people working 8 hours a day for 27 days straight to put in the equivalent amount of time. A clearer illustration of the patent unreasonableness of the 27 day time to respond would be hard to imagine.

B. The Process Was Inconsistent With the MTA's Normal and Historical Practices.

The RFP process, by which the MTA determined to sell the Rail Yards property to the Jets, radically differs from its usual and historical RFP process in a number of material respects, without any rational basis existing for MTA's departure from normal practice.

First, the 27 day period to respond to the RFP is the shortest ever in MTA history. Normally, interested proposers are given several months to respond to a real estate RFP. (*See*, Straphangers Petition, ¶39, Watt aff., ¶9, Russionaff aff., ¶¶ 5-9).

Second, the MTA admits that it usually spends 60 to 90 days evaluating proposals before making a decision. (*see*, Watt aff., ¶5, Russianoff aff., ¶4). Here, however, the entire process took a scant 10 days, and the MTA has provided no rational explanation for how this was possible or why it was desirable.

Third, the MTA Board, when voting on whether to accept a proposal for a real estate transaction, normally votes on a written recommendation from its Real Estate Department.

Specifically, the Real Estate Department advises whether to accept a specific proposal judged by MTA experts to be in the MTA's best interests.[8] (*See,* Watt aff., ¶¶ 6-7, Lhota aff., ¶¶ 2-3). The Staff Summary for the Rail Yards, however, not only fails to make a specific recommendation for Board action but actually requests direction from the Board on how to proceed with the evaluation process, clearly indicating that the evaluation process was not completed. (*See*, Watt aff., ¶7, Exhibit E).

Fourth, price is normally the primary factor considered by the MTA when evaluating proposals to purchase MTA property. (*See*, Watt Aff., ¶8). Here, however, the MTA appears to have placed little or no weight on the fact that all bids deemed responsive were substantially below the appraised fair market value of the property. Yet, in a dramatic departure from its normal approach, the MTA Board decided to sell the property anyway, for substantially less than fair market value.

These unexplained, unnecessary and unjustified deviations from normal and historical practices render the MTA Board's vote to accept the Jets proposal arbitrary and capricious.

[8]These recommendations are set forth in a document known as a "Staff Summary."

C. The MTA Board's Decision Is Arbitrary and Capricious Because it is Based Upon Unfounded Assumptions and Speculation and Disregards Material Facts.

By disregarding material facts and instead relying on erroneous assumptions and fanciful speculation, the MTA acted arbitrarily and capriciously in accepting the Jets proposal. As more fully explained in the Affidavit of New York City Council Member Christine Quinn and the Amicus Curiae brief filed by New York City Council Speaker A. Gifford Miller, *et al.*, the purported factual foundation for the MTA's decision is seriously defective in the following respects:

1. No transferrable air rights exist or are likely to materialize. (*See*, Brief of Amici Curiae Miller, *et al.*, pages 23-25).

2. The extension of the #7 subway line will occur regardless of who purchases the Rail Yards property. (*See*, Quinn aff., ¶¶ 19-24).

3. The Mayor lacks the legal authority to unilaterally commit PILOTs. (*See*, Quinn aff., ¶¶ 16-18).

4. The MTA's own appraised fair market value for the Rail Yards is substantially higher than the sales price approved by the MTA Board. (*See*, Watt aff., ¶8).

Because it lacked a rational basis supported in fact, the MTA Board's decision to accept the Jets' proposal was arbitrary and capricious.[9]

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[9]In addition to being speculative and factually incorrect, some of the rationalizations offered by the MTA in support of its decision were invented after the Board already voted. For example, MTA Executive Director Katherine Lapp claimed on April 5, 2005, that the Jets proposal is "more likely to achieve the objective of extending the Number 7 train to the far west side of Manhattan." (*See*, Brief of Amici Curiae Miller, *et al.*, page 25.) This appears to be the first time that this justification was articulated by the MTA in support of its decision. *Post hoc* rationalizations of this sort, however, provide no support for a decision being challenged as arbitrary and capricious. *See, e.g.*, Matter of Martin, *supra.*

IV. AS THIS CASE INVOLVES A MAJOR ISSUE OF PUBLIC POLICY AND IS COMMENCED BY STRAPHANGERS, CITIZEN TAXPAYERS AND GOOD GOVERNMENT GROUPS, NO BOND SHOULD BE REQUIRED TO BE POSTED

The MTA states that "the Court should order Petitioners to post a bond of $250 million" alleging substantial damage should this Court grant a "preliminary injunction". *(See,* MTA Memo of Law, page 26). As a threshold issue, no preliminary injunction is sought by Petitioners. Moreover, after a thorough review of all reported cases involving citizen taxpayers commencing actions involving important public policy, Petitioners are unaware of any Court requiring Petitioners, such as those herein, to post a bond.

V. PETITIONERS DO NOT SEEK A WRIT OF MANDAMUS.

Petitioners seek any and all remedies available pursuant to the statutes and common law of the State of New York. The cases cited by the MTA in support of its argument that Petitioners seek a mandamus to compel are distinguishable. In each case, Petitioners sought a Court order compelling a State or City agency to engage in an affirmative act. *See,* Dean v. Department of Buildings, 177 Misc.2d 687, 677 N.Y.S.2d 416 (Supreme Court, New York Ct. 1998)(Petition seeking to compel Department of Buildings to hold hearings on landmark status of building dismissed), Donaldson v. State of New York, 156 A.D.2d 290, 548 N.Y.S.2d 676 (1st Dept. 1989)(Petition seeking to compel State of New York to provide counsel to tenants in eviction proceeding dismissed). Petitioners herein simply seek judicial review of the Rail Yard RFP to determine if the process was fair and conducted pursuant to statutory and common law to encourage the participation of the maximum number of credible bidders and to maximize the benefit realized by taxpayers of the State of New York.

VI. INJUNCTIVE RELIEF IS A PROPER .

Contrary to assertions in the MTA's Memo of Law (*See,* MTA Memo of Law, pages 20-25), injunctive relief is proper. *See,* Perez v. Giuliani, 182 Misc.2d 398, 697 N.Y.S.2d 470 (Sup. Ct., N.Y. Cty 1999); Seabury Construction Corp. v. Department of Environmental Protection of the City of New York, 160 Misc.2d 87, 607 N.Y.S.2d 1017 (Sup. Ct., N.Y. Cty 1999).

CONCLUSION

For the foregoing reasons, the relief sought in the Order to Show Cause and Petition should be granted.

Dated: New York, New York
April 30, 2005

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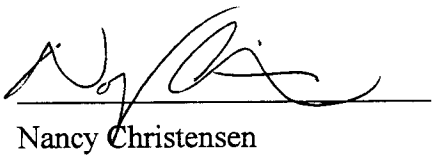

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SUPREME COURT
STATE OF NEW YORK, COUNTY OF NEW YORK

Index No. Year

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,

- against -

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

Respondents.

SHANAHAN & ASSOCIATES, P.C.

PETITIONERS REPLY MEMORANDUM OF LAW

Attorney(s) for Petitioners

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PHONE (212) 867-1100
FAX (212) 972-1787

To

Signature (Rule 130-1.1-a)

Print name beneath

Service of a copy of the within is hereby admitted.

Dated:

Attorney(s) for

PLEASE TAKE NOTICE:

☐ NOTICE OF ENTRY

that the within is a *(certified) true copy of a*
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order
will be presented for settlement to the HON.
within named Court, at
on at M.

of which the within is a true copy
one of the judges of the

Dated,

Yours, etc.

SHANAHAN & ASSOCIATES, P.C.