SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of the Application of

MANHATTAN BOROUGH PRESIDENT
GALE A. BREWER,

Petitioner-Plaintiff,

For Judgment Pursuant to Article 78 and § 3001 and § 6301 of the Civil Practice Law and Rules

– against –

THE NEW YORK CITY HOUSING AUTHORITY; KATHRYN GARCIA, Interim Chair and CEO; THE CITY OF NEW YORK; and BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK,

Respondents-Defendants.

Index No. 154063/2019

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-PLAINTIFF'S VERIFIED ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

Petitioner-Plaintiff Manhattan Borough President Gale A. Brewer ("MBP") brings this hybrid Article 78-plenary action to require Respondents-Defendants New York City Housing Authority ("NYCHA") and its Interim CEO Kathryn Garcia, as well as Mayor Bill de Blasio (collectively "Respondents"), to submit a controversial new development on the Holmes Towers NYCHA campus on Manhattan's Upper East Side to the lawful public review process. On December 19, 2018, NYCHA's Board of Directors approved a 99-year lease between NYCHA and a private developer for a 20,000 square foot parcel of land in the Holmes Towers public housing project, on which the developer will build a 50-story tower ("the New Skyscraper"). NYCHA has approved this project without the required Borough President and City Council review, although it will dramatically transform the area and is sited on a playground.

Figure 1: "Next Generation NYCHA Holmes Towers, Aerial View from the South"

The 530-foot tower will be wedged between two existing, 25-story buildings that house hundreds of NYCHA residents; it will contain 339 units, 50% market-rate and 50% affordable housing, along with other facilities (collectively, "the Holmes Towers Infill Development").

Figure 2: A rendering of the 50-story residential building to be built between the two 25-story towers of NYCHA's Holmes Towers public housing development.

As one of the tallest buildings on the Upper East Side, the New Skyscraper will cast long shadows and impact the community's access to sunlight. It is undisputed that the proposed tower violates zoning restrictions related to building spacing, setback from the street, and open space; it is at once too tall and too close to the surrounding buildings and sidewalk.

Figure 3: New York City Housing Authority / FXCollaborative

The large development site is currently the site of a playground and pedestrian walkway, and functions as a central open space for the community.

Figure 4: (Gregg Vigliotti/For New York Daily News)

The chosen private developer Fetner Properties ("Fetner") will pay NYCHA only $25 million to lease the land. With apparently no irony intended, the developer has named the project "The Bellwether at Yorkville." The project is indeed a bellwether of enormous change, marking the first time that public housing land in New York City is opened to large-scale private residential development. It will be the opening project in NextGeneration NYCHA ("NextGen"), a 10-year strategic plan to permit private developers to build "infill" developments of mixed market-rate and affordable housing on "underutilized" NYCHA land to raise revenue for the near-bankrupt authority. Following closely on the heels of this project, future "infill" development is currently slated for several other NYCHA developments.

Despite the magnitude of this project and its effect on the neighborhood, and on the future eleven NextGen sites, NYCHA has advanced this project, and now authorized a lease with Fetner, without submitting it to the public review process required by the New York State Public

Housing Law. Here in New York City, that process is Uniform Land Use Review Procedure ("ULURP").

While ULURP does not compel any outcome, it ensures a process with multiple points for public hearings and input. But it is not just the opportunity to be heard. As a critical step, ULURP provides the MBP with the duty to review and make recommendations regarding the City's use of land. Under the Charter, the MBP has the power to "submit a written recommendation on an application," including disapproval or conditional approval with suggestions for change. Charter § 197-c(f). Using this statutory authority, the Borough President can analyze land use changes to determine their impact on the neighborhood and the community at large.[1]

NYCHA has bypassed the Charter-required involvement of the MBP and other elected officials and community members. Instead of ULURP, NYCHA has petitioned, or will imminently petition, the Mayor to issue a Mayoral Zoning Override ("MZO") waiving all zoning restrictions to allow the development to speed forward. To allow Fetner to construct the New Skyscraper, NYCHA plans to seek overrides of the New York City Zoning Resolution ("Zoning Resolution") related to height and setback, minimum distance between buildings, and open space ratio.

An MZO is an infrequently used, discretionary tool by which the Mayor's Office overrides zoning restrictions for certain public projects. The MZO process is the opposite of the open, transparent ULURP process, un-cabined by any standards and effectively nonreviewable.

[1] The City Council, based upon input from the community and the Borough President, has to power to approve, approve with modification, or disapprove the proposed project by majority vote. Charter § 197-d(c). The City Council's vote is final unless rejected by the Mayor, in which case the City Council must override the Mayor by two-thirds vote. Charter § 197-d(d).

By using this clandestine procedure instead of ULURP, Respondents will further shut the public out from any meaningful input. While NYCHA has gone through the motions of holding resident "stakeholder" meetings (largely at invite-only gatherings behind closed doors), it is pressing forward with the Holmes Towers plans without ULURP, despite widespread calls by residents and City officials for true public deliberation and review.

All parties to this action agree that New York City faces an affordable housing crisis. The MBP has long been a leader in the effort to protect and develop affordable housing in New York City. Selected "infill" development may be required for NYCHA to address its ever-growing fiscal crisis, particularly as the authority is further starved of federal funds by the Trump administration. But NYCHA and the Mayor must still follow the law by submitting the project to ULURP, consulting with affected residents, and proceeding with input from the Borough President, the City Council, and other statutorily-mandated bodies before acting.

Here, NYCHA has issued a Request for Proposals, selected a developer, greenlighted a controversial plan to build on a playground and open space in the very center of the community, submitted an application to the federal government to transfer public land at Holmes Towers to that private developer, conducted an Environmental Assessment, agreed to seek zoning variances on behalf of the developer to allow for an out-of-scale, 50-story tower, and now, approved a 99-year lease to transfer land on financial terms highly favorable to the developer – all without any of the formal public review required by law.

MBP brings this suit to vindicate her statutory right under ULURP to participate in the analysis and decision-making about this significant project requiring land use, zoning and public policy changes that will impact New York City and its public housing for decades to come. Such a sweeping redesign of Manhattan's Upper East Side that affects thousands of residents of public

housing—and that could be a bellwether of many more developments on NYCHA land in Manhattan with even fewer affordable units[2]—should not take place behind closed doors.

STATEMENT OF FACTS

Holmes Towers

In 1965, the City of New York (the "City") condemned the plot of land bounded by what is now 92nd Street and 93rd Street on one side and 1st Avenue and the FDR Drive on the other. Pet. ¶¶ 23-24. The City then conveyed the land to NYCHA specifically for construction of a federally-aided public housing project named John Haynes Holmes Towers ("Holmes Towers"). *Id.* ¶ 23. The architects of Holmes Towers, inspired by the "tower in the park" vision that typified the era, designed the project as a series of moderately tall buildings with open green space between and around them for community use. *Id.* ¶ 24.

Figure 5: Site of Proposed Development (4/17/19)

[2] It appears that the proportion of affordable units in such infill projects is already shrinking. A newly announced NextGen project will contain 75% market-rate units, and will still not be put through ULURP. https://www.6sqft.com/early-reports-of-market-rate-towers-coming-to-nycha-sites-on-the-lower-east-side-and-chelsea/.

As families moved into Holmes Towers, the distinctive design proved prescient; residents of all ages made frequent use of the open space, gathering together as a community to play, talk, or just relax. To this day, Holmes Towers residents make use of the open space to let their children play in a central location, walk, or simply catch up with their neighbors. *Id.* ¶ 57(a).

NextGeneration NYCHA and the Holmes Towers Infill Development

In recent years, budget shortages and NYCHA's rising operating costs have forced the agency to seek new sources of revenue. In 2015, NYCHA and the Mayor announced the NextGen initiative, a 10-year strategic plan. *Id.* ¶ 28. In relevant part, NextGen seeks to meet NYCHA's capital needs by alienating or leasing "underutilized land, such as parking lots and trash areas," on a number of designated projects around New York City, in some cases to private developers, to generate revenue for maintaining and repairing existing NYCHA housing. *Id.* ¶¶ 29-30. This process is known as "infill development." *Id.* ¶ 28. All of the NextGen projects are slated for NYCHA developments in neighborhoods where the land has significant market value. *Id.* ¶ 30.

After NextGen was first announced, the City Council considered an amendment that would have, in relevant part, reduced the required spacing between buildings in several residential districts containing public housing projects, including the district in which Holmes Towers sits. *See* Ex. A at 2.[3] These proposed amendments would have made it significantly easier for infill development to take place by easing the building spacing requirements applying to open space on NYCHA property. After public submissions and hearings, however, City

[3] Citations to "Ex. __" refer to the exhibits attached to the Affirmation of Katherine Rosenfeld in Support of Petitioner-Plaintiff's Verified Article 78 Petition, dated May 6, 2019 and filed in connection with this brief.

Council voted in 2016 to keep the existing building spacing requirements. *Id.* All infill development, the Council decided, would need to comply with applicable zoning requirements.

On June 30, 2016, the Mayor and NYCHA, along with several other municipal actors, issued a Request for Proposals under NextGen, inviting private developers to submit proposals for infill development at Holmes Towers (the "RFP").[4] Pet. ¶ 31. The RFP identified only one proposed infill development site at Holmes Towers: the playground and pedestrian walkway located between the two main towers.[5] This site was a far cry from the "underutilized" areas such as "parking lots and trash areas" initially contemplated as development sites under NextGen.[6] NYCHA did not engage in any environmental review before putting out the RFP. Given this proposed change to a sizable open space used by large swaths of the community, MBP, along with many stakeholders, wrote to NYCHA on September 1, 2016, stating that the proposed infill development should go through ULURP. *Id.* ¶ 49. NYCHA did not respond to MBP's letter or concerns.

On May 17, 2017, NYCHA announced that it had selected Fetner through the RFP process. *Id.* ¶ 33. Fetner's proposal immediately provoked concerns: where the playground and pedestrian walk now sit, Fetner proposed building a 530-foot-tall, 50-story building, adding 338 units of housing to the block. *Id.* ¶¶ 34, 47. Half of the units will be affordable housing, and half will be market-rate. *Id.* ¶ 42. On May 30, 2018, NYCHA's Board of Directors authorized NYCHA to submit an application to the United States Department of Housing and Urban Development ("HUD"), as required by Section 18 of the U.S. Housing Act of 1937, for approval

[4] The RFP also sought proposals for infill development at the Wyckoff Gardens NYCHA project in Brooklyn. That proposed infill development is not the subject of this petition.
[5] https://www1.nyc.gov/assets/hpd/downloads/pdf/developers/NextGen-Neighborhoods-Sites-Brooklyn-Manhattan-RFP.pdf at 9.
[6] https://www1.nyc.gov/assets/nycha/downloads/pdf/nextgen-nycha-web.pdf at 83.

of a 99-year ground lease to "facilitate" this new construction. Ex. B. The approval requested made explicit that the leased land was only to be used for construction of the New Skyscraper. *Id.* NYCHA has refused to provide constituents with a copy of the application submitted to HUD. Pet. ¶ 35.

MBP, Holmes Towers Residents, and Elected Officials Seek Answers about the Project

From the beginning, the community has questioned many aspects of the project. Holmes Towers residents have shown up in large number to Community Board 8 meetings about the proposal. *Id.* ¶ 50. Residents have raised concerns—both to MBP and to Respondents—about quality of life issues, local hiring and jobs, air quality and noise during construction, the impact on children and senior citizens from the loss of open space, and the impact on the after-school learning center which is in close proximity to the construction site and serves dozens of young children from the Holmes Towers and the neighboring Issacs Houses. *Id.*

The changes to the playground and the open space are of particular concern. The site of the proposed construction is far from "underutilized." Rather, the campus serves as home to the Stanley M. Isaacs Neighborhood Center, which runs many critical programs that serve the entire neighborhood, including after-school programs for children, educational and workforce training for at-risk adolescents, daycare services for infants and toddlers, public benefits assistance for seniors, and a variety of social and clinical services.[7]

[7] https://isaacscenter.org/what-we-do/.

Figure 6: Isaacs Community Center

Many, if not all, of these services would be negatively impacted by years of disruptive construction. Much of the outdoor programming offered to children and seniors would have to be sharply reduced, if not eliminated entirely. The noise and air pollution associated with construction of the New Skyscraper would risk deterring community members from taking advantage of the community center's services; educational and clinical outcomes could be affected by the ongoing disruption to a community of vulnerable people. Residents expressly raised the need to protect these social programs to NYCHA, but were ignored.[8]

Another specific piece of resident feedback that NYCHA obtained but disregarded was that the developer should install an alternative playground area *before* construction commences and the current playground is removed for several years for construction of the New Skyscraper.[9] *Id.*¶ 57(f). Similarly, Fetner has promised to build two new playgrounds to replace the central

[8] https://www1.nyc.gov/assets/hpd/downloads/pdf/developers/NextGen-Neighborhoods-Sites-Brooklyn-Manhattan-RFP.pdf at 48.
[9] https://www1.nyc.gov/assets/hpd/downloads/pdf/about/nextgen-neighborhoods-community-principles-holmes.pdf at 2 ("Residents also wanted to ensure that the new playground would be built before the old playground is removed to make way for the new building.").

playground that will be demolished. But the siting of these replacement playgrounds is less central and closer to traffic—another area of resident feedback that NYCHA has ignored. *Id.*¶ 57(i).

Just one month after the announcement of the project, Holmes Towers residents noted that the New Skyscraper was sited squarely upon the Holmes Towers playground and open space despite "widespread resistance from the community to development that would take away the park from the children." Ex. C. Yet NYCHA hid this opposition in its public submissions; while trumpeting that "over 1,300 residents participated in meetings, visioning sessions, and charrettes" prior to the site's selection, NYCHA failed to mention the significant public opposition to the plan. Ex. D at 12.

As the details of the project became public, community opposition grew. Following the completion of the Environmental Assessment Statement ("EAS") for the New Skyscraper, Community Board 8 called a public hearing on November 28, 2018. Residents challenged the infill development's multi-million-dollar shortfall in meeting the capital needs of Holmes Towers (estimated by NYCHA to be approximately $36 million) and expressed disappointment that the "needs and preferences identified by residents . . . were not a part of the final Fetner project design" despite "significant community need and request." Ex. E. Yet the Mayor's office, Fetner, and NYCHA all refused to even attend the hearing, let alone respond to residents' concerns. Ex. F at 2.

On December 20, 2018, Community Board 8 wrote to the Mayor, NYCHA, and Fetner, again stating that "NYCHA residents['] concerns have been ignored by Fetner and NYCHA," and that the visioning sessions and other informal meetings "were pro forma only." Ex. G at 3. The letter reiterated the community's serious questions about the New Skyscraper's impact on

the open space at Holmes Towers and about the New Skyscraper's failure to generate enough revenue to meet the capital needs of Holmes Towers. *Id.*

Over the three years of the Holmes Towers infill development's planning, NYCHA has made its attitude towards resident engagement abundantly clear: it is a procedural hurdle to clear, not a substantively valuable input. Public participation is meaningless if it is simply collected and discarded. Here, NYCHA has valued least the voices of those people it is supposed to serve.

NYCHA Acknowledges the Building's Inability to Comply with the Zoning Resolution, and States its Intent to Seek Mayoral Zoning Overrides

As currently planned, the New Skyscraper does not comply with the neighborhood zoning. Although Holmes Towers is located in a district without a maximum building height, the district does impose strict requirements set within a sky exposure plane and an open space requirement[10] The New Skyscraper—slated to be over 500 feet tall—cannot achieve the necessary setback, and will instead be located just a few feet from the street line. Further, the New Skyscraper will dramatically reduce the space between buildings on the block; the New Skyscraper will sit far closer to the neighboring buildings than the mandatory 60-foot spacing required. Pet. ¶¶ 46-48, 57(b).

NYCHA has acknowledged these violations. On August 23, 2018, NYCHA submitted an amendment to its Public Housing Agency Plan ("PHA Plan") for the Fiscal Year 2018 for HUD's consideration.[11] *Id.* ¶ 36. NYCHA conceded that the New Skyscraper did not comply

[10] https://www1.nyc.gov/site/planning/zoning/districts-tools/r8.page.
[11] The U.S. Housing Act requires every public housing agency to submit an annual "PHA Plan" to HUD to certify its plans for the year, and its compliance with all applicable statutes and regulations.

with the neighborhood's zoning, stating that "a waiver may be sought for some items including penetration of the sky exposure plane."[12] Ex. D at 57.

After NYCHA selected the site, issued the RFP, and selected the developer, NYCHA undertook an EAS review. In connection with NYCHA's submissions to HUD, the New York City Department of Housing Preservation and Development prepared an EAS in October 2018, concluding that construction of the New Skyscraper would not have a significant impact on the quality of the human environment. *Id.* ¶ 38. This determination shielded the project from undergoing an Environmental Impact review, a more searching and detailed review triggered if a proposed major action significantly impacts the quality of the human environment. *Id.* The EAS simultaneously noted, however, that NYCHA—not Fetner itself—would seek the MZOs to waive requirements of the Zoning Resolution relating to setback and the sky exposure plane, building spacing, and open space, and thereby allow for the New Skyscraper. *Id.* ¶ 40; Ex. H at 1.

On December 19, 2018, NYCHA's Board entered a resolution authorizing NYCHA to enter into the lease with Fetner, pending HUD approval of its application, for the price of $25 million. Ex. B. Nine days later, on December 28, 2019, Fetner filed requests for necessary permits with the New York City Department of Buildings ("DOB"). Pet. ¶ 44. These applications were denied by the DOB pending zoning approval. *Id.* ¶ 45.

At a public meeting held on January 30, 2019 by Community Board 8's Housing Committee, NYCHA's Director of Construction confirmed that NYCHA itself intended to seek

[12] The "sky exposure plane" refers to the virtual plane sloping in from the edge of a zoning towards the lot's center (as a building rises higher), set forth in a specific district's regulations, that a building may not cross. A building may not penetrate the sky exposure plane, which is designed to provide light and air at street level, primarily in medium- and higher-density districts. https://www1.nyc.gov/site/planning/zoning/glossary.page.

MZOs to excuse myriad aspects of the New Skyscraper's noncompliance with the Zoning Resolution. *Id.* ¶ 46. At least one of the MZOs sought—to waive the building spacing requirements—represents a zoning change for the district that was specifically rejected by the City Council just three years prior. *Id.* ¶ 48.

MBP Continues to Express Concern Over the Secrecy of the Redevelopment

Increasingly concerned that such a significant project—adding over 300 units to a single block, eliminating a large open space for residents, and violating several aspects of the neighborhood's zoning—was being undertaken without real public oversight, MBP testified before City Council on October 30, 2018 that the New Skyscraper was being ferried through approvals without any meaningful review by the community. *Id.* ¶ 51. MBP stressed that "all NextGen Neighborhoods projects must trigger ULURP so that Community Board members, Borough Presidents, and Councilmembers can work with NYCHA residents and other community stakeholders to review project plans and approve only the proposals that will benefit both NYCHA and the community." Ex. I.

On February 20, 2019, having received no indication that NYCHA or the Mayor was reconsidering its approach to Holmes Towers, MBP sent a letter to the Mayor reiterating the need for review of the proposal through ULURP. Pet. ¶ 52. MBP stressed that she was not opposed to *any* redevelopment; she wrote that she "do[es] not see ULURP as a way to defeat infill; rather [she] see[s] it as a way to improve infill." Ex. J at 2. MBP's concerns were procedural: she sought to ensure that all stakeholders were consulted, and the best possible deal reached. She expressed strong opposition to the Mayor's use of MZOs to exempt the New Skyscraper from the various requirements of the Zoning Resolution. Finally, MBP questioned whether NYCHA was receiving a good deal in this transaction, since Fetner stood to receive over

$60 million in public money through housing subsidies and would pay less than half that amount to lease the site.

On February 27, 2019, an expediter approached the office of the MBP on behalf of Fetner to request a "House Number Verification appointment" about the new building. *Id.* ¶ 53.

On February 28, 2019, MBP sent another urgent letter to the Mayor, again expressing concern that such a significant change to the neighborhood was going to take place without ULURP, and that the neighborhood's zoning would be fundamentally disrupted by a shadowy and standard-less process through the use of MZOs. *Id.* ¶ 54.

MBP commenced the instant special proceeding to ensure that Holmes Towers and the surrounding neighborhood are not radically changed without the necessary public review and input procedures embodied in ULURP.

ARGUMENT

This Court should grant MBP's Petition and annul NYCHA's authorization of the lease with Fetner because NYCHA acted in violation of lawful procedure, and arbitrarily and capriciously, when it bypassed ULURP and approved the lease to Fetner on December 19, 2018. *See* CPLR 7803(3). This Court should also grant MBP's Petition and enjoin the application for, and grant of, MZOs related to the New Skyscraper. NYCHA is not empowered to seek such MZOs for the purpose of assisting a private developer to circumvent ULURP, nor may the Mayor use them in this case to specifically override the will of the City Council. *See* CPLR 7803(2).

I. NYCHA ACTED UNLAWFULLY BY CIRCUMVENTING ULURP

New York state law is clear and unambiguous: NYCHA must submit any public housing "plan" or "project"—or any "essential or significant" modification thereto—to ULURP. The Holmes Towers Infill Development will fundamentally alter the character, design, and essence of

Holmes Towers and the neighborhood at large. Where there is now open space and a playground, there will be an immense skyscraper set just feet from the street line that blocks access to light and sky. Over three hundred additional units of housing, half of which will be market-rate units, will be added to the area. Hundreds of new residents will crowd the sidewalks and use the neighborhood's infrastructure, schools, and roads. One of the largest open spaces around will be eliminated, at minimum, for the three years of construction. Construction will occur at the footsteps of an active community center and a senior center. It is hard to imagine a more drastic change from the "tower in the park" vision that defines Holmes Towers.

Such a significant change must be put through ULURP. No other process—no informal "visioning sessions" or interviews—can replicate the robust and multifaceted review provided by ULURP. NYCHA's conduct to date confirms this fact. Despite conducting several informal community engagement meetings, NYCHA has cast aside every criticism of the project without explanation and has rushed the project towards completion. At the same time, NYCHA has, in previous litigation, admitted that such construction—requiring zoning changes on NYCHA lands—would require ULURP review. *See New York City Council v. New York City Hous. Auth.*, 41 Misc. 3d 1238(A), 2013 WL 6500171, at *3 (Sup. Ct. N.Y. Cnty. 2013) ("While the parties dispute whether ULURP approval is required for the Land Lease Initiative as a whole, the parties do not dispute that at a minimum 'it is required for actions requiring zoning changes from the city.'").

That is all MBP seeks to do: have NYCHA follow the procedures it has acknowledged are required for projects of this type. By intentionally shielding the Holmes Tower Infill Development from the required public review provided by ULURP, NYCHA has acted in violation of lawful procedure, and has acted arbitrarily and capriciously.

A. New York State Law Requires ULURP for the Proposed Development

The requirement that NYCHA submit this project to ULURP arises under state law. The New York State Public Housing Law charges NYCHA with "the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas" and the "providing of adequate, safe and sanitary low rent housing accommodations . . . for persons and families of low income." N.Y. Pub. Hous. Law § 2. These purposes are also enshrined in Article XVIII of the New York State Constitution, which authorizes the Legislature to "provide . . . low rent housing and nursing home accommodations for persons of low income as defined by law" and "for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas." N.Y. State. Const. Art. XVIII, Sec. 1; *accord Holmes v. New York City Hous. Auth.,* 398 F.2d 262, 263 (2d Cir. 1968).

Because it is subject to the requirements of state law as interpreted by the Court of Appeals, NYCHA must submit any public housing "plan" or "project," as well as any "essential or significant modification" thereto, through ULURP. N.Y. Pub. Hous. Law § 150. Construction of the New Skyscraper is a new "project" on NYCHA lands. Alternatively, it constitutes an "essential or significant" modification to Holmes Towers. In either event, the state Public Housing Law requires that the development must undergo ULURP.

1. The State Public Housing Law Requires NYCHA to Submit a "Plan" or "Project," or Any "Essential or Significant" Modification Thereto, for Approval Through ULURP

The Public Housing Law requires NYCHA to submit every "plan or project" to the "local legislative body" for prior approval. N.Y. Pub. Hous. Law § 150. Because New York City is a city of more than one million people, the statute defines the "local legislative body" as the "officer or agency vested with power under the charter by such city, or by other law, to act pursuant to this chapter." *Id*. 3(7).

Under the New York City Charter, the statutorily-mandated approval process is ULURP. ULURP applies to eleven categories of land-use decisions. Charter § 197-(c). One of the enumerated categories requiring ULURP review is "[h]ousing and urban renewal plans and projects pursuant to city, state and federal housing laws." *Id.*§ 197-c(8) *see also id.* § 197-a(a)-(c) (noting that all "plans" for "development, growth, and improvement" of the City must be submitted through ULURP). A project that involves any of the eleven classes of covered land-use decisions will be subject to full ULURP review.

Section 150 of the Public Housing Law also requires prior approval from the "local legislative body" for any "essential or significant" modification to a public housing plan or project. In the leading case of *Margulis v. Lindsay*, the Court of Appeals held that under Section150 "new approval is necessary" when "the essence" of a plan or project "has been changed." 31 N.Y.2d 167, 173 (1972).

2. The Holmes Towers Infill Development is a "Plan" or "Project"

Under the Public Housing Law, housing authorities such as NYCHA have the power to "prepare or arrange for the preparation of plans" for projects, as well as to "carry out" and "operate projects." N.Y. Pub. Hous. Law § 37(1)(d). Both the term "plan" and "project" are specifically defined in the statute. A "plan" is defined as:

> a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and insanitary area or areas and for recreational and other facilities incidental or appurtenant thereto to effectuate the purposes of article eighteen of the constitution or any other provision of the constitution delegating any similar power or providing homes for persons of low income.

N.Y. Pub. Hous. Law § 3(13).

A "project," in turn, is defined as:

> a specific work or improvement to effectuate all or any part of a plan. The term shall include the lands, buildings or any dwelling units therein, and improvements acquired, owned, constructed, managed or operated hereunder, to provide dwelling accommodations for persons of low income, and such stores, offices and other non-housing facilities as well as social, recreational or communal facilities, as may be deemed by the authority or municipality to be incidental or appurtenant to a project . . . .

Id. § 3(14).

Putting these definitions together, the term "project" means a specific "work or improvement" that effectuates a plan, such as the "replanning and reconstruction or rehabilitation" of "homes persons of low income," including by alterations to the "lands, buildings, or any dwelling units therein . . . as well as social, recreational or communal facilities . . . ." *Id*.; *see also Margulis*, 31 N.Y.2d at 172 (defining a "plan broadly as an undertaking for the clearance and replanning of an area," and "a project as the specific work or improvement, including of course the buildings, to effectuate the plan").

The Holmes Tower Infill Development is a housing plan or project within the meaning of the Public Housing Law. The New Skyscraper will either directly provide homes for persons of low income or provide funds for the rehabilitation of units within Holmes Towers. And the new construction will affect the playground, community center, and other "social, recreational, or communal facilities" that are "appurtenant" to Holmes Towers. N.Y. Pub. Hous. Law § 3(14). As such, it is both a plan—a "replanning" of the Holmes Towers site—and a project—a "specific work or improvement" for the purpose of "rehabilitating" Holmes Towers. NYCHA itself refers to the Holmes Towers Infill Development interchangeably as a "plan" and as a "project." *See, e.g*., Exs. L & M (NYCHA press releases).

3. At a Minimum, the New Skyscraper Constitutes an "Essential or Significant" Modification to Holmes Towers Requiring ULURP

Even if the New Skyscraper is not itself an independent "plan" or "project" under the PHL, it will undoubtedly change the "essence" of the existing Holmes Towers project. Therefore, "new approval is necessary because the essence has been changed." *Margulis*, 31 N.Y.2d at 173. What was constructed as a "towers in the park" project in the 1960s will be transformed by a 50-story tower at its center, built in close proximity to the existing buildings—so close, in fact, that it violates the current zoning requirements.

The proposed changes will have a "significant impact on the community." *Id.* at 174. The New Skyscraper will bring hundreds of new market-rate and affordable-housing tenants into close proximity with Holmes Towers. Even setting aside the land use and zoning changes, the introduction of substantial new numbers of tenants into the community—many of whom will be paying market-rate rents—is a significant modification to Holmes Towers that requires prior approval. Any change to the "number and quality of the tenant population" of an existing plan or project is a significant modification requiring prior approval. *Id.* at 173. Courts have subsequently paid close attention to how the tenancy of a project is affected by a proposed change. *See Falbros Realty Inc. v. Michetti*, 200 A.D.2d 85, 89 (1st Dep't 1994) (noting relevance of "number and quality of the tenant population planned for the project"); *West 97th-98th Sts. Block Ass'n v. Volunteers of America of Greater N.Y.*, 153 Misc. 2d 321, 327 (Sup. Ct. N.Y. Cty. 1991) (finding that changing a project from housing for homeless singles to housing for homeless families was "significant," requiring additional ULURP approval). Here, the demographic and social changes catalyzed by the project, and the increased density and pressure on neighborhood resources, are significant community impacts.

The Holmes Towers project is also "essential or significant" because it will "affect the physical design, [a]esthetics, safety, or convenience of the community." *Lower East Side Joint Planning Council v. N.Y.C. Bd. of Estimate*, 83 A.D.2d 526, 527 (1st Dep't 1981). These diagrams by planner George Janes illustrate how substantially the proposed project will alter the physical design and aesthetics of the community, removing a large open space and, in its footprint, constructing a tall new tower.

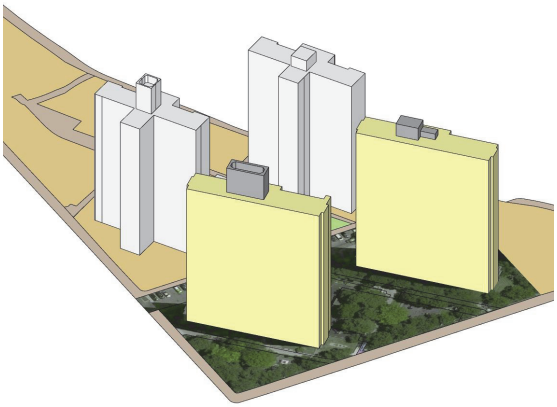

Figure 4 Existing Conditions

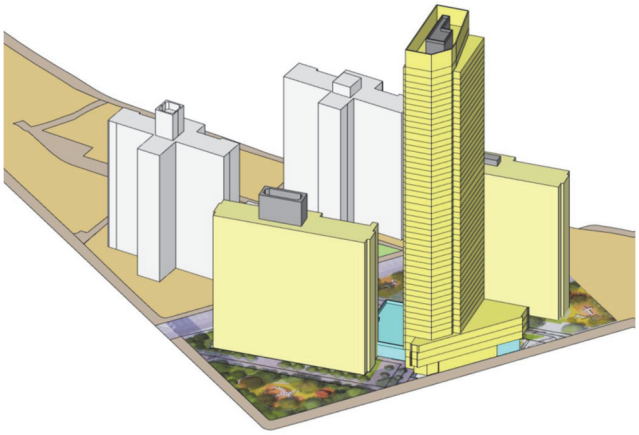

Figure 5 Building as Proposed (George Janes)

The October 2018 EAS demonstrates that the proposed project will have a significant impact on the surrounding community. In the EAS conducted, NYCHA itself has confirmed, across categories including Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities; Shadows; Historical and Cultural Resources; Urban Design and Visual Resources; Hazardous Materials; Greenhouse Gas Emissions; Noise; and Construction, that construction of the New Skyscraper would:

- Introduce a new building, a new building height, or result in a[] substantial physical alteration to the streetscape or public space in the vicinity of the proposed project that is not currently allowed by existing zoning;
- Generate a net increase of more than 200 residential units or 200,000 square feet of commercial space;

- Result in 50 or more elementary or middle students, or 150 or more high school students based on number of residential units,
- Result in a collective utilization rate of an elementary and/or intermediate schools in the study area that it is equal to or greater than 100 percent;
- Result in a net height increase of any structure of 50 feet or more;
- Result in any increase in structure height and be located adjacent to or across the street from a sunlight-sensitive resource;
- Result in development of 350,000 square feet or more;
- Generate or reroute vehicular traffic; and
- Involve construction activities lasting longer than two years.

See Ex. H. Even these answers are likely a conservative summary of the project's impacts.

Although these environmental impacts were documented, the EAS nonetheless concluded that no significant environmental impact is caused by the Holmes Towers Infill Development, and thus no detailed EIS was required. This conclusion that a massive new building not permitted by existing zoning will have no significant impact on the environment does not withstand scrutiny. The EAS was irrational, conclusory, littered with omissions and contradictions, and results-driven to permit the project. ULURP provides the opportunity to closely evaluate the EAS, including whether the project should have been designated a Type I Project subject to heightened environmental review. ULURP should also be the forum to address the key environmental issues of resiliency and climate change.

The Holmes Towers Infill Development is a textbook example of a change to the essence of a plan or project, for which State law requires local legislative approval. Whether as an independent "plan" or "project," or as an "essential or significant" modification to an existing plan or project, the result is the same under the Public Housing Law. The New Skyscraper

changes the essence of Holmes Towers, and state law requires that NYCHA obtain local legislative approval, which in this case is through ULURP.

B. ULURP Is a Unique Process That Cannot be Replicated Through Other Means of Informal Public Review

NYCHA's alternative methods of community engagement are poor substitutes for the robust ULURP process. ULURP was established in the Charter in 1975 to address "a perceived need for informed local community involvement in land use planning, for adequate technical and professional review of land use decisions and for final decision-making by a politically accountable body." *Council of City of New York v. Giuliani*, 664 N.Y.S.2d 197, 201–02 (Sup. Ct. Queens Cnty. 1997) (citing 2 Morris, New York Practice Guide, Real Estate § 20.04, p. 20–47). The ULURP process was meticulously designed to strike a balance between the authority of the Mayor and the specialized agencies under his control and the Council, Borough President, and local Community Boards, bodies with stronger local knowledge that would be more responsive to the effects significant land-use decisions have on local communities. *See* Frederick A.O. Schwarz Jr. and Eric Lane, *The Policy and Politics of Charter Making: the Story of New York City's 1989 Charter*, 42 N.Y.L. Sch. L. Rev. 723 (1998). This balance has yielded numerous constructive compromises that have improved large-scale development projects with community input.

For example, the Borough President recently played precisely this type of constructive role in ULURP when she recommended changes after reviewing the original application for JPMorgan Chase Bank's new corporate headquarters in East Midtown. In that situation, the applicant sought waivers to the recently enacted East Midtown rezoning to avoid having to construct a 10,000 square foot publicly accessible open space. After the Community Board and the MBP review recommending "no" votes at the CPC, the applicant agreed to construct the full

amount of open space and agreed to additional mass transit improvements.[13] The ULURP process worked just as intended: public input led to more public benefits.

Courts have repeatedly rejected the City's attempted end runs around ULURP. This is not the first time a mayoral agency has claimed that ULURP does not apply in order to seize power over land-use actions. Courts must carefully review the substance of the proposed land use action to determine whether ULURP is required and ensure stakeholders a voice in the decisions that will affect their local communities. *See Dist. 4 Presidents' Council v. Franchise & Concession Review Comm. of City of New York*, 18 Misc. 3d 1123(A), 2008 WL 253048, at *4 (Sup. Ct., N.Y. Cnty. Jan. 30, 2008) (rejecting City's "interpretation designed to evade ULURP" which would "undermine ULURP's purpose of requiring community input on significant land use decisions regarding public land."); *Stop BHOD v. City of New York*, 22 Misc. 3d 1136(A), 2009 WL 692080, at *13 (Sup. Ct., Kings Cnty. Mar. 13, 2009) (rejecting City's narrow interpretation of § 197-c(a)(5) that there must be a new acquisition of land or a change in the land's use for a development to be categorized as a "site selection for a capital project" requiring ULURP review).

1. Other Forms of Public Review Cannot Replace ULURP

Respondents may attempt to minimize the harm caused by their bypassing ULURP by claiming there was "robust" public review and pointing to other informal meetings they held with stakeholders. But any such informal alternate forms of public review do not displace the need for the specific processes the Charter sets forth through ULURP. *Id.* at *14 ("[C]orrespondences and meetings that have taken place are, by no means, a substitute for the

[13] https://www.manhattanbp.nyc.gov/wp-content/uploads/2019/01/2019-01-09-N-190180-ZRM-270-Park-Avenue-MBP-Recommendation.pdf

legally mandated formal review procedures of . . . ULURP."). NYCHA also held these sessions behind closed doors at invitation-only events, selecting certain residents and excluding other residents. In a tone-deaf attempt to stifle debate, NYCHA actually went so far as to require residents who participated in the RFP Stakeholder Committee to sign a "Non-Disclosure Agreement" attesting to their "inability to share any knowledge of proposals" until the selection of the developer was complete. Ex. N. No genuine public review process requires participating community members to sign a non-disclosure agreement to muzzle discussion.

ULURP exists to ensure that the branches of government that are directly responsive to the public, including the MBP and City Council, have the *power* to modify or disapprove of a proposed development armed with all the underlying documents and analyses. More specifically, the Charter provides that prior to any vote by the CPC or City Council, the Borough President is given a thirty-day review period to consider the proposal and submit a recommendation. Charter § 197-c(g).

While the breadth of the non-ULURP public review is irrelevant to whether ULURP is required, the inadequacy of the public review here is apparent. Only one day after NYCHA's Board approved the lease with Fetner, Community Board 8 passed a resolution opposing the project. Respondents tossed aside input from the affected communities—the exact input ULURP is meant to ensure. The Manhattan Community Board 8 repeatedly recommended disapproval of the project. Exs. F, G, K. The public hearing on January 30, 2019 yielded *nearly five hours* of speakers, largely in opposition to the construction. That Respondents were only paying lip service to the so-called public review is further illustrated by the fact that community members requested that (1) the New Skyscraper be sited on a different area of the Holmes Tower campus, and that (2) if destroyed, the playground be reconstructed on a different site. Ex. C. Yet there

was no opportunity to provide any meaningful input on those findings before Respondents approved this project.

Public review is not meaningful in and of itself when no one in a position of authority over the process is responsive to the public. ULURP is meant to prevent exactly what happened in this case, when the public is "heard" but ignored. Elected representatives who are accountable to their constituents must have the opportunity to influence the outcome of these neighborhood-altering decisions. The NYCHA Board's approval of the 99-year lease must be annulled.

II. NYCHA IS NOT EMPOWERED TO SEEK MZOs TO BYPASS ULURP, NOR IS THE MAYOR EMPOWERED TO ISSUE MZOs IN THIS CASE

This Court must also annul any application made by NYCHA for MZOs exempting the New Skyscraper from any applicable zoning requirements, or any such MZOs actually granted by the Mayor. Because both NYCHA and the Mayor's powers are sharply delineated, their use of MZOs in this case are actions in excess of their lawful authority.

A. NYCHA Lacks Statutory Authority to Petition for MZOs

NYCHA, as a creature of statutory making, is limited in its powers "to those expressly conferred by the enabling act or those necessarily implied therein." *Summerson v. Barber*, 93 A.D.2d 652, 654 (3d Dep't 1983). While it has flexibility in how to achieve its prescribed purposes, NYCHA may not *expand* the scope of its statutory authority by its own fiat. *Riccelli Enters., Inc. v. New York State Dep't of Envtl. Conservation*, 30 Misc. 3d 573, 578 (Sup. Ct. Onondaga Cty. 2010) (granting Article 78 petition where agency expanded the classes of regulated entities beyond those prescribed in statute). NYCHA's role is limited to "employing its public [housing] expertise in making technical determinations so as to implement legislative policies," as opposed to "a balancing of political, social and economic factors [to] dr[a]w up a

code embodying its own assessment of what public policy ought to be." *Consolidated Edison Co. of New York, Inc. v. Dep't of Envtl. Conservation*, 71 N.Y.2d 186, 191 (1988).

NYCHA's organic statute, the New York Public Housing Law, defines a housing "authority" as a "public corporation . . . organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution . . . ." PHL § 3(2). And Article 18 of the Constitution, in turn, focuses entirely on "low income housing" or "low rent housing." *See, e.g.*, N.Y. Const., art. XVIII §§ 1, 2, 4. Thus, NYCHA may act only to further "low income housing' or "low rent housing." And NYHCA's actions, under the Public Housing Law, "*shall* be subject to the planning, zoning, sanitary and buildings laws . . . applicable in [New York City]." PHL § 155 (emphasis added).[14] NYCHA's authority to seek MZOs to override the Zoning Resolution for any purpose—even its own construction—is dubious at best.

When NYCHA acts to further the interests of a private developer in constructing market-rate housing, albeit in support of its general mission to construct low-income housing, its powers are even more circumscribed. Where the legislature intended NYCHA to act in concert with private housing developers, it was explicit. For example, in 2010, the Public Housing Law was amended to add Section 402-b, which specifically recognizes that "an infusion of private capital is necessary to ensure the continued success and long-term viability of [NYCHA] projects." PHL § 402-b(1). This section authorizes NYCHA to "sell or lease all or part of" its holdings if "such sale or lease will enable the projects to be redeveloped and operated in such manner as to provide decent, safe and sanitary housing within the financial reach of persons and families of low income . . . ." PHL § 402-b(2). That the legislature specifically contemplated NYCHA's

[14] *See also* PHL § 123 (an authority's "acquisition and use of property under this section shall be subject to the planning and zoning laws, ordinances and regulations applicable to the municipality in which the property is situated").

powers with respect to private housing and limited them to "sale or lease" of NYCHA holdings—not any permitting, zoning, or other assistance to the developer—evidences the legislature's plain intent *not* to include any other conduct as within NYCHA's authority. *See Awe v. D'Alessandro*, 154 A.D.3d 932, 934 (2d Dep't 2017) ("[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").

By applying for—or, at a minimum, taking the unequivocal position that it will apply for—MZOs on behalf of Fetner to exempt the New Skyscraper from zoning, NYCHA has acted beyond its statutory authority. NYCHA must be enjoined from submitting any such application to obtain MZOs on behalf of Fetner.

B. The Use of MZOs for the New Skyscraper Is Improper Because it Defies Express Contrary Determinations by the City Council

Under the New York City Charter, the Mayor is "the chief executive officer of the city," separate and distinct from the City's legislative body—City Council. *Compare* Charter § 3, *with* Charter § 21. Institutional safeguards, including the doctrine of separation of powers, dictate that "no matter how well-intentioned his actions may be, the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council." *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344, 356 (1985). The Mayor "may not usurp the legislative function by enacting social policies not adopted by the [City Council]." *Id.* at 359. Thus, the Mayor acts beyond his authority when he "create[s] a different policy, *not embraced in the legislation . . . .*" *Broidrick v. Lindsay*, 39 N.Y.2d 641, 645 (1976) (emphasis added).

The Mayor's proposed use of MZOs to exempt the New Skyscraper from the applicable zoning raises serious separation-of-powers concerns in this case, in light of the City Council's

recent express rejection of the exact changes that would be required to allow for the building's construction. In 2015, the City Council considered a bill that would amend the Zoning Resolution to reduce the required spacing between buildings in R-8 zoning districts, such as the one in which Holmes Towers sits, from 60 feet to 40 feet—and voted it down. Faced with the exact fact pattern posed by the Holmes Towers project, the City Council decided *not* to amend the Zoning Resolution to ease the way for such infill developments. Its rejection of this amendment precludes the other branches of City government—including the Mayor—from making such determinations based on their independent assessments of public policy. *See Carney v. Phillippone*, 1 N.Y.3d 333, 341-42 (2004).

NYCHA is not empowered to seek MZOs to support private developers in connection with infill development. Nor is the Mayor authorized to grant MZOs in this case when they contradict express decisions made by the City Council. Because any application for, or grant of, MZOs in connection with the Holmes Tower infill development are in excess of Respondents' legal authority, MBP's petition must be granted.

III. AT A MINIMUM, THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION WHILE THE NECESSITY OF ULURP IS DECIDED

This case can be decided on the record based on Respondents' unlawful, and arbitrary and capricious actions. Should the Court determine the case cannot yet be resolved, it should issue a preliminary injunction.

A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Coinmach Corp. v. Alley Pond Owners Corp*., 25 A.D.3d 642, 643 (2d Dep't 2006); *see also* CPLR 6301. Whether to grant such relief is within this Court's "sound discretion[.]" *Id*. All three factors favor issuance of an injunction.

A. MBP Is Likely to Succeed on the Merits

As detailed *supra*, Sections I-III, MBP is exceedingly likely to succeed on her claims that Respondents have acted outside the scope of their legal authority in bypassing ULURP.

B. MBP And The Community She Represents Face Irreparable Harm Absent an Injunction

If the proposed development moves forward without any ULURP review, Petitioner's legally mandated rights under the City Charter will be irreparably harmed. "Where, as here, a regulatory regime is implemented to ensure community involvement in government decision-making or to protect the public from potential harm, the government's failure to follow the law, in itself, constitutes irreparable harm to the community." *Stop BHOD*, 2009 WL 692080, at *13.

The very purpose of ULURP is to allow for the most representative branches of the municipal government, such as the MBP and the City Council, to have input into the City's land-use decisions at the earliest stage possible. Without these required reviews, MBP "will be irreparably harmed by the commencement of expansion of the [development project] without the City respondents conducting the legally mandated reviews which are designed to protect the community and to allow community participation and review in significant land use actions." *Id*; *see also Connor v. Cuomo*, 161 Misc. 2d 889, 897 (Sup. Ct., Kings Cnty. 1994) (holding that petitioners had shown they would be irreparably harmed in the absence of an injunction since ULURP requires community input in the decision-making, making it "essential that [the community] be empowered to make its recommendations at the very beginning of the land use review process before an action is implemented").

C. The Equities and the Public Interest Weigh Strongly In Favor of an Injunction

The balance of the equities also overwhelmingly favors MBP's request to preserve the status quo pending the outcome of this proceeding. Respondents have ignored their legal duties

under ULURP. If a preliminary injunction is not granted, Petitioner will be "deprived of any opportunity to voice their legitimate concerns about the [development plans]. . . [p]etitioners would, thus, be excluded from the project planning process," and thus, "the balance of the equities lies in petitioners' favor." *Stop BHOD*, 2009 WL 692080, at *14; *see also Connor*, 161 Misc. 2d at 897 (balance of the equities favored petitioners because "Respondents may not . . . avoid compliance with local laws, i.e., ULURP, and . . . bypass any meaningful formal community review"); *Lee v. New York City Dep't of Hous. Pres. & Dev.*, 162 Misc. 2d 901, 912 (Sup. Ct., N.Y. Cnty. 1994) (Government's substantive and procedural violations of law tipped balance of equities in Petitioner's favor).

CONCLUSION

Democratic governance depends on robust public participation in the political process; the more voices heard, the sounder the policies generated. By evading ULURP, intentionally shielding this important project from public scrutiny, and avoiding any meaningful community input, Respondents have violated not just the law, but this foundational principle of public policy. No matter the importance of Respondents' objectives in developing and advancing the New Skyscraper, they may not circumvent lawful limits on their authority in doing so. MBP's petition must be granted, and the Holmes Tower infill development subjected to ULURP.

Dated: New York, New York
May 6, 2019

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