

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

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. \_\_\_\_\_

**VERIFIED ARTICLE 78 &  
DECLARATORY JUDGMENT  
PETITION-COMPLAINT**

Petitioner-Plaintiff Manhattan Borough President Gale A. Brewer, for her verified Petition-Complaint, pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”), and CPLR § 3001 and § 6301, against Respondents-Defendants the New York City Housing Authority (“NYCHA”), Kathryn Garcia, Interim Chair and CEO of NYCHA, the City of New York, and Bill de Blasio, Mayor of the City of New York (hereinafter collectively “Respondents”) alleges in this hybrid Article 78 and plenary action as follows:

**PRELIMINARY STATEMENT**

1. Petitioner-Plaintiff Borough President Gale A. Brewer brings this action to ensure full compliance with the New York State Public Housing Law and the city’s Uniform Land Use Review Procedures (“ULURP”), and ensure transparent and full-throated community input into

the Holmes Towers infill process, the first infill project under the Mayor and NYCHA's NextGeneration plan.

2. This matter arises out of the NYCHA's Board of Directors' December 19, 2018 decision to approve a resolution for NYCHA to enter into a 99-year lease with a private developer for a 20,000 square foot parcel of land in the Holmes Towers NYCHA public housing development ("Holmes Towers") on the Upper East Side, to allow for the construction of a 530-foot, 50-story tower ("the New Skyscraper"). The developer Fetner Properties ("Fetner") will pay NYCHA \$25 million to lease the land, and then build a new residential building containing 50% market-rate and 50% affordable housing units (collectively, "the Holmes Towers Infill Development").



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

3. The New Skyscraper will be constructed on a site that is currently occupied by a playground and pedestrian walkways. It will therefore have a significant impact on the open space available to the residents of Holmes Towers. Fetner has stated that it will construct new playgrounds and recreational spaces to replace the current ones. But particularly during the three

or more years of scheduled construction when the existing playground will be razed with no planned replacement, the adverse impact on residents will be profound.



Figure 2: (Gregg Vigliotti/For New York Daily News)

4. The New Skyscraper will be sandwiched between the two existing 25-story residential NYCHA buildings.



Figure 3: 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. (NYCHA)



5. As one of the tallest buildings on the Upper East Side, the New Skyscraper will cast long shadows, block the views of residents of Holmes Towers, and impact the light and air for the whole community.



Figure 4: New York City Housing Authority / FXCollaborative

6. The Holmes Tower Infill Development is the first “infill” project of a City 10-year strategic plan known as NextGeneration NYCHA. Under this initiative, NYCHA will raise needed revenue by allowing “infill” development by private developers on open space in NYCHA public housing developments.

7. Fetner has already named the New Skyscraper: “The Bellwether at Yorkville.” This name is fitting, because the New Skyscraper, and the entire Holmes Towers Infill Development, is indeed a bellwether, an indicator and predictor of dramatic change. NYCHA’s decision to take a 20,000 square foot parcel of land currently used as a play area and pedestrian walkway centrally situated between two 25-story residential public housing towers, and turn the parcel over to a private developer to construct a 50-story, 530-foot, mixed market rate/affordable housing building, is a momentous one for the residents of Holmes Towers, the surrounding

community, NYCHA, and the City of New York. Serious questions exist as to whether Respondents negotiated adequate compensation from the developer and whether the revenue generated will address NYCHA's pressing capital needs. At the same time, the Holmes Towers Infill Development is also an exciting opportunity to create a model for thoughtful, inclusive planning on NYCHA land to raise funds for capital improvements and create affordable housing.

8. From the beginning, Borough President Brewer has made clear that robust public review following established land use procedures is needed—and indeed legally required—to vet a proposal of this magnitude. Unfortunately, despite the enormity of the proposed changes, Respondents have illegally circumvented ULURP, to the detriment of the communities they are tasked with serving. Respondents NYCHA and Garcia have refused to submit the project to ULURP, even though Section 150 of the New York State Public Housing Law (“PHL”) and the New York City Charter (“Charter”) mandate that the Holmes Tower Infill Development be completed with the consultation and advice of the community, including the City Planning Commission (“CPC”), the New York City Council, the Borough President and the local Community Board.

9. Pursuant to the PHL, the Holmes Tower Infill Development constitutes a “plan” or “project” subject to public hearing, local planning commission review, and approval by the local legislative body. PHL § 150. The Charter provides that the avenue for this process is ULURP, which also provides for a formal review period and opportunity to comment and offer recommendations by the local community board and the Borough President.

10. The law is clear that local legislative approval through ULURP is required here. The New York Court of Appeals has held that under the PHL, such approval is required for modifications to public housing projects that affect their “essence.” Adding a 50-story

skyscraper right between two 25-story buildings of public housing, and removing the central open space occupied by a playground and pedestrian walkway, certainly changes the “essence” of Holmes Towers.

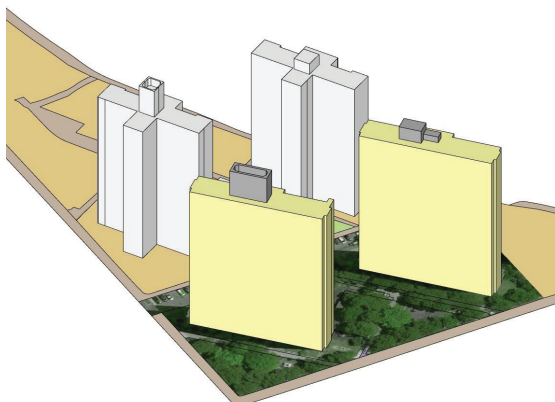


Figure 4 Existing Conditions

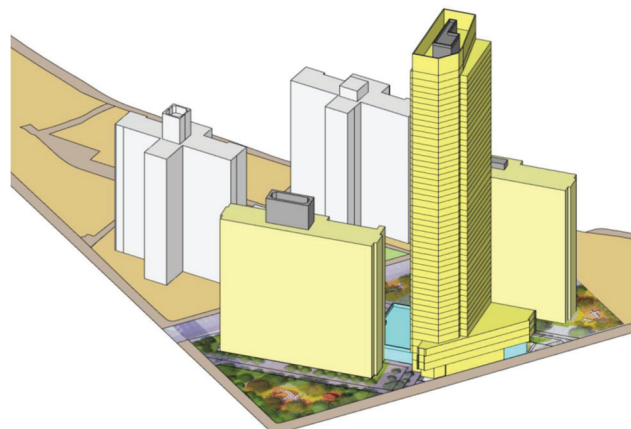


Figure 5 Building as Proposed (George Janes)

11. In addition, the Charter requires that the proposed changes to the underlying zoning go through ULURP. The New Skyscraper fails to comply with the New York City Zoning Resolution with respect to setback (as it stands 50 stories close to the streetline), minimum building spacing, and open space requirements. Respondents NYCHA and Garcia plan to seek (or have already sought) Mayoral Zoning Overrides on behalf of the developer to exempt the New Skyscraper from these zoning requirements under limited circumstances. Mayoral Zoning Overrides are discretionary actions taken by the Mayor, outside the ULURP process, that allows projects with a public interest to waive certain zoning requirements. But these significant zoning changes must be submitted to ULURP for public review, rather than using the clandestine Mayoral Zoning Overrides process as currently proposed. The ULURP process will allow the Borough President and other stakeholders to examine these proposed zoning changes which have thus far received no public scrutiny.

12. By approving this lease and permitting the project, Respondents have attempted to improperly and irrevocably evade the Borough President's statutory role in the review of land use applications, as required pursuant to the Charter.

13. The Borough President brings this action to require NYCHA to proceed with a genuine community planning process pursuant to ULURP, which requires review by the Community Board, Borough President, and City Council, to ensure that the public receives the best possible deal from the lease of this land to Fetner. NYCHA must allow for broader community consultation and consideration of a range of development alternatives through the ULURP process, New York City's established mechanism for deliberation and community participation concerning proposed developments. Only this lawful process will yield a result that accommodates NYCHA's critical need to raise revenue, the City's need for affordable housing, and the needs of the community where the "infill" development will take place.

### **PARTIES**

14. Petitioner-Plaintiff Manhattan Borough President Gale A. Brewer has served as Manhattan Borough President since 2014. As Manhattan Borough President, she is responsible for advising the Mayor and the City Council on borough concerns, commenting on all land-use matters in the borough, advocating for the borough in the municipal budget process, and appointing members to Manhattan's 12 Community Boards. One of the central responsibilities of the Manhattan Borough President's office is its charter-mandated role in the city's land-use process. The Charter requires the Borough President to have a planning office to plan for the growth, improvement and development of the borough and to review and make recommendations on applications and proposals for the use and development of land.

15. In the ULURP process, applications certified by the CPC come to the Borough President for a thirty-day review and the Borough President submits a written recommendation.

This recommendation comes after the Community Board’s review and recommendation and before final approval by the CPC, the Council, and the Mayor. The Borough President reviews the land use and environmental impacts of projects in light of community concerns and mediates between developers and the community if those concerns conflict.

16. Respondent NYCHA is an authority established pursuant to Article 5 of the former State Housing Law and validated and ratified by section 400 of the PHL. NYCHA’s mission is to “increase opportunities for low- and moderate-income New Yorkers by providing safe, affordable housing and facilitating access to social and community services.”<sup>1</sup> Pursuant to section 402(3) of the PHL, Respondent Mayor de Blasio appoints all seven members of NYCHA’s Board of Directors and designates its chair.

17. Respondent Kathryn Garcia is the Interim Chair and CEO of NYCHA. Upon information and belief, in her capacity as Interim Chair and CEO, Ms. Garcia is responsible for the actions of NYCHA that are being challenged in this action.

18. Respondent Bill de Blasio is the Mayor of the City of New York who created the plan challenged herein and who exercises authority, *inter alia*, to issue “overrides” of the New York City Zoning Resolution.

19. Respondent City of New York is a municipal corporation organized and existing under the laws of the State of New York.

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<sup>1</sup> <https://www1.nyc.gov/site/nycha/about/about-nycha.page>



## **JURISDICTION AND VENUE**

20. This Court has jurisdiction pursuant to CPLR § 3001.

21. This Court also has jurisdiction pursuant to CPLR §§ 7801-7806, to review actions by bodies or officers who have failed to perform a duty enjoined upon them by law and who have made a determination in violation of lawful procedure.

22. Venue is properly in New York County pursuant to CPLR §§ 504(3) & 506(b), because claims are asserted against a City agency and officer for actions taken in New York County and because the agency's and officer's principal offices are in New York County.

## **FACTS**

### **I. BACKGROUND**

#### **A. The Holmes Towers NYCHA Development**

23. In 1965, the City acquired the land now comprising the Holmes Towers project by condemnation and conveyed the land to NYCHA for a federally aided public housing project.

24. The Holmes Towers is a public housing project for low-income residents in the Yorkville section of the Upper East Side. The two public housing buildings were completed in 1969. The buildings are 25 stories tall and contain 537 apartments. The project is located between 92<sup>nd</sup> and 93<sup>rd</sup> Streets from 1<sup>st</sup> Avenue to York Avenue and the FDR Drive. Like most NYCHA developments built in this period, Holmes Towers employed the "tower in the park" design, a cluster of high-rise buildings surrounded by green space and playgrounds for children.



Figure 6: Site of Proposed Development (4/17/19)

## **B. ULURP and the Appropriate Role of the Borough President**

25. ULURP was established in the Charter in 1975 to further democratize land-use decision making and to move away from the previous model of top-down planning. ULURP provides certainty in the land-use review process by establishing a predictable timetable and a single procedure for the review of certain actions. ULURP also provides a transparent process and a vehicle for public participation in the City's significant land-use decisions. It defines a role in the process for the Community Boards, the Borough Boards, the Borough Presidents, the CPC, the City Council, and the Mayor.

26. The Charter provides a formal role to the Borough President under ULURP. After consideration of a ULURP application by the Community Board and prior to votes by the CPC and City Council, the Borough President has a thirty-day review period to consider the application and submit a written recommendation. Charter § 197-c(g).

27. The importance of the role of the Borough President under ULURP was recently illustrated. The original application for JPMorgan Chase Bank's new corporate headquarters in East Midtown sought waivers to the recently enacted East Midtown rezoning to avoid having to construct a 10,000 square foot publicly accessible open space. After Community Board and Borough President 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.<sup>2</sup> The ULURP process worked just as intended: public input led to more public benefits.

**C. The Mayor's and NYCHA's NextGeneration NYCHA Plan**

28. In 2015, the Mayor and NYCHA announced a long-term strategic plan called NextGeneration NYCHA to "change how NYCHA is funded, operates, rebuilds and engages with residents."<sup>3</sup> At the forefront of the NextGeneration NYCHA plan is NextGen Neighborhoods, NYCHA's program for infill developments that is slated to bring in a projected \$300 to \$600 million over the next decade to meet the increasing capital needs at NYCHA developments.

29. The NextGeneration NYCHA plan set forth specific goals and strategies. The third goal of the plan is to "(Re)build, expand and preserve public and affordable housing stock," and strategy number 10 for achieving this goal is to "provide underutilized NYCHA-owned land to support the creation of affordable housing units."<sup>4</sup>

30. The NextGeneration NYCHA plan goes on to state that "NYCHA's large land holdings across the five boroughs contain value. The potential value of underutilized land, such

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<sup>2</sup> <https://www.manhattanbp.nyc.gov/wp-content/uploads/2019/01/2019-01-09-N-190180-ZRM-270-Park-Avenue-MBP-Recommendation.pdf>

<sup>3</sup> <https://www1.nyc.gov/assets/nycha/downloads/pdf/nextgen-nycha-web.pdf> at 3.

<sup>4</sup> <https://www1.nyc.gov/assets/nycha/downloads/pdf/nextgen-nycha-web.pdf> at 83.

as parking lots and trash areas, can be harnessed to reinvest into existing NYCHA housing and bring properties back to a state of good repair, or assist NYCHA with operating deficits. The sites could also provide an opportunity for market-rate units to cross-subsidize affordable housing units on the site. NYCHA could generate revenue from its existing holdings while providing additional affordable housing units.”<sup>5</sup> The plan lays out a strategy whereby a limited number of vacant parcels within NYCHA developments that have significant market value can be developed with projects that are 50% affordable and 50% market rate.

**D. Current Proposal: The Holmes Towers Infill Development**

31. On June 30, 2016, the Mayor, the Deputy Mayor, the City’s Department of Housing, Preservation and Development (“HPD”) and NYCHA issued a Request for Proposals (“RFP”) inviting developers to submit proposals for developments on the site of the Holmes Towers NYCHA project in Manhattan and the Wyckoff Gardens NYCHA project in Brooklyn.<sup>6</sup> The RFP states that that the proposed development site on the campus of the Holmes Towers NYCHA project is currently a play area and pedestrian walk.

32. The “Guidelines” section of the RFP stated that proposals must conform to the current New York City Zoning Resolution. The RFP took the position that “ULURP is not triggered by the disposition of NYCHA-owned land but may be required for other types of land use actions.” It stated that for such actions “NYCHA may be the co-applicant for the Developer’s ULURP application.”<sup>7</sup> Responses to the RFP were due on September 30, 2016.

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<sup>5</sup> <https://www1.nyc.gov/assets/nycha/downloads/pdf/nextgen-nycha-web.pdf> at 83-84.

<sup>6</sup> <https://www1.nyc.gov/site/hpd/about/press-releases/2016/06/06-30-16.page>

<sup>7</sup> <https://www1.nyc.gov/assets/hpd/downloads/pdf/developers/NextGen-Neighborhoods-Sites-Brooklyn-Manhattan-RFP.pdf> at 13.



33. On May 17, 2017, NYCHA and HPD announced that they had selected Fetner as the developer for the Holmes Towers Infill Development.

34. On May 30, 2018, the NYCHA Board of Directors approved an authorization for the submission of an application to the Department of Housing and Urban Development (“HUD”) for approval to enter into a 99-year ground lease for the parcel at Holmes Towers “to facilitate the construction of a building with approximately one hundred sixty-nine (169) affordable housing units, one hundred sixty-nine (169) market rate units” pursuant to section 18 of the U.S. Housing Act of 1937 as amended (the “Section 18 Application”).<sup>8</sup>

35. When a member of the public attempted to obtain a copy of the Section 18 Application via FOIL earlier this year, NYCHA stated that application was not yet complete and therefore not available.

36. On August 23, 2018, NYCHA issued a “FINAL Significant Amendment to the Annual PHA Plan for Fiscal Year 2018” (the “Amendment”). The Amendment stated that NYCHA had selected a development team for the New Skyscraper and that prior to that selection had held meetings, visioning sessions and charrettes at the NYCHA project and had NYCHA resident members and stakeholder committees review responses to the RFP.<sup>9</sup>

37. In the Amendment, NYCHA addressed whether the proposed development complied with the underlying zoning, stating: “All these issues will be included in the submission to the [DOB]. DOB ensures compliance with zoning. It is anticipated that a waiver

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<sup>8</sup> [https://www1.nyc.gov/assets/nycha/downloads/pdf/board\\_meeting\\_minutes\\_05302018-r.PDF](https://www1.nyc.gov/assets/nycha/downloads/pdf/board_meeting_minutes_05302018-r.PDF)

<sup>9</sup> [https://www1.nyc.gov/assets/nycha/downloads/pdf/Final%20Amendment\\_FY%202018%20Annual%20Plan\\_08.23.18%20No%20PIH%20notice.pdf](https://www1.nyc.gov/assets/nycha/downloads/pdf/Final%20Amendment_FY%202018%20Annual%20Plan_08.23.18%20No%20PIH%20notice.pdf) at 12.

may be sought for some items including penetration of the sky exposure plane. The actual height of the building is planned to be approximately 530 feet.”<sup>10</sup>

38. In October 2018, HPD completed a draft Environmental Assessment Statement (“EAS”) in connection with NYCHA’s Section 18 Application. The draft EAS concluded that the Holmes Towers Infill Development would not have a significant impact on the quality of the human environment. Therefore, there will be no Environmental Impact Statement, the more detailed review triggered if a proposed major action is determined to significantly impact the quality of the human environment.

39. The EAS concluded that the project would not result in adverse impacts on public access to open space because “open spaces within NYCHA are typically for the use of NYCHA residents, are not open to the general public, and are not considered public open space for the purposes of CEQRA.” Thus, the City’s assessment of the impact of the New Skyscraper on the access to open space for residents of Holmes Towers—the people most directly impacted by the loss of their central playground, pedestrian walkways, and green space—concluded that there was no significant impact, because the Holmes Towers NYCHA residents did not count as members of the public for purposes of the analysis. In fact, the Holmes Towers campus is widely used; in particular, the Stanley M. Isaacs Neighborhood Center is in the campus, and runs many critical programs that serve the entire neighborhood.

40. The EAS repeatedly stated that NYCHA will seek Mayoral Zoning Overrides to waive requirements of the New York City Zoning Resolution related to height and setback, minimum distance between buildings, and open space.

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<sup>10</sup>*Id.* at 57.

41. On December 19, 2018, the NYCHA Board of Directors approved an authorization to enter into a 99-year ground lease with Fetner, or its affiliate, for the parcel at Holmes Towers to facilitate the construction of the New Skyscraper “upon approval of” the Section 18 Application and upon obtaining financing commitments.<sup>11</sup>

42. The December 19, 2018 Board resolution authorized NYCHA to enter into “(i) an Agreement to Lease, upon approval of the application to the United States Department of Housing and Urban Development pursuant to Section 18 of the United States Housing Act of 1937 as amended, and, subsequently, upon obtaining financing commitments, (ii) a ninety-nine (99) year Ground Lease with Fetner Properties, Inc, or its affiliate, for an approximately 20,707 square foot parcel of land located at East 92<sup>nd</sup> Street between First Avenue and York Avenue, being a portion of New York County, Block 1573, Zoning Lot 20 (new Tax Lot TBD) with approximately 330,368 square feet of zoning floor area, and easements, to facilitate the construction of a building with approximately one hundred sixty-nine (169) affordable housing units, one hundred sixty-nine (169) market rate units, one (1) superintendent’s unit, ground floor community facility uses, and site improvements.”<sup>12</sup>

43. In return for the 99-year land lease at the development site, Fetner will pay NYCHA \$25 million.

44. On December 28, 2018, the developer filed its permit requests with the Department of Buildings, which were denied pending zoning approval.

45. The Board authorization to approve NYCHA entering into a lease with Fetner constitutes a formal determination to proceed with the Holmes Towers project.

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<sup>11</sup> [https://www1.nyc.gov/assets/nycha/downloads/pdf/board\\_meeting\\_minutes\\_12192018.pdf](https://www1.nyc.gov/assets/nycha/downloads/pdf/board_meeting_minutes_12192018.pdf) at 8.

<sup>12</sup> *Id.*

46. On January 30, 2019, Community Board 8's Housing Committee convened a public meeting about the Holmes Towers project. At that meeting, the Director of Construction for NYCHA, Matthew Charney, confirmed that NYCHA intended to seek Mayoral Zoning Overrides to existing zoning to allow the New Skyscraper to pierce the sky exposure plane; reduce the minimum distance between the proposed new building and the existing NYCHA buildings; and to provide less open space than required under zoning.<sup>13</sup>

47. Although the project is in an R8 zoning district which does not have a maximum building height, it does require buildings to be setback from the street as they get taller. This requirement protects access to light and air on public streets and sidewalks. The New Skyscraper is grossly noncompliant with the required setback; it rises over 500 feet just a few feet from the streetline.

48. With respect to the building spacing rule, the Holmes Tower Infill Development will allow less than the required spacing between buildings. As recently as 2016, the Council specifically rejected a change to the Zoning Resolution to reduce the required spacing between buildings.<sup>14</sup>

#### **E. Manhattan Borough President Opposes Respondents' Bypass of ULURP**

49. As early as September 1, 2016, the Borough President and other impacted community stakeholders wrote to NYCHA and asked that the Holmes Towers "infill" plan go through ULURP, expressing that the site "was selected in the RFP amid widespread resistance from the community to development that would take away the park from the children."<sup>15</sup>

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<sup>13</sup> <https://patch.com/new-york/upper-east-side-nyc/residents-pols-rip-nycha-ues-private-development-project>.

<sup>14</sup> <https://council.nyc.gov/land-use/wp-content/uploads/sites/53/2016/05/ZQA-Summary-Council-modifications.pdf>

<sup>15</sup> <http://www.nydailynews.com/new-york/manhattan/nycha-upper-east-side-tenants-clash-luxury-housing-article-1.2797326>



50. Since that time, Holmes Towers residents have shown up in large number to Community Board meetings about the proposal. The Borough President's Office is aware of significant concern by local residents about quality of life issues, local hiring and jobs, air quality and noise during construction, the impact on 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 Issacs Houses.

51. On October 30, 2018, the Borough President testified before the City Council about the importance of the formal land use review process to public oversight, and in particular, her belief that the Holmes Towers Infill Development "is very much a significant change to the neighborhood and should have undergone ULURP. I strongly believe 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."<sup>16</sup>

52. On February 20, 2019, the Borough President sent a letter to the Mayor stating that while she fully supports efforts to increase affordable housing as well as "efforts to develop additional sources of revenue" for NYCHA, the proposed Holmes Towers Infill Development is subject to ULURP because changes or approvals of "housing and urban renewal plans or projects" must undergo ULURP review. Borough President Brewer also stated her objection to the Mayor issuing zoning overrides to "exempt the Holmes project from setback, minimum building space, and open space requirements of the Zoning Resolution" which she termed

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<sup>16</sup> <http://www.manhattanbp.nyc.gov/downloads/pdf/2018-10-30%20Testimony%20on%20NYCHA%20Financing%20and%20Development.pdf> at 2.

“another evasion of the ULURP process.” The letter concluded by stating that “[w]e do not see ULURP as a way to defeat infill; rather we see it as a way to improve infill,” and requesting “that NYCHA and Fetner Properties submit an application pursuant to Charter § 197-c to facilitate the proposed development.” The Borough President never received a response from the Mayor’s office to the issues raised in her letter.<sup>17</sup>

53. On February 27, 2019, an expediter came into the Borough President’s Office on behalf of Fetner requesting a “House Number Verification appointment” for the address 401 East 92nd Street described as “CONSTRUCTION OF NEW MIXED USE 50 STORY BUILDING . . .”

54. On February 28, 2019, in response to phone calls received at the Borough President’s Office in which both individuals and community organizations shared reports that work on the Holmes Towers Infill Development was set to begin in spring or early summer and that the Mayoral Zoning Overrides had already been issued, Borough President Brewer sent an urgent letter to the Mayor stating:

In the intervening days [since my letter of February 20th] I have heard of and seen actions that indicate that Fetner Properties is preparing to commence construction of its development. In addition, I have just today been told that mayoral overrides of the City’s zoning resolution have already been issued - something which, if true, I was completely unaware and would be deeply troubling in its lack of transparency.

I am requesting that you immediately provide me information as to whether any zoning overrides relating to the proposed Holmes Towers development have been issued. If so, please forward copies of those overrides immediately. If no overrides have been issued, please furnish me with your Administration’s and

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<sup>17</sup> <http://www.manhattanbp.nyc.gov/wp-content/uploads/2019/02/2019-02-20-NYCHAHolmesLetter-to-Mayor-2.pdf>

NYCHA's timeline for whatever steps you are contemplating in connection with this proposed development.

I reiterate that I strongly believe the only appropriate next step must be preparation of a ULURP application.<sup>18</sup>

55. The Borough President never received a response from the Mayor's Office to her February 28, 2019 letter with respect to her request that the Holmes Towers Infill Development go through ULURP.

56. Upon information and belief, the Mayor plans to issue — and/or will imminently issue — Mayoral Zoning Overrides authorizing the construction of the New Skyscraper notwithstanding its noncompliance with the Zoning Resolution.

57. The ULURP process would allow the Borough President and the public to engage in full public analysis and discussion of myriad features of the Holmes Towers Infill Development, including:

- a. **Project Alternatives**: What other locations and configurations for the proposed development were considered and rejected? Upon information and belief, during outreach preceding the selection of a developer, NYCHA and potential developers dismissed other potential sites for the project, in favor of the current proposal to build the New Skyscraper on the footprint of the children's playground and walkways. NYCHA originally claimed that the NextGeneration NYCHA plan would involve “underutilized land, such as parking lots and trash areas,” but the current proposal occupies a playground, walkways, and central gathering space all used by residents.

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<sup>18</sup> <https://www.manhattanbp.nyc.gov/wp-content/uploads/2019/04/2019-02-28-Urgent-Letter-to-Mayor-de-Blasio-re-Holmes-Towers-Infill-Project2-2.pdf>

- b. **Zoning Changes:** Should the zoning be changed to allow for construction of the New Skyscraper at the site? The current proposal departs from the applicable zoning requirements in critical ways: (1) it does not comply with the required sky exposure plane, which requires tall buildings to be set back from the street to preserve light and air at street level; (2) it does not preserve the minimum required space between buildings; and (3) it does not follow the required open space ratio.
- c. **Terms of the Fetner-NYCHA Deal:** Did NYCHA and the City obtain the best value for the land from Fetner in agreeing to \$25 million for a 99-year lease? Upon information and belief, the project is expected to receive over \$60 million in government housing subsidies and since the land will continue to be owned by NYCHA, the developer will not be subject to City property taxes. The Borough President has publicly stated that the development will receive twice the amount of public subsidy that NYCHA will get out of it. At a public meeting, NYCHA's Director of Construction stated that an appraisal placed the value of the land at closer to \$60 million.
- d. **Benefits to Residents of Holmes Towers:** Will the \$25 million that NYCHA will receive from Fetner meaningfully impact Holmes' Towers' five-year capital needs of reportedly \$59 million? Which repairs will be funded in the surrounding NYCHA buildings from the project funds, and how will those repairs be managed? Will access to the planned community space be free or will the developer charge residents a fee for access?
- e. **Affordable Housing:** Should the apartments in the New Skyscraper be 100% affordable housing as opposed to 50% affordable housing? What will be the



income levels for residents of the New Skyscraper? With the 50-50 split between market rate and affordable housing, does this mean that the top floors of the building are half affordable and half market, or that all the affordable units are at the bottom leaving the top half for market rate views?

- f. **Interim Playground Access**: Even if new space is planned, what is the plan for interim playground and open space access for NYCHA residents in the Holmes Towers building during the years of construction to come? The developer obtained but disregarded feedback from the residents of the Holmes Towers requesting that a new playground be constructed *before* the current playground is removed for construction of the New Skyscraper.<sup>19</sup>
- g. **Resiliency**: What are the project design components to address resiliency to future climate change and/or resiliency to natural disasters? The Holmes Towners Infill Development will be built on a brownfield already susceptible to flooding as one of the lowest points in Manhattan and within the 100-year floodplain.
- h. **Community Outreach**: Was there true community outreach and input to residents by NYCHA and Fetner, and if so, what changes were made to the plans to reflect that feedback? NYCHA convened “stakeholder” committees instead of the elected tenants’ association. While the developer conducted many meetings, Community Board 8 and many residents still vigorously object to the project.

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<sup>19</sup> <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.”).

- i. **New Open Space Features:** Will *all* the greenspace be replaced? The developer has committed to replace the playground and other open space being used for the New Skyscraper with new playgrounds. A close look at the proposed plan shows that one of the replacement playgrounds faces the highway, which is not the preference for after-school students, and the other playground sits on the far side of the development by Isaacs Houses.
- j. **Traffic and Noise Impact:** How will the project impact street parking and future traffic congestion? No transit study was made of the site.
- k. **Construction Impact on Community:** What steps are being taken to mitigate the environmental impact of the project on seniors and children given that the construction site is directly next to the community center?

58. Getting answers to these critical questions is the purpose of ULURP: to make sure full public review of a proposed project ensures the best project for the City and the community.

## II. RESPONDENTS' APPROVAL OF THE PROPOSED DEVELOPMENT IS UNLAWFUL

### A. Under Section 150, NYCHA Must Submit the Plan for Approval to ULURP

59. Section 150 of the New York State Public Housing Law provides that “[t]he prior approval of the local legislative body and of the planning commission, if any . . . shall be requisite to the final adoption or approval by an authority or municipality of a plan or project.”<sup>20</sup>

60. Under the PHL, the term “plan” includes “providing homes for persons of low income.”<sup>21</sup> The term “project” means a specific work or improvement to effectuate all or any

<sup>20</sup> N.Y. Pub. Hous. Law § 3(7).

<sup>21</sup> N.Y. Pub. Hous. Law § 3(13).

part of a plan.<sup>22</sup> The statute is explicit that the term “project” is not limited to the creation or removal of additional apartments for persons of low-income, but also includes “plans” that alter the “lands, buildings, or any dwelling units therein . . . as well as social, recreational or communal facilities” that are “incidental or appurtenant” to a public housing development.

61. Under controlling New York Court of Appeals case law, any “essential or significant” modification to a public housing plan or project requires approval under Section 150 of the PHL.<sup>23</sup>

62. For New York City, the PHL defines the “local legislative body” from which prior approval for a plan or project must be gained, as the “officer or agency vested with power under the charter by such city, or by other law, to act pursuant to this chapter.”<sup>24</sup>

63. Under the Charter, the approval process occurs under section 197-c, which requires that “changes, approvals contracts, consents, permit or authorization thereof, respecting the use, development or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure in the following categories. . .”

64. Specifically, section 197-c(a)(8) subjects “[h]ousing and urban renewal plans and projects pursuant to city, state and federal housing laws” to ULURP.

65. The proposed drastic change to the Holmes Towers NYCHA campus involving the construction of the New Skyscraper in between the two Holmes Towers buildings and on the footprint of the current playground and open space, is an essential or significant modification to a public housing “plan or project,” or must itself be a “plan or project.”

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<sup>22</sup> *Id.*

<sup>23</sup> *Margulis v. Lindsay*, 31 N.Y.2d 167, 173 (1972).

<sup>24</sup> N.Y. Pub. Hous. Law § 3(7).

66. The proposed project must therefore go through the review process embodied in ULURP which includes Borough President review and comment and ultimately be voted on by the New York City Council.

**B. The Use of Mayoral Zoning Overrides to Change Zoning and Circumvent ULURP is Unlawful**

67. The Court of Appeals has held that the Mayor has no power beyond that delegated to him by Charter or statute. *Under 21 v. City of New York*, 65 N.Y.2d 344 (1985).

68. The Charter does not delegate land use decisions to the Mayor; it expressly provides for oversight by the Borough President and City Council.

69. Respondents NYCHA and Garcia intend to seek, or have already sought, Mayoral Zoning Overrides to the current zoning to allow the project to proceed as planned.

70. Upon information and belief, Respondent Bill de Blasio intends to grant, or has already granted, Mayoral Zoning Overrides to authorize construction of the project.

71. While municipalities may have the authority in limited circumstances to waive zoning restrictions for a public good, Mayoral Zoning Overrides are not appropriate for a project of this scope and magnitude, particularly for a project that is the first in a series of City-wide planned infill developments involving public housing, requires huge departures from the current zoning, and involves the transfer of public land to a private developer under highly favorable terms to the developer.

72. These Mayoral Zoning Overrides are also improper because they are designed to evade and further shield a project of exceptional scale and public concern from the public review process. But for the Mayoral Zoning Overrides, these zoning changes would require ULURP review under the City Charter, and thus would require a vote by the CPC, public review and comment by the Community Board and Borough President, and final action by the City Council.



73. Without any legal basis, Respondents have seized authority that is expressly delegated to local representatives under the City Charter and lawlessly granted it to the Mayor to exercise without any oversight.

74. Making matters worse, upon information and belief, the process of issuing the Mayoral Zoning Overrides for the New Skyscraper is completely shielded from the public. It is a fully internal process with no notice, opportunity for public input or even notice after the fact.

75. There are no written criteria or standards governing when an entity may apply for or obtain Mayoral Zoning Overrides. It is not listed in the City Record. It is a standard-less, secretive process that allows major land use decision to be made off-stage and without any public review or transparency.

76. The use of Mayoral Zoning Overrides to shield from public review (or even from the public's sight) the zoning changes that allow for the construction of the New Skyscraper on the Holmes Towers playground is unlawful and violates the Charter.

**C. NYCHA is Acting Outside its Statutory Authority By Evading ULURP**

77. NYCHA's statutory powers are limited to the twin purposes of clearing substandard or insanitary areas and providing housing to low-income New Yorkers.

78. Under the PHL, "authority" is defined as "a public corporation which is a corporate governmental agency . . . organized pursuant to law to accomplish any or all of the purposes specified in article 18 of the constitution" and specifically includes NYCHA.

79. Article 18 of the New York State Constitution provides for the provision of "low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction, rehabilitation of substandard or insanitary areas, or both . . . ." Nowhere in this provision is NYCHA granted the authority to assist with or facilitate the development of market-rate apartments by evading the lawful regulatory process.

80. NYCHA has publicly represented that NYCHA itself, after alienating the identified land through a 99-year lease, will request the Mayoral Zoning Overrides, either on its own or in concert with Fetner.

81. NYCHA, by the terms of its own mission statement, does not exist to help private developers with the regulatory process to gain approval of their projects, and has no authority to seek Mayoral Zoning Overrides on behalf of or in concert with the private developer.

82. NYCHA's attempt to engage in private market-rate development without compliance with the State PHL and ULURP is improper.

83. NYCHA is not only offering its resources to aid in the development of market-rate housing by seeking Mayoral Zoning Overrides on Fetner's behalf, but is doing so in express contravention of the very laws designed to ensure that the public housing projects entrusted to NYCHA are developed with appropriate local input.

84. The Borough President has a right and an obligation to review changes of this magnitude—changes that will permanently alter the nature and character of the Holmes Towers neighborhood

85. In light of the institutional injury to the Borough President and the abrogation of her role in the Charter-mandated ULURP process caused by the failure to subject the Holmes Towers Infill Development to ULURP in violation of State PHL and the City Charter, and by NYCHA's actions beyond the scope of its delegated authority, Manhattan Borough President Gale A. Brewer authorized the instant litigation.

**FIRST CAUSE OF ACTION**  
**(Request for Declaratory Relief Under Article 30 of the CPLR)**  
**(Against All Respondents)**

86. Petitioner repeats and realleges the preceding paragraphs as though fully set forth herein.

87. Section 150 of the PHL provides that the “prior approval of the local legislative body and of the planning commission is “requisite to the final adoption or approval by an authority or municipality of a plan or project.”

88. Under controlling New York Court of Appeals case law, any essential or significant modification to a public housing plan or project requires approval under Section 150.

89. The Holmes Tower Infill Development therefore requires prior approval of the local legislative body and of the planning commission pursuant to Section 150 of the PHL.

90. For cities of one million or more people such as New York City, “local legislative body” means the “officer or agency vested with power under the charter of such city, or by other law, to act pursuant to this chapter.” Under the Charter, “[h]ousing and urban renewal plans and projects pursuant to city, state and federal housing laws” are subject to the ULURP. Thus, State law requires NYCHA to submit any public housing plan or project, or essential or significant modification thereto, to ULURP.

91. To comply with Section 150 of the PHL, the Holmes Towers Infill Development must be submitted to ULURP.

92. Respondents NYCHA and Garcia have acted outside of the law and the authority given to them by the PHL and the Charter by moving forward with the approval of the Holmes Towers Infill Development without applying for review and approval to the Borough President and other elected officials via the Charter’s ULURP process.

93. Respondents NYCHA and Garcia also intend to seek, or have already sought, Mayoral Zoning Overrides to the current zoning restrictions to allow the proposed development to proceed as planned.

94. Respondent de Blasio intends to grant, or has granted, Mayoral Zoning Overrides to existing zoning to allow the New Skyscraper to pierce the sky exposure plane; reduce the minimum distance between the proposed new building and the existing NYCHA buildings; and to provide less open space than required under zoning.

95. Respondents have acted outside of the law and the authority given to them by the Charter by seeking to use the mechanism of Mayoral Zoning Overrides to waive critical zoning requirements without applying for review and approval by the Borough President and other elected officials via the Charter's required ULURP process.

96. The December 19, 2018 approval of the Fetner lease without approval through ULURP and the publicly stated intention to circumvent ULURP by seeking zoning changes through Mayoral Zoning Overrides on behalf of a private developer creates a justiciable controversy as to whether the project is subject to ULURP.

97. Respondents have deprived the Borough President of her right to review the applications as part of the ULURP process and usurped the role of the Borough President. Respondents have no justification for their actions and have improperly exceeded their authority under the PHL and under the Charter by intruding on the Borough President's Charter-created rights.

98. Because they have exceeded their authority and have acted *ultra vires*, Respondents' actions have no legal force and should be declared null as a matter of law.

**SECOND CAUSE OF ACTION**  
**(Request for Relief Under Article 78 of the CPLR)**  
**(Against All Respondents)**

99. Petitioner repeats and realleges the preceding paragraphs as though fully set forth herein.

100. Respondents NYCHA and Garcia abused their discretion by approving the resolution to enter into a 99-year lease with Fetner for the New Skyscraper to be constructed on the playground of Holmes Towers which will significantly alter the campus of the Holmes Towers and require significant changes to the zoning requirements, without going through the ULURP process, as the decision was arbitrary and capricious and incorrect as a matter of law.

101. The proposed development requires demolition of a playground and pedestrian walkway that provides open green space to the community to construct a 50-story tower. Despite the drastic change in the use of the property, none of the necessary processes for approving the zoning changes, and providing public notice thereof, have occurred.

102. Removing the playground and pedestrian walkway to build the New Skyscraper is a significant and essential modification to Holmes Towers, and must go through ULURP, under which the Borough President can ensure that all appropriate processes for this development are followed and that the affected community, and City residents at large, can be heard.

103. Respondents NYCHA, Garcia, the City, and the Mayor have also abused their discretion by seeking, obtaining, granting, or preparing to grant Mayoral Zoning Overrides to the current zoning restrictions to allow the proposed development to proceed as planned.

104. Respondents intend to seek and grant, or have sought and granted, Mayoral Zoning Overrides to existing zoning to allow the New Skyscraper to pierce the sky exposure



plane; reduce the minimum distance between the proposed new building and the existing NYCHA buildings; and to provide less open space than required under zoning.

105. Respondents NYCHA and Garcia's determination to approve the Holmes Tower Infill Development without going through ULURP is affected by an error of law or was arbitrary and capricious or an abuse of discretion in violation of CPLR Article 78.

106. Respondents NYCHA, Garcia, the City, and the Mayor's determination to use Mayoral Zoning Overrides to waive critical zoning requirements without going through ULURP is affected by an error of law or was arbitrary and capricious or an abuse of discretion in violation of CPLR Article 78.

**THIRD CAUSE OF ACTION**  
**(Request for Relief Under Article 78 of the CPLR)**  
**(Against NYCHA/Garcia Only)**

107. NYCHA is a public corporation created pursuant to the Public Housing Law of the State of New York for the purpose of implementing the State Constitution by providing low-rent housing for persons of low income as defined by law.

108. New York State law does not authorize NYCHA to seek Mayoral Zoning Overrides for private developers.

109. In seeking Mayoral Zoning Overrides on behalf of a private developer seeking to construct a mixed market-rent/affordable housing tower, NYCHA is acting without or in excess of its jurisdiction, and its determination to do so is affected by an error of law or was arbitrary and capricious or an abuse of discretion in violation of CPLR Article 78.

WHEREFORE, Petitioner requests that this Court enter an Order:

- a. Annuling and vacating NYCHA's December 19, 2018 resolution authorizing NYCHA to enter into a lease with Fetner;

- b. Declaring that NYCHA and Garcia are required to submit the Holmes Towers Infill Development to ULURP;
- c. Declaring that Respondents' proposed or actual use of Mayoral Zoning Overrides to permit the development is in excess of their authority and unlawful;
- d. Granting judgment to Petitioner on each of her claims;
- e. Temporarily restraining and preliminarily and permanently enjoining the Respondents from taking any action in furtherance of the commencement of construction related to the Holmes Towers Infill Development, including but not limited to permitting, conducting, authorizing, or continuing any construction work at the development site; and
- f. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York  
April 18, 2019

EMERY CELLI BRINCKERHOFF  
& ABADY LLP

By: \_\_\_\_\_/s/  
Katherine Rosenfeld  
600 Fifth Avenue  
New York, New York 10020  
(212) 763-5000

OFFICE OF MANHATTAN BOROUGH  
PRESIDENT  
GALE A. BREWER

Adele Bartlett  
James W. Caras  
1 Centre Street, 19<sup>th</sup> Floor  
New York, New York 10007

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,

v.

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. \_\_\_\_\_

**VERIFICATION**

STATE OF NEW YORK     )  
                                      )  
COUNTY OF NEW YORK    )     ss.:

Adele Bartlett, being duly sworn, states that she is General Counsel for the Office of Manhattan Borough President Gale A. Brewer, she has read the foregoing Petition-Complaint and knows the contents thereof, and that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief, which in turn she believes to be true.

  
ADELE BARTLETT

Sworn to before me this  
18 day of April, 2019

  
NOTARY PUBLIC

ELKA MORETY  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01MO6378028  
Qualified in New York County  
My Commission Expires 06-04-2022