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White Paper:
Stadium Development Litigation
New York's West Side Story

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STADIUM DEVELOPMENT LITIGATION

New York's West Side Story

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I. Introduction

When a professional sports team embarks on a stadium development project, it can expect litigation to follow. As many teams consider such projects, we thought that it would be useful to describe some of the issues that came up in the recent litigations over the New York Jets' effort to develop the New York Sports & Convention Center on Manhattan's West Side. We also treat briefly a few related issues of interest.

The litigation that was brought to block the Jets stadium project lasted about nine months and actually involved five different sets of lawsuits, some of which themselves comprised a number of separate civil actions. The cases moved quickly. Ultimately, the focus of the litigation was on the request for proposals (RFP) issued by the Metropolitan Transportation Authority (MTA).

The RFP litigation was filed on April 5, 2005; decided by the trial court on June 2, 2005; and decided by the appellate court on June 23, 2005. This speed was achieved, in part, because active court oversight forced the litigation to focus on the merits and avoided the kind of procedural squabbles that can often slow down lawsuits, especially of this kind.

Here is a summary of the key dates in the Jets stadium litigation:

TIMELINE

(not intended to be complete; for presentation purposes only)

8/26/04	--	MSG sues to stop public hearing on environmental impact review
9/21/04	--	Trial judge rejects MSG's effort to stop hearing; dismisses suit
12/22/04	--	MSG sues to challenge environmental impact statement
1/05	--	MTA and Jets agree to arbitrate sale price of railyards
2/4/05	--	MSG submits "bid" for railyards
2/22/05	--	MTA issues RFP for railyards
3/16/05	--	Jets sue MSG for antitrust violations
3/21/05	--	MTA receives 5 proposals in response to RFP
3/31/05	--	MTA Board authorizes negotiations with Jets for railyards
4/5/05	--	MSG sues to stop sale of railyards to Jets (others soon file "me too" suits)
5/12/05	--	MSG sues to annul ESDC's approval of the Jets project plan
5/18/05	--	Groups file federal clean air act case to stop plan
6/2/05	--	Trial court rejects MSG's challenge to RFP decision
6/6/05	--	PACB fails to vote on Jets project due to two abstentions
6/9/05	--	MSG submits brief in support of RFP case appeal
6/13/05	--	MTA/Jets submit opposition briefs to MSG's appeal in RFP case
6/23/05	--	Appellate Division upholds trial court's decision in RFP action
7/6/05	--	Olympic Committee rejects NYC's Olympic bid
8/31/05	--	Jets inform MTA that they will not contract for railyards
9/28/05	--	MTA cancels its RFP for the railyards

The major litigations were:

- The first environmental impact case (dismissed on the merits)
- The second environmental impact case (still pending as to any non-Stadium-related issues)
- The RFP case (dismissed on the merits; motion to dismiss appeal to NY Court of Appeals as moot is pending)
- The ESDC case (dismissed without prejudice)
- The clean air act case (pending)

The project also engendered an abandoned arbitration over the value of the railyards and an antitrust action between the Jets and MSG. The parties fully briefed the two environmental

impact cases, the RFP case, and the ESDC case in fewer than six months. While the Jets stadium project did not proceed on the West Side, the Jets were successful in court.

We address the issues that can arise in the following areas: soliciting the government's support; approaching the government; securing the financing; acquiring the land; constructing the stadium; and dealing with the competition.

II. <u>Soliciting the Government's Support</u>

The proponents and opponents of any stadium project will in all likelihood have to work with government officials. Those involved in the project, therefore, will have to be keenly aware of the regulations governing lobbying and other interactions with government officials. The Jets stadium project generated a significant amount of lobbying. Although the lobbying activities were not a focus of the litigation, some of the ethical issues raised were covered in the media, which can influence litigation.

a. Focus on the Laws of the Jurisdiction

   i. Most jurisdictions regulate lobbying and other activities (such as giving gifts to public officials). (One exception appears to be Pennsylvania, which has no lobbyist disclosure statute.) You need to check both state and municipal law.

   ii. Some Examples:

      1. <u>Ohio:</u> "The Ohio Ethics Laws and related statutes prohibit city council members from accepting free season tickets from a professional athletic team that plays its games in a stadium located within the city even if the city council members may choose to give the free tickets, which they have accepted, to their

constituents instead of using the free tickets personally." Ohio Ethics Commission Adv. Opn. 95-001 (Feb. 8, 1995).

2. Minnesota: A team that is represented by a lobbyist cannot give tickets to a public official. Minn. Campaign Fin. & Pub. Disc. Bd. Adv. Op. 348 (May 28, 2003) (An "official . . . may not accept gifts . . . if they are given by a lobbyist, a lobbyist principal, or are given at the request of a lobbyist or lobbyist principal. . . . Therefore, a game ticket provided by the team is a prohibited gift from a lobbyist principal."). While a public official may accept tickets from a team represented by a lobbyist if the public official pays "fair market value" for the tickets, if the tickets have no market value because they are not available for sale to the public, they cannot be given to the public official. Minn. Campaign Fin. & Pub. Disc. Bd. Adv. Op. 287.

3. Atlanta: Atlanta has a specific ordinance that deals with tickets, which states that public officials may not "accept any ticket of admission" to "any entertainment" including "any athletic events" "for a value less than the price printed on the ticket, which would not be offered or given to such official or employee if such person were not an official or employee." Under the statute it is presumed that a ticket received from a "professional sports team located in the metro Atlanta area, is given by reason of such official's or employee's position with the city." The statute contains an

exemption where the public official is performing an official duty at the particular event. Atlanta Ga. Code § 2-816.

4. Tampa: Tampa Code of Ethics may soon be amended to match Florida state law and thereby allow the Council and Mayor to accept free admission to football and hockey games, concerts, fundraising soirees and other community events (including gifts from the Tampa Sports Authority) as long as the event sponsor is not a lobbyist. (*St. Petersburg Times On Line*, Oct. 7, 2005).

b. Teams Can Be Targeted in Enforcement Actions

It can be damaging to the reputation of a sports team to be dragged into a public scandal regarding gifts to a public official. In some instances, teams have also been targeted by law enforcement. For example, the Yankees recently paid a civil penalty of $75,000 to the New York Lobbying Commission.

c. Gift Prohibitions in New York:

N.Y. Legislative Law § 1-m (the Lobbying Act):

"A Lobbyist or client of a lobbyist may not offer or give a gift valued at more than seventy-five dollars to any public official."

N.Y.C. Charter § 2604(b)(5):

"No public servant shall accept any valuable gift, as defined by rule of the board [i.e., worth $50 or more], from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except that nothing contained herein shall prohibit a public servant from accepting a gift which is customary on family or social occasions."

N.Y.C. Charter § 2604(b)(3):

"No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant."

N.Y. Public Officers Law § 73(5):

"No person shall, directly or indirectly, offer or make any gift having a value of seventy-five dollars or more to a statewide elected official, or any state officer or employee, member of legislature or legislative employee under circumstances in which it could be reasonably inferred that the gift was intended to influence such person, or could reasonably be expected to influence such person, in the performance of his or her official duties or was intended as a reward for any official action on his or her part."

d. Comparison of the New York Statutes

   i. While the Public Officers Law and City Charter only restrict the conduct of public officers, the Lobbying Act restricts the conduct of companies that lobby or retain lobbyists.

   ii. Violations of these provisions could subject the violator to prosecution for a misdemeanor. *See* Thomas C. Moore [partner at Proskauer Rose LLP], "Is Entertaining Public Officials a Crime," 226 (110) N.Y.L.J. 1 (Dec. 20, 2001).

   iii. The Public Officers law is only violated where it may be "reasonably inferred" that the gift was intended to influence the public official. There is no such restriction in the other statutes.

e. The New York State Lobbying Act

   i. The Lobbying Act addresses gifts from certain persons (who are required to file with or report to the Lobbying Commission) to any "public official."

   ii. "Public official" is defined in the Lobbying Act to include both State and City officers and employees. N.Y. Legislative L. § 1-c(l).

iii. Reporting or filing persons under the statute include "lobbyists" and lobbying "clients" (incurring more than $2,000 in expenses). N.Y. Legislative L. § 1-j(l)(a).

iv. Regulated gifts include anything of value, whether in the form of money, entertainment, food, travel, discounts, or in any other form (including tickets to sports events). Things for which the public official pays market value are not included. Even if a public official pays for a ticket to an event, the Lobbying Commission may view the official's receipt of food and drink at a luxury box, VIP tent, etc., as a gift.

v. Thus far, the Lobbying Commission has taken the position that a public official may receive multiple gifts from a single source of $75 each over time. (On the other hand, the Public Officers Law and City Charter use an annual aggregate limit.)

vi. There is an important exception for admission, food, and beverage at "officially-related, widely attended events if offered by the sponsor." (N.Y. Legislative L. § 1-c(j)). In Opinion Number 57 (05-1), the Lobbying Commission examined a sports team's policy that any public official that attended a game in the owner's box would have to pay the full face value of the ticket and the per person cost of food and beverage provided in the box "except where exceptions to the gift rules set forth in the Lobbying Commission's Guidelines are applicable." Considering this exception to the team's policy, the Commission concluded that a sports event is "widely attended" but is only covered by the "widely attended event" exception if the public official's presence is "officially related" and

the "expense would be reimbursable if paid for by the public official" under "the guidelines set by the New York State Comptroller's Office for those expenses that are subject to reimbursement when paid for by a public official." The Commission also stated that it analyzes the value of a gift based on its "fair market value." (Note that, in a subsequent opinion, Number 60 (05-05), the Commission stated that the "fair market value" of a flight on a private jet is not the highest available commercial fare; it is the actual cost of the private flight divided by the number of passengers.)

f. New York City Gift Rules

i. The New York City Charter prohibits public servants from accepting a "valuable gift" ($50 or more aggregated over any one year period). N.Y.C. Charter § 2604(b)(5). *See* New York City Conflicts of Interest Board ("COIB") Advisory Opinion 2000-4 (a City employee may not accept from a City vendor a ticket to a sporting event for the employee's personal use where the price of the ticket to the public exceeds $50). The Charter also prohibits a public servant from using his or her position for private gain. N.Y.C. Charter § 2604(b)(3).

ii. The differences between sub-sections (b)(5) and (b)(3) are significant. Sub-section (b)(5), the gift rule, creates a blanket prohibition on a public servant's receipt of any "valuable gift" from any actual or prospective City vendor. Sub-section (b)(3) is broader in the sense that it applies to "***any*** financial gain," but is narrower in that it requires proof that the public servant "use[d] or attempt[ed] to use" his or her position to secure that

financial gain. Generally, in the context of gifts, sub-section (b)(3) will apply where the public servant has *solicited* the gift, even if the gift is not "valuable." *See* COIB Advisory Opinion 95-05; COIB Advisory Opinion 92-23; COIB Advisory Opinion 92-10.

iii. The COIB has defined "valuable gift" for the purposes of sub-section (b)(5)'s broad prohibition as "any gift to a public servant which has a value of $50.00 or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form." R.C.N.Y. § 53-1-01(a).

iv. Two or more gifts received by the same public servant will be aggregated during the course of any twelve-month period for the purposes of applying the COIB's gift rule if "they are given by persons who the public servant knows or should know are . . . . employees of the same firm or affiliated firms." R.C.N.Y. § 53-1-01(a).

v. With respect to determining the value of a ticket, there is some support for the position that the ticket's face value should be determinative. *See*, *e.g.*, COIB Advisory Opinion 2000-04 ("As to the 'value' of . . . tickets [that the donor obtained without incurring any cost], their value for the purposes of Chapter 68 is their price to the public, ***typically*** the price stated on a ticket or an invitation.") (emphasis added); COIB Advisory Opinion 96-03 (employee cannot accept tickets worth more than $50 "by paying for the portion of the face value of the tickets which exceeds $50"). While the COIB has acknowledged that a "hot" ticket to a sold out event may arguably exceed its face value, it appears to have used the face value

standard for the purposes of sub-section (b)(5). COIB Advisory Opinion 2000-04. The COIB has emphasized, however, that where a City employee *solicits* "hot" tickets of any value, the City employee may nonetheless violate sub-section (b)(3). *Id*. ("acceptance of an offer to purchase tickets to 'hot' events [presumably at face value] will not violate Chapter 68, but that it will violate Section 2604(b)(3) in certain circumstances when a public servant affirmatively seeks to purchase tickets to an event"). Thus, it is not a violation of the Charter's gift rule for a City employee to accept tickets to Shakespeare in the Park, which are free to the public but hard to get. *Id*. The Charter may still be violated, however, if the City employee *asks* a City vendor for such tickets. *Id*. (acceptance of a block of tickets to a free, "hot" event "will violate Section 2604(b)(3) in certain circumstances when a public servant affirmatively seeks from a non-City source tickets to a free event"). The COIB staff might nevertheless look to the actual market value of the ticket where the market value significantly exceeds face value.

vi. A City employee cannot except a valuable gift by paying the donor to reduce the value of the gift below $50. COIB Advisory Opinion 96-03 ("neither an Agency employee nor any other public servant may accept a gift worth more than $50 from any person or firm which is or intends to become engaged in business dealings with the City, even if the public servant offers to pay for the portion of the gift which exceeds $50"). Accordingly, a City employee may not accept tickets for premium seats at a hockey game that have a face value of $100 each. *Id*.

vii. A City *agency* (as opposed to employee) may accept "block" gifts of tickets to the City provided that the vendor is not engaged in complex negotiations with the City. COIB Advisory Opinion 2000-4 ("when tickets become available to the City because of the City's involvement in an event or because of its relationship to the donor, either for no cost or for sale at face value, these tickets can be distributed to City employees if the involved agency head determines that there is a City purpose for such distribution and if the tickets are distributed in a manner approved by the agency head").

viii. Exceptions. The Charter contains an exception for gifts that are "customary on family and social occasions." City Charter § 2604(b)(5); *see also* R.C.N.Y. § 53-1-01(c); *Acceptance of Valuable Gift (Howard Safir),* COIB Case No. 99-115 (2000) (receipt of trip to Oscars from a friend after a second meeting was not a "customary" gift from a "close personal friend").

ix. The COIB's gift rule also contains a fairly open-ended "approved by agency head or deputy mayor" exception. The COIB's rules state that a City employee may "be a guest at any function or occasion where the attendance of the public servant has been approved in writing as in the interests of the City, in advance where practicable or within a reasonable time thereafter, by the employee's agency head or by a deputy mayor if the public servant is an agency head." R.C.N.Y. § 53-1-01(f)(5).

III. <u>Obtaining Public Financing</u>

a. Stadium projects are generally public-private partnerships and are dependent, at least in part, on public financing. The Jets' project was unusual in that the public financing was designed to foster the construction of those elements that were designed to address governmental, rather than private, needs. The State of New York – which had an interest in the MTA-owned site – wanted to foster the development of MTA railyards (essentially a pit in the ground) which had long stymied development in the neighborhood. Accordingly, the Governor had expressed willingness to invest $300 million for the construction of a platform over the site. The City of New York (as well as the State) wanted to improve the City's convention and trade show facilities and develop a stadium that could accommodate Olympic games, all of which required that the facility be capable of being covered. Accordingly, the Mayor had expressed willingness to invest another $300 million. The remaining cost – in excess of the funds that would have been required to construct a stadium at an ordinary site without a retractable roof – was to be paid for by the Jets. Nevertheless, the public finance elements of the Jets' project were raised as issues in the litigation filed to stop the project.

b. Legal suits attacking the use of public financing are commonly filed when sports teams pursue stadium projects.

    i. <u>Illinois:</u> *Friends of the Parks v. Chicago Park District*, 203 Ill. 2d 312 (Sup. Ct. 2003): Provision of Sports Facilities Authority Act enabling public financing of renovations to stadium is constitutional. The financial benefits to the Bears were deemed "incidental."

ii. Arizona: *Long v. Naplitano*, 203 Ariz. 247 (Ct. App. 2002): Upholding Tourism and Sports Authority statute but severing provision requiring State Treasurer to pay taxes on incomes that State would not have lost if team left the State.

iii. Pennsylvania:

1. *Consumers Education & Proactive Ass'n v. City of Philadelphia*, 808 A.2d 266 (Pa. Comm. Ct. 2002): City ordinances providing for development of stadiums did not violate state constitutional debt limitations because financing was based on "current revenues of the City in the subsequent year or years" which would not be "'debt' in the constitutional sense." *Id*. at 271.
2. *Allegheny Institute Taxpayers Coalition v. Allegheny Regional Asset District*, 556 Pa. 102 (Sup. Ct. 1999): Rejecting challenge to governmental decision to fund stadiums on the ground that court's "scope of review" "does not extend to the wisdom or discretion of [the governmental board or its] members." *Id*. at 414.
3. *Giordano v. Ridge*, 737 A.2d 350 (Pa. Comm. Ct. 1999): Provision in state statute authorizing grants of Commonwealth funds to a municipality or authority for purpose of constructing or renovating a sports facility did not infringe state constitutional provision prohibiting pledging or loaning of state funds to a corporation. "[O]ur Supreme Court has held that this language does not prohibit loans from the Commonwealth to a municipal

authority, even where the ultimate beneficiary of such loan may be a private entity." *Id*. at 353.

c. MSG invoked such arguments in its "ESDC suit" – the legal challenge that it filed to overturn a decision of the Empire State Development Corporation (also known as the Urban Development Corporation or UDC) approving the "Jets project plan." While these arguments were fully briefed, the action was dismissed before the Court reached the merits.

   i. MSG challenged the Jets project plan on the ground that it depended on an unconstitutional "gift" of funds from the State.

      1. In New York, a public expenditure may lawfully bestow a private benefit if the private benefit is "incidental" to the expenditure's public purpose. "The term 'incidental' . . . does not mean that the public use must . . . outweigh the private use to which the facility is put." *Hotel Dorset Co. v. Trust for Cultural Res.*, 46 N.Y.2d 358, 371 (1978). In applying this test, court "may not substitute its judgment for that of the body which made the decision." 46 N.Y.2d at 370.

      2. The respondents relied on the ESDC's determination that the Jets project plan would "spur economic development, create employment and generate fiscal revenues in excess of the public sector contribution." ESDC Response to Comment 18. The respondents also cited a study by the Independent Budget Office, an "independent city agency" with no reporting relationship to the Mayor, which determined that the facility would only have to

attract 14 non-stadium events for the public to recoup its investment and break even, and that, if it were as successful as its operators predicted, the net government surplus, at present value, would be $425.7 million.

3. Respondents also argued that any benefits received from the MTA, the Javits Convention Center, and other public benefit corporations were exempt from the anti-gift provisions of the state constitution. *Counties of Warren & Wash. Indus. Dev. Agency v. Adirondack Res. Recovery Assocs*., 283 A.D.2d 846, 849 (3d Dep't 2001) (public benefit corporations are not subject to constitutional prohibition against gifts of public funds).

4. MSG challenged ESDC's findings "that adequate provision" had or would be made "for the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project." N.Y. Unconsol. Laws § 6260(d)(3).

    a. The respondents replied that the statutory requirement cited by MSG only restricted ESDC's ability to approve a plan as a "civic" project. N.Y. Unconsol. Laws § 6260(d) (listing findings ESDC must make "in the case of a civic project"). The respondents explained that ESDC had approved the plan in two independent ways: (i) as a "land use improvement" project and (ii) as a "civic" project. Respondents argued that no such findings are required for a "land use project." N.Y. Unconsol. Laws § 6260(c).

b. Respondents also argued that the Court had to defer to the ESDC's financing-related findings. *In re Fisher*, 287 A.D.2d 262, 263-64, 730 N.Y.S.2d 516, 516-17 (1st Dep't 2001) (there is a "very restricted scope of our review of [the ESDC's] findings"; because findings were "rationally supported in the record made before respondent, our review function is exhausted"); *East Thirteenth St. Cmty. Ass'n v. New York State Urban Dev. Corp.*, 189 A.D.2d 352, 359 (1st Dep't 1993) (where "there is no showing that [the ESDC's] determination . . . was made 'corruptly or irrationally or baselessly, there is nothing for the courts to do about it'").

c. ESDC in fact had "determined that adequate provision can and will be made for the acquisition, construction, operation, maintenance, and upkeep of the Project," based both "on its own financial analysis and advice from Citigroup, [the] ESDC's financial advisor." ESDC's Response to Comment 22.

5. MSG challenged ESDC's reliance on the City's representation that the Mayor would have the authority to direct PILOTs received by New York City's Industrial Development Agency (IDA) from developers in connection with unrelated economic development projects. MSG argued that – despite a long contrary history in

New York City – City Council approval was actually required for the use of such payments.

a. The respondents conceded that in most New York State municipalities PILOTs are subject to the local municipal legislature's control, since such legislatures control the local industrial development agencies. *See* N.Y. Gen. Mun. Law § 854(5). The respondents argued, however, that the General Municipal Law treats New York City's IDA differently from industrial development agencies in other jurisdictions, and specifies that the Mayor has exclusive authority over the activities of the City's IDA. *See* N.Y. Gen. Mun. Law § 917(k) (for New York City's IDA, the "governing body . . . shall mean the Mayor of the City").

b. The respondents also argued that the rights negotiated by the IDA to obtain PILOTs are contractual rights (not City "revenues") that the Mayor could transfer under the mayoralty's "reserve power." *See Creole Enters., Inc. v. Giuliani*, 167 Misc. 2d 810, 818(Sup. Ct. N.Y. County 1995) (reserve power justified Mayor's disposition of City radio stations), *aff'd*, 236 A.D.2d 272 (1st Dep't 1997).

c. Respondents argued that N.Y. Gen. Mun. Law § 874(3), which requires industrial development agencies to remit the PILOTs that they receive to the affected tax jurisdiction within thirty days of receipt, did not apply to the City's

IDA because the provision was adopted after January 1, 1973. N.Y. Gen. Mun. Law § 917(c).

6. MSG also attacked the ESDC's action on procedural grounds, asserting that ESDC violated Section 16 of the UDC Act (N.Y. Unconsol. Laws § 6266) because ESDC did not hold an additional, supplemental public hearing after it modified the general project plan in light of MSG's public hearing testimony. The respondents replied that no additional hearing was required because the statute states that upon receipt of testimony, the agency may modify the plan based on that testimony and then simply file the final plan. *See* N.Y. Unconsol. Laws § 6266(3). They argued that requiring an endless circuit of hearings would undermine the legislative intent of cutting through red tape. 1987 N.Y. Laws 2538.

IV. Acquiring An Appropriate Site From Governmental Authorities

a. The focus of the litigation brought to stop the Jets stadium project was ultimately over the MTA's RFP concerning rights to develop the railyards on Manhattan's West Side. Normally, opponents of a project would lack standing to challenge the results of the process used by a governmental entity to select the project developer. By submitting a proposal in response to the MTA's RFP, MSG was able to position itself as a "disappointed" proposer, which is ordinarily accorded such standing.

b. The Jets stadium project did not raise significant questions of eminent domain. The Supreme Court, however, has recently clarified that taking of private property to sell for private development qualifies as a "public use" within the meaning of

the Takings Clause of the U.S. Constitution. *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655 (2005). New York constitutional law is likely no obstacle here either.

c. In the RFP case in the Jets stadium litigation, MSG argued (1) the MTA was required to sell the rights to MSG because MSG was the "highest bidder"; (2) the MTA's preference for the Jets proposal over the MSG proposal was "arbitrary and capricious"; (3) the process followed by the MTA was unfair; and (4) the Jets' proposal should have been disqualified as "non-responsive."

    i. "Highest Bidder"

        1. Respondents argued that the MTA was entitled to select a developer based on a mix of factors, including price. *Jo & Wo Realty Corp. v. City of New York*, 76 N.Y.2d 962, 964 (1990) (upholding MTA's sale of Coliseum site to the second-highest proposer and stating that "no provision of law requires" a public authority, such as the MTA, "to seek competitive bids").

        2. MSG relied on *Ross v. Wilson*, 308 N.Y. 605 (1955), which holds that under the Education Law the "higher offer must be accepted" in school land dispositions. 308 N.Y. at 611. Respondents argued that, unlike school districts, public authorities were "deliberately designed to be able to function with a freedom and flexibility not [otherwise] permitted" and are thus not restricted by competitive bidding laws that bind ordinary agencies. *Plumbing, Heating, Piping & Air Conditioning Contractors Ass'n v. New York State Thruway Auth.*, 5 N.Y.2d 420, 423-24 (1959); *New York Post*

Corp. v. Moses, 10 N.Y.2d 199, 205 (1961) (public authorities are free "from restraints otherwise applicable to agencies of the government").

3. Respondents also argued that the Jets offered the highest price – per square foot acquired – since the Jets proposed to pay $250 million to develop 2 million square feet while MSG offered to pay $400 million to develop 6.8 million square feet.

ii. "Arbitrary and Capricious"

1. In reviewing the process followed by a governmental entity and examining its final decision, New York courts may only consider whether the agency acted arbitrarily or capriciously or had a "rational basis" for its decision. *See Conduit & Found. Corp. v. Metro. Transp. Auth.*, 66 N.Y.2d 144, 149 (1985).
2. The respondents identified a number of grounds cited by the MTA as the basis for its opinion:
   a. The Revenue Stream To Support The Number 7 Subway Line Extension. The respondents argued that the revenue stream needed for the Number 7 subway extension would be more certain if a stadium/convention center (rather than residential housing) were constructed.
   b. Impact On The Future Value Of The Eastern Yards. The respondents argued that MSG's proposal to develop housing would have diminished the future sale value of the

"Eastern Rail Yards," another adjacent site owned by the MTA.

c. Transferable Development Rights (TDRs). The respondents argued that, because the Jets proposed to use less developable space, the MTA would have been able to sell the remaining TDRs to generate future revenue.

d. The Construction Timetable. The respondents argued that funding and construction would take place more quickly if the Jets' proposal was approved.

iii. The RFP Process

1. High Hurdles. Respondents argued that the "fact that [MSG] continued to participate in the bidding process . . . indicate[d] that there was no procedural unfairness." *See Fischbach & Moore, Inc. v. New York City Transit Auth.*, 182 A.D.2d 533, 533 (1st Dep't 1992). Respondents also argued that the MTA's action was entitled to the "presumption of regularity." *Rittersporn v. Sadowski*, 48 N.Y.2d 618, 619 (1979).

2. Flexibility. The process used by the MTA, an RFP, is an inherently flexible one. *Jo & Wo Realty*, 157 A.D.2d 205, 212 (1st Dep't), *aff'd*, 76 N.Y.2d 962 (1990)

3. Timing. While MSG argued that the period for responding to the RFP was too short, respondents replied that the timing was appropriate under the circumstances. Respondents argued that the MTA's decision regarding timing was based on the following:

(a) the MTA's perception that the Jets could lose interest in the site if the MTA proceeded at a more leisurely pace, (b) a historic lack of commercial interest in the site, (c) MSG's statement that it could close immediately, and (d) MTA's perception that MSG might not pursue its offer if the Jets lost interest. Respondents also cited procurement rules allowing for even tighter deadlines. *See*, *e.g.*, N.Y. City R. & Regs. tit. 9, § 3-03(c)(1) (2004) (City Procurement Policy Board Rules); *cf. Software Testing Solutions, Inc. v. United States*, 58 Fed. Cl. 533, 539 (Ct. Cl. 2003) (collecting cases holding that, where the federal procurement rule's 30-day minimum response time is inapplicable, "the decision as to the appropriate preparation time lies within the discretion of the contracting officer," and a much shorter time period can suffice). Finally, respondents argued that MSG offered no proof that any proposer or would-be proposer was prejudiced by the MTA's schedule, or that the Jets benefited from the RFP schedule.

4. "Where is/As is." While MSG argued that the RFP required proposers to propose a "where is/as is" price that would not be "conditioned upon future zoning," respondents contended that this provision – coupled with a willingness to accept alternative proposals – was reasonable. Respondents cited to other examples where this was employed and argued that there was no evidence that it favored the Jets. Even in the stricter competitive bidding context, courts had upheld zoning provisions even though they

favored one party. *See Knowles v. City of New York*, 176 N.Y. 430, 437-38 (1903) (upholding restrictive specifications); *Fur-Lex Realty, Inc. v. Lindsay*, 367 N.Y.S.2d 388, 394 (Sup. Ct. N.Y. Co. 1975) (court refused to strike down a City lease even though bidding was tainted by an existing, restrictive zoning rule that "was drawn so as to effectively limit the bidding to the owner . . . of the adjoining lot").

5. Evaluation Criteria. The respondents argued that MTA's evaluation criteria were disclosed and reasonable. The RFP set forth a non-exhaustive list of criteria that were "of significant concern to the MTA." *See Transactive Corp. v. New York State Dep't of Social Servs.*, 236 A.D.2d 48, 53 (1997) (need not spell out every factor), *aff'd*, 92 N.Y.2d 579 (1998).

6. Term Sheet. While MSG argued that the term sheet between the Jets and the MTA differed from the Jets' proposal, the respondents replied that there is no requirement that final contracts conform to an RFP. *Starburst Realty Corp. v. City of New York,* 131 Misc. 2d 177, 186 (Sup. Ct. N.Y. County 1985), *aff'd as modified on other grounds*, 125 A.D.2d 148 (1st Dep't).

iv. The Jets' Responsiveness. MSG argued that the Jets were "non-responsive" and should have been disqualified. Respondents replied that the Jets confirmed during the RFP process that their proposal was in no way contingent.

d. The Decision of the Trial Court. On June 2, 2005, Justice Cahn dismissed MSG's challenge (*Madison Square Garden v. N.Y. Metro. Trans. Auth.*, No. 104644/05, slip op. (Sup. Ct. N.Y. Co. June 2, 2005)):

   i. The Court's conclusion was that MSG's suit was unfounded: "MSG has failed to demonstrate that the MTA acted arbitrarily or capriciously in choosing the Jets' proposal, or that MSG was damaged by the manner in which the RFP was conducted." (p. 24)

   ii. The Court rejected MSG's contention could only consider the immediate cash value of the offers: "In assessing which terms are most beneficial, the MTA can take into account not only the dollar figure being offered, but the long-term benefit to the MTA and to the public it serves." (p. 11)

   iii. The Court also rejected MSG's arguments regarding the RFP evaluation criteria. *See*, *e.g.*, p. 17("MSG's argument that the RFP did not impose any restrictions based on the Eastern Rail Yards, is disingenuous. . . . Obviously, the MTA would be especially concerned about that portion of the surrounding community which it and its affiliate/subsidiary owns.").

   iv. The Court concluded that the "Where is/As is" clause in the RFP was proper: "MSG contends that the 'where is/as is' term in the RFP unfairly favored the Jets. However, MSG has not offered any evidence that this type of provision is unusual. . . . [I]f the MTA had, in fact, had the property rezoned, that would have further limited the potential for proposals. Additionally, the 'where is/as is' term did not enable the Jets to make their proposal more easily. The area is not zoned for a stadium, and the Jets need PACB approval in order to go forward with construction.

The RFP required the Jets to accept a risk that they apparently had not originally anticipated." (pp. 21-22)

v. Finally, the Court rejected MSG's arguments regarding the timing of the RFP process.

- "MSG fails to demonstrate in what way the 27-day deadline benefited the Jets over MSG. Both MSG and the Jets were familiar with the property, and with its availability, for a long time. MSG had, in fact, submitted an unsolicited proposal prior to the RFP. Further, MSG has not suggested any changes in the way it would have formulated its proposal had it had more time." (p. 22)
- "MTA could reasonably have concluded, and apparently did conclude, that allowing a longer period of time to respond to the RFP could be counterproductive, and could jeopardize the viability of the proposal." (p. 30)
- "While the challengers all point to the lack of bids from local developers or from developers throughout the world as evidencing the unfairness of the procedure, not one has submitted any evidence that any developer would have been interested in pursuing a project on this site had there been more time to respond." (pp. 30-31)

e. The Decision of the Appellate Court. On June 23, 2005, the First Department unanimously rejected the challenge to the MTA's decision. *See Madison Square Garden v. N.Y. Metro. Trans. Auth.*, 19 A.D.3d 284, 799 N.Y.S.2d 186 (1st Dep't 2005), *leave to appeal granted*, 2005 WL 2313215 (N.Y. Ct. App. Sept. 20, 2005). The First Department concluded that "[t]he MTA was not obligated to

accept MSG's proposal because it offered more cash up-front." 799 N.Y.S.2d at 188 (citing *Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 212, 226 (1990), *aff'd*, 76 N.Y.2d 962 (1990); *New City Jewish Ctr. v. Flagg*, 111 A.D.2d 814 (2d Dep't), *aff'd*, 66 N.Y.2d 980 (1985)). The First Department also concluded that "MSG was not treated unfairly." 799 N.Y.S.2d at 188. It explained that an "[a]n RFP is a more flexible alternative to competitive bidding" and that it "need not spell out every single factor" that will be considered during the evaluation process. *Id.* (citing *Transactive Corp. v. New York State Dep't of Social Servs.*, 236 A.D.2d 48, 53 (3d Dep't 1997), *aff'd*, 92 N.Y.2d 579 (1998); *Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 212 (1990), *aff'd*, 76 N.Y.2d 962 (1990)). The First Department also rejected the assertion that the parties' term sheet deviated from the RFP, explaining that "'[t]here exists no legal requirement . . . that the final contracts must conform to the original RFP.'" 799 N.Y.S.2d at 188 (citing *Starburst Realty Corp. v. City of New York*, 131 Misc. 2d 177, 186 (Sup. Ct. N.Y. Co. 1985), *mod. on other grounds* 125 A.D.2d 148 (1st Dep't 1987), *appeal denied*, 70 N.Y.2d 605 (1987)). Finally, applying the "arbitrary and capricious" test for Article 78 challenges, the First Department concluded that the MTA resolution "had a rational basis" and "should not be disturbed." 799 N.Y.S.2d at 189. (The New York Court of Appeals granted MSG leave to appeal the First Department decision. The MTA has moved to dismiss the appeal as moot. That motion is pending.)

V. <u>Constructing the Facility</u>

a. Opponents of stadium projects sometimes seek to enjoin construction by asserting claims under environmental review statutes. Opponents of the Jets' project used

this approach as well. MSG filed two environmental review actions: The first, filed in August 2004, sought to enjoin public hearings on the project on the ground that the draft environmental impact statement was inadequate. That suit was dismissed in September 2004. The second suit, filed in December 2004, alleged, among other things, that the final environmental impact statement was flawed. That case was fully briefed but was not resolved during the life of the project.

b. Other stadium projects have been challenged on environmental grounds. Some examples:

    i. Florida: *White v. Metropolitan Dade County*, 563 So. 2d 117 (Fla. App. Ct. 3rd Dist. 1990): County project to construct tennis complex required environmental review.

    ii. Connecticut: *Fromer v. Department of Economic Development*, 1995 WL 559015 (Conn. Super. Ct. 1995): Environmental challenge was moot after minor league stadium's construction.

    iii. California:

        1. *Concerned Citizens of Costa Mesa*, *Inc. v. 32nd Dist. Agricultural Ass'n,* 231 Cal. Rptr. 748 (Sup. Ct. 1986): Citizens could pursue challenge to small stadium after statute of limitations expired where they alleged that the actual project built differed substantially from the facility described in the environmental impact report.

        2. Jon Rainwater & Susan Stephenson, *Too Late In The Game: How Ballot Measures Undercut CEQA*, 28 Golden Gate U. L. Rev. 399

(Spring 1998) (discussing exception in California's environmental review statute for projects resulting from voter referenda).

c. The standard of review in environmental review cases generally favors the developers. In New York, agencies carrying out an environmental review under SEQRA (the State statute) and CEQR (the New York City analogue), must identify the relevant areas of concern, take a hard look at them, and make a reasoned elaboration of the basis for their determinations. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986). Agencies performing their SEQRA duties are entitled to "considerable latitude evaluating environmental effects" and "while judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). An agency's SEQRA review will be overturned only if it is arbitrary and capricious or unsupported by substantial evidence. *Aldrich v. Pattison*, 107 A.D.2d 258, 267 (2d Dep't 1985). Disagreements about methods or results are routinely rejected by courts in SEQRA cases. *See*, *e.g.*, *Argyle Conservation League, Inc. v. Town of Argyle*, 223 A.D.2d 796 (3d Dep't 1996) ("it is clear that scientific unanimity need not be achieved and the FGEIS is not required to make an exhaustive analysis of every possible environmental impact").

d. MSG's Environmental Challenge

   i. MSG's challenge to the final environmental impact statement was primarily based on an allegation that the MTA and the City concealed the extent to which the stadium would generate traffic. MSG relied heavily

on an e-mail from a Jets employee describing some of the questions allegedly used by the government agencies in its "modal split" survey for the stadium.

ii. The "modal split" survey (of Jets season ticket holders) was designed to predict how many visitors to the stadium would drive and how many would use mass transportation. The survey results indicated that only about 30% of the season ticket holders would travel to the stadium by car or taxi. MSG argued that the e-mail established that the survey was a "push poll" that distorted the results.

iii. Respondents replied that the agencies acted properly in relying on the survey results:

1. Respondents argued that, while the government agencies relied on the survey, they did not rely on the particular questions that MSG claimed were "push" questions.
2. Respondents also contended that the survey was approved and conducted by SRBI, experts in the field. Respondents argued that an environmental impact statement cannot be set aside on the ground that another expert disagrees with the approach.
3. Respondents also contended that the survey was proper. They argued that SRBI used a standard approach to determine how Jets season ticket holders would travel to and from the facility if it were constructed with no enhancements to mass transportation. They said that, after doing so, SRBI explored whether particular enhancements would induce any of the would-be drivers to use

mass transportation instead. Respondents described this as consistent with approaches typically used by urban planners in designing systems that will efficiently maximize the use of mass transportation.

4. Respondents also contended that there was no evidence that anyone involved in the project considered the survey a "push poll." They argued that a pollster may use "push questions" (which they described as an accepted polling technique) without transforming the poll into a "push poll."

5. Finally, respondents argued that the poll results were supported by other statistics including:

   - 36% of those attending Sunday afternoon Knicks games at Madison Square Garden came in cars and taxis;
   - 74% of workers use public transportation to reach New York City's central business district compared to 24% in Baltimore, 17% in Cincinnati, 21% in Cleveland, 34% in Pittsburgh, and 34% in Seattle.
   - When the San Francisco Giants played at 3Com Park at Candlestick Point, 4% of attendees used mass transit; when the Giants moved to SBC Park (one mile from the city's downtown center), transit usage increased to 52%.

VI. Dealing with the Competition

a. The Jets stadium litigation was unusual in that it focused on a struggle between Cablevision/MSG (Madison Square Garden, the Knicks, the Rangers) and the Jets. While pursuing the project, the Jets filed its own suit against Cablevision which alleges that Cablevision violated the antitrust laws in its campaign to stop the Jets stadium project.

b. The Court in that case recently issued a decision granting in part and denying in part Cablevision's motion to dismiss the Jets' antitrust suit. *New York Jets LLC v. Cablevision Systems Corp.*, 2005 WL 2649330 (S.D.N.Y. Oct. 17, 2005).

    i. The Jets alleged in that case that Cablevision violated Section 2 of the Sherman Act by monopolizing the market for large indoor entertainment venues in Manhattan. The complaint, as described by the Court, alleges that Cablevision:

    - lobbied state officials to reject the proposed Sports and Convention Center.
    - funded a multi-million dollar advertising blitz "designed to malign and denigrate" the Jets and the proposed Sports and Convention Center.
    - refused to allow the Jets to purchase airtime for local commercials on any of the non-broadcast networks carried on its cable system, and coerced other television stations into refusing to air the Jets' ads.
    - filed actions to halt the Jets' proposal.
    - funded other litigations brought by third parties to defeat the Jets' proposal.
    - submitted a bid to the MTA for the railyards.

    The Court also stated that the Jets claimed that Cablevision had monopoly power and engaged in four types of anticompetitive behavior: (1) "public

misrepresentations;" (2) "attempts to silence" the Jets; (3) "misuse of the litigation process;" and (4) a "sham bid for the West Side Rail Yard."

ii. Cablevision sought to dismiss the complaint, claiming that: (1) the Jets failed to allege that Cablevision possesses monopoly power in a properly defined market; and (2) Cablevision's actions were directed at securing government action and therefore immune from antitrust liability (among other grounds). The motion was largely unsuccessful.

iii. The Court rejected Cablevision's attack on the Jets' market definition. The Jets had alleged that Cablevision monopolized three relevant markets: (1) the facilities market ("for the rental of enclosed facilities with seating capacity greater than 5,000 for enclosed large scale spectator events in Manhattan"); (2) the ticket market ("for sales of tickets for enclosed large-scale spectator events held in enclosed facilities with seating capacity of greater than 5,000 in Manhattan"); and (3) the suites market ("for the rental of suites . . . in enclosed facilities with seating capacity of greater than 5,000 in Manhattan"). The Court held that the determination of whether smaller Manhattan venues and venues outside Manhattan should be considered was too-fact intensive to be made at that time. 2005 WL 2649330 at *5 (citing *Geneva Pharm. Tech. Corp. v. Barr Lab. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (Proskauer Rose LLP represents one of the plaintiffs in that case)).

iv. The Court also rejected Cablevision's claim of immunity as to all but one of the Jets' allegations. The Court explained that "a valid attempt to procure government action, even when initiated to attain a competitive

advantage, is protected by *Noerr-Pennington*. However, a meritless petition, submitted to impose undue delay and expense on a rival, will subject a defendant to antitrust liability." 2005 WL 2649330 at *6 (citing *Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92, 100-01 (2d Cir. 2000) (one of the authors represented the plaintiff in that case)).

1. The Court held that the Jets' claims concerning Cablevision's alleged misrepresentations through the media fell "squarely within the confines of *Noerr-Pennington*" and were thus immune from liability. 2005 WL 2649330 at *7.
2. The Court, however, refused to dismiss the Jets' allegations that Cablevision refused to sell the Jets airtime. The Court held: "While Cablevision is generally free to engage in business or refuse to engage in business with whomever it chooses, it may not do so when the purpose of such refusal is to maintain a monopoly." 2005 WL 2649330 at *8.
3. The Court also refused to dismiss the Jets' claims that Cablevision filed sham litigation to stop the project. "If Cablevision did indeed file successive suits without regard for their merit, but rather to impose additional expense and delay on the Jets, this conduct is not protected by *Noerr-Pennington*." 2005 WL 2649330 at *9 (citing *Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92, 101 (2d Cir. 2000)).

4. Finally, the Court refused to dismiss the Jets' claim that Cablevision filed a sham bid for the railyards. The Court stated that "if the Jets can establish that Cablevision never intended to acquire the property, but submitted a bid only to impede the Jets' progress, immunity will be unavailable." 2005 WL 2649330 at *10.

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