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The 42nd Street Development Project: How Litigation Obstructs Public Goals*

Eric J. Lobenfeld**

I want to spend a few minutes talking about a development project that has been in the planning stages for years and the lawsuits that have kept it there. The Forty-second Street Development Project ("Project")¹ has received overwhelming support from citizens, city and state politicians, and every governmental entity, body or agency that has ever considered it. Yet, the Project has been delayed because of litigation: litigation that has created a possibility (although we certainly hope it does not come to pass) of one of those rare instances where every battle is won but the war is lost.

I. Background

I appreciate Nick Robinson's concern about the Strategic Lawsuit Against Public Participation (SLAPPs) suit and obviously most of us here on the panel have a particular perspec-

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1. The Project was created through an agreement between the New York State Urban Development Corporation (UDC) and the City of New York. The purpose of the Project was to redevelop Forty-second Street between Seventh and Eighth Avenues by a condemnation of the area.

tive. The Project is unusual because both developers and public agencies are defendants.² Typically, lawsuits are brought by developers against public regulatory bodies for interfering with property, or by governmental agencies seeking to block development.³

The gentleman before⁴ discussed where we would be if laws such as those which some of the panelists now favor had been enacted one hundred years ago when Times Square still consisted of single-family homes. Fortunately, at least in the early days, those laws were not enacted. Times Square became the international center of entertainment and theaters — at least in the 1920's, '30's, and '40's — and was a great credit to the City of New York. When I was thinking about what I would say today, I thought of the book by Mr. Caro entitled *The Power Broker*.⁵ It is a story about Robert Moses and how he built New York. Whether you agree or disagree with the course of the City's development, there is one thing with which none of us could disagree: the manner and ease with which Mr. Moses was able to build the Battery and Midtown Tunnels, the Triboro and Whitestone Bridges, the East River Drive, the Grand Central Parkway, and all the other things that have made the New York metropolitan area the center of the United States — and perhaps of the world — could not be duplicated today. The cost, in terms of time, effort, and money, would be so staggering that one would wonder whether it would be worthwhile.

I am sure that most, if not all of you, have spent at least some time on Forty-second Street, and I don't have to tell you what kinds of establishments prosper there today. Forty-second Street between Seventh and Eighth Avenues is perhaps the most crime-ridden and littered street in the City of New York.

2. The principal public agency involved as a defendant is the New York State UDC.

3. See generally 7 PACE ENVTL. REV. 3-74 (1989).

4. Keenan, *A Perspective: New York Communities and Impact Fees*, 7 PACE ENVTL. L. REV. 329 (1990).

5. R. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

The Urban Development Corporation (UDC) was created by New York State in 1968. It was obvious that the multiple layers of red tape created by municipal, town, county, and state regulations governing large projects in the state were so thick that they would prevent anything from ever being accomplished.⁶ Governor Rockefeller's message at the time was to create an agency that could cut through all this and get things done quickly.⁷ We will see in a few moments what "quickly" has turned into.

In the early 1980's, the city and the UDC agreed to the Project. The purpose of the Project was to clean up Forty-second Street between Seventh and Eighth Avenues — a goal I think few people would oppose, at least in principle. The area is not only dirty and filled with businesses of which most of us do not approve, at least not publicly, but the tax base on that block is very low. The poor uses to which the block has been put create an extraordinary dichotomy between the tax revenues it generates for the city and the cost to the city of providing police and sanitation services on that block.

The block includes theaters with some of the most beautiful architecture the city has to offer. In fact, they may easily be landmarks. However, because of what the theaters have become, it is difficult to see that today.

II. The Process

The Project formally began in 1980 when New York City and the UDC entered into a Memorandum of Understanding concerning the Project. Next, the Project went through a number of public review processes. First, in order to determine the effect of the development, there were draft Environmental Impact Statements (EISs) and final EISs, pursuant to the State Environmental Quality Review Act (SEQRA).⁸ The Project was then reviewed by the New York City Board of

6. The scope of the UDC's power is found in the New York Urban Development Corporation Act, N.Y. UNCONSOL. LAW §§ 6251-85 (McKinney 1979 & Supp. 1990).

7. See *Waybro Corp. v. Board of Estimate*, 67 N.Y.2d 349, 356, 493 N.E.2d 931, 935, 502 N.Y.S.2d 707, 711 (1986).

8. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117. (McKinney 1984 & Supp. 1990).

Estimate (BOE), which unanimously approved it in 1984.⁹ Finally, the Project went through the process required by the Eminent Domain Procedure Law (EDPL),¹⁰ which is the New York State statute that governs condemnation. If successful, the Project would entail condemnation of virtually all of Forty-second Street between Seventh and Eighth Avenues, and some of the blocks on either side. The Project was also the subject of numerous public hearings and public notices pursuant to the UDC Act.¹¹

III. The Lawsuits

What has happened to Forty-second Street? What has happened to the Project? More than thirty-five lawsuits challenging the Project have been brought.¹² These lawsuits were

9. BOE RES. CAL. No. 31 (Nov. 8, 1984).

10. N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 1979 & Supp. 1990).

11. N.Y. UNCONSOL. LAW §§ 6251-85 (McKinney 1979 & Supp. 1990).

12. Seven of these lawsuits were brought in federal courts. See *Wilder v. Thomas*, 659 F. Supp. 1500 (S.D.N.Y. 1987), *aff'd*, 854 F.2d 605 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989); *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986); *G. & A. Books, Inc. v. Stern*, 604 F. Supp. 898 (S.D.N.Y.), *aff'd*, 770 F.2d 288 (2d Cir. 1985), *cert. denied sub nom. M.J.M. Exhibitors, Inc. v. Stern*, 475 U.S. 1015 (1986); *Milstein v. City of New York*, 629 F. Supp. 97 (S.D.N.Y. 1985), *aff'd*, 795 F.2d 1004 (2d Cir. 1986); *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 609 F. Supp. 113 (S.D.N.Y. 1985), *aff'd*, 790 F.2d 1032 (2d Cir. 1986); *Forty-Second St. Co. v. Koch*, 613 F. Supp. 1416 (S.D.N.Y. 1985); *Broadway 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, No. 89 Civ. 3213 (S.D.N.Y. filed May 10, 1989).

The remainder were New York State actions. (See, e.g., *Broadway Plus Corp. v. Metropolitan Transp. Auth.*, 157 A.D.2d 453, 549 N.Y.S.2d 23, *aff'd*, 76 N.Y.2d 702, 558 N.E.2d 41, 559 N.Y.S.2d 239 (1990); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986); *Waybro Corp. v. Board of Estimate*, 67 N.Y.2d 349, 493 N.E.2d 931, 502 N.Y.S.2d 707 (1986). See also *Three O Realty Co. v. New York State Urban Dev. Corp.*, No. 85-40161 (N.Y. Sup. Ct. June 14, 1985), *aff'd*, 114 A.D.2d 592 (1985); *Waybro Corp. v. Frederick A.O. Schwarz, Jr.*, No. 84-24598 (N.Y. Sup. Ct. March 11, 1985); *Mastic Assocs. v. City of New York*, No. 85-4916 (N.Y. Sup. Ct. July 3, 1985), *aff'd*, 117 A.D.2d 1028, 498 N.Y.S.2d 241 (1986); *Times Square Garage, Ltd. v. City of New York*, No. 85-4916 (N.Y. Sup. Ct. July 3, 1985); *Friedlander v. Department of City Planning*, No. 85-16912 (N.Y. Sup. Ct. 1985); *Clarose Cinema Corp. v. New York State Urban Dev. Corp.*, 114 A.D.2d 745, 494 N.Y.S.2d 592 (1985); *Three O Realty Co. v. New York State Urban Dev. Corp.*, 114 A.D.2d 745, 494 N.Y.S.2d 592 (1985); *Times Square Garage, Ltd. v. New York State Urban Dev. Corp.*, 114 A.D.2d 745, 494 N.Y.S.2d 592

brought by an amazing amalgam of plaintiffs: members of environmental organizations citing aspects of SEQRA and claiming that the Project will increase traffic and air pollution;¹³ local politicians; and members of citizen groups who have stood up at public hearings and said they think Forty-second Street is part of the character of New York and have questioned why anyone would want to fix it or clean it up? Also, some plaintiffs were owners of property on Forty-second Street which faced condemnation;¹⁴ others were developers whose bids to participate in the project were not accepted.¹⁵

What kinds of lawsuits have been brought? There have been first amendment suits brought by pornography shop operators who claim that the Project is really a ploy to put por-

(1985); *In re* Petition of TSNY Realty Corp., 114 A.D.2d 746, 494 N.Y.S.2d 592 (1985); *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1985), *aff'd sub nom. Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986); *Leichter v. New York State Urban Dev. Corp.*, No. 87-30229 (N.Y. Sup. Ct. May 18, 1988), *aff'd*, 145 A.D.2d 366, 536 N.Y.S.2d 625 (1988), *appeal denied*, No. M-345 (Feb. 23, 1989), *appeal denied*, 74 N.Y.2d 606, 543 N.E.2d 85, 544 N.Y.S.2d 820 (1989); *Friedlander v. New York State Urban Dev. Corp.*, No. 85-26204, *dismissed*, (N.Y. Sup. Ct. Mar. 3, 1988); *Flynn v. New York State Urban Dev. Corp.*, No. 88-11664 (N.Y. Sup. Ct. Feb. 3, 1989), *aff'd*, 154 A.D.2d 263, 546 N.Y.S.2d 354 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *Friedlander v. New York State Urban Dev. Corp.*, No. 88-18054 (N.Y. Sup. Ct. Feb. 14, 1989); *Lazard Realty Inc. v. New York State Urban Dev. Corp.*, No. 88-11498 (N.Y. Sup. Ct. Jan. 18, 1988); *Lazard Realty, Inc. v. New York State Urban Dev. Corp.*, No. 88-11499 (N.Y. Sup. Ct. Jan. 23, 1988); *Leichter v. New York State Urban Dev. Corp.*, No. 88-11662 (N.Y. Sup. Ct. Jan. 25, 1989), *aff'd*, 154 A.D.2d 258, 546 N.Y.S.2d 351 (1989); *Toh Realty Corp. v. New York State Urban Dev. Corp.*, No. 88-20434 (N.Y. Sup. Ct. Jan. 30, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 356 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *Toh Realty Corp. v. City of New York*, No. 88-20435 (N.Y. Sup. Ct. Jan. 30, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 357 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (Feb. 15, 1990); *New York Design Center, Inc. v. New York State Urban Dev. Corp.*, No. 88-21426 (N.Y. Sup. Ct. Feb. 9, 1989), *aff'd*, 154 A.D.2d 269, 546 N.Y.S.2d 541 (1989); *Broadway Plus Corp. v. Metropolitan Transp. Auth.*, No. 89-1447 (N.Y. Sup. Ct. May 11, 1989), *aff'd*, 157 A.D.2d 453, 549 N.Y.S.2d 23 (1990); *42nd St. Theater Corp. v. Honorable Stanley Parness*, No. 89-42035 (Jan. 30, 1990)).

13. See, e.g., *Wilder v. Thomas*, 659 F. Supp. 1500 (S.D.N.Y. 1987), *aff'd*, 854 F.2d 605 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

14. *Forty-Second St. Co. v. Koch*, 613 F. Supp. 1416 (S.D.N.Y. 1985).

15. *Milstein v. City of New York*, 629 F. Supp. 97 (S.D.N.Y. 1985), *aff'd*, 795 F.2d 1004 (2d Cir. 1986).

nography out of business, in violation of the first amendment. These were thrown out by the southern district court and affirmed by the Second Circuit.¹⁶ There have also been civil rights lawsuits. Mr. Morris spoke about the increased use of civil rights laws by developers to redress their grievances.¹⁷ There have been civil rights lawsuits against the Forty-second Street Project by groups of the poor and homeless who claim it will deprive them of their home, as well as by proposed condemnees who claim that because of certain provisions in the contracts between the UDC and the private developers, there is no certainty of compensation. There have also been civil rights lawsuits by other developers who own a wholesale furniture mart on the east side of Manhattan. They argue that the Project violates their equal protection and due process rights because they would be adversely impacted by the furniture mart proposed for Forty-second Street.¹⁸

As you would expect, there have been environmental suits in state court under SEQRA,¹⁹ and in federal court under the Clean Air Act.²⁰ There have been numerous suits under the UDC Act.²¹ Finally, there has been a suit claiming that the

16. *G.&A. Books, Inc. v. Stern*, 604 F. Supp. 898 (S.D.N.Y.), *aff'd*, 770 F.2d 288 (2d Cir. 1985), *cert. denied sub nom. M.J.M. Exhibitors, Inc. v. Stern*, 475 U.S. 1015 (1986).

17. Morris, *New Developments in Federal Takings Law*, 7 PACE ENVTL. L. REV. 309 (1990).

18. *New York Design Center, Inc. v. New York State Urban Dev. Corp.*, No. 88-21426 (N.Y. Sup. Ct. Feb. 9, 1989), *aff'd*, 154 A.D.2d 269, 546 N.Y.S.2d 541 (1989), *appeal dismissed*, 75 N.Y.2d 808, 551 N.E.2d 603, 552 N.Y.S.2d 928 (1990). Plaintiffs in this case sought an appeal as of right to the court of appeals. That court dismissed it after determining, *sua sponte*, that there was no jurisdiction as of right.

19. See, e.g., *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986); *Wilder v. New York State Urban Dev. Corp.*, No. 88-11663 (N.Y. Sup. Ct. Jan. 20, 1989), *aff'd*, 154 A.D.2d 261, 546 N.Y.S.2d 95 (1989), *appeal denied*, 75 N.Y.2d 709, 554 N.E.2d 1280, 555 N.Y.S.2d 692 (1990).

20. *Wilder v. Thomas*, 659 F. Supp. 1500 (S.D.N.Y. 1987), *aff'd*, 854 F.2d 605 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1314 (1989).

21. See, e.g., *Flynn v. New York State Urban Dev. Corp.*, No. 88-11664 (N.Y. Sup. Ct. Feb. 3, 1988), *aff'd*, 154 A.D.2d 263, 546 N.Y.S.2d 354 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *Toh Realty Corp. v. New York State Urban Dev. Corp.*, No. 88-20434 (N.Y. Sup. Ct. Jan. 30, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 356 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990).

leases actually entered into for the development of the west end of Times Square indicate a different project than the one approved by the Board of Estimate Resolution in 1984.²²

What has happened to these lawsuits? Every state court case, including those in the Appellate Division, New York Supreme Court, and those that went to the New York Court of Appeals, were all won by the Project.²³ Every suit in federal court, including the cases appealed to the Second Circuit and for which *certiorari* was sought in the United States Supreme Court, have been won by the Project.²⁴

And yet, nine years after the Project was first proposed, there have been no shovels in the ground and no properties condemned, although the condemnation proceeding has been brought.²⁵ A principal reason for this lack of action may be that litigation challenging development is exceptionally easy to institute and, therefore, pervasive. For example, nine years after the Memorandum of Understanding between the state and city was signed no property has been condemned. The New York State Legislature has exempted UDC-initiated projects from state and local laws.²⁶ Thus, a small group opposing this project has brought suits under many different theories. There is nothing we can do about it except continue to fight the suits and win them. Six cases were recently won by the Project in the appellate division. The court, in unanimous written opinions, upheld the Project and lambasted the people who brought the suits for causing inordinate and unnecessary delay.²⁷

22. *Toh Realty Corp. v. City of New York*, No. 88-20435 (N.Y. Sup. Ct. Feb. 3, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 357 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990).

23. *See supra* note 12.

24. There is one lawsuit still pending to enjoin the condemnation petition. This action was brought under the Federal Civil Rights Act, 42 U.S.C. § 1983 (1988). *See Broadway 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, No. 89 Civ. 3213 (S.D.N.Y. filed May 10, 1989). UDC's motion to dismiss the case is *sub judice*.

25. In the Matter of the 42nd St. Dev. Project, No. 89-42035 (N.Y. Sup. Ct. Apr. 28, 1989).

26. *See Waybro Corp. v. Board of Estimate*, 67 N.Y.2d 349, 355-57, 493 N.E.2d 931, 934-35, 502 N.Y.S.2d 707, 710-11 (1986).

27. *Leichter v. New York State Urban Dev. Corp.*, No. 88-11662 (N.Y. Sup. Ct.

And, what do you think happened? On the thirtieth day after we served notice of entry of the orders of affirmance, as sure as the night follows the day, we got motions for leave to appeal to the court of appeals. In two of the six cases,²⁸ the petitioners went back to the appellate division which had just unanimously rejected their arguments finding their suits ridiculous. These petitioners asked the justices of that court for leave to appeal to the court of appeals. And I said, "Why do that? It's going to be turned down." Well, we certainly hoped it would. All that does is add another layer of appeal. When the appellate division turns that down, as you may know under the rather arcane provisions of the New York Civil Practice Law and Rules (CPLR), they can then ask the court of appeals to review it.²⁹ In two other cases, the petitioners decided to bypass the appellate division and go right to the court of appeals.³⁰ Another group of petitioners decided that because their suit was couched in terms of due process and

Jan. 25, 1989), *aff'd*, 154 A.D.2d 258, 546 N.Y.S.2d 351 (1989); *Wilder v. New York State Urban Dev. Corp.*, No. 88-11663 (N.Y. Sup. Ct. Feb. 6, 1989), *aff'd*, 154 A.D.2d 261, 546 N.Y.S.2d 95 (1989), *appeal denied*, 75 N.Y.2d 709, 554 N.E.2d 1280, 555 N.Y.S.2d 692 (1990); *Flynn v. New York State Urban Dev. Corp.*, No. 88-11664 (N.Y. Sup. Ct. Feb. 3, 1989), *aff'd*, 154 A.D.2d 263, 546 N.Y.S.2d 354 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *Toh Realty Corp. v. New York State Urban Dev. Corp.*, No. 88-20434 (N.Y. Sup. Ct. Jan. 30, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 356 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *Toh Realty Corp. v. City of New York*, No. 88-20435 (N.Y. Sup. Ct. Feb. 3, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 357 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *New York Design Center, Inc. v. New York State Urban Dev. Corp.*, No. 88-21426 (N.Y. Sup. Ct. Feb. 9, 1989), *aff'd*, 154 A.D.2d 269, 546 N.Y.S.2d 541 (1989), *appeal dismissed*, 75 N.Y.2d 808, 551 N.E.2d 603, 552 N.Y.S.2d 110 (1990).

28. Leave to appeal in *Wilder*, No. 88-11663 (N.Y. Sup. Ct. Feb. 6, 1989), and leave to appeal in *Flynn*, No. 88-11664 (N.Y. Sup. Ct. Feb. 3, 1989), were denied by the appellate division on December 28, 1989.

29. N.Y. CIV. PRAC. L. & R. § 5602 (McKinney 1978 & Supp. 1990). Petitioners moved for leave to appeal in the court of appeals on January 26, 1990. The motion in *Flynn* was denied on February 15, 1990; the *Wilder* motion is *sub judice*.

30. *Toh Realty Corp. v. New York State Urban Dev. Corp.*, No. 88-20434 (N.Y. Sup. Ct. Jan. 30, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 356 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990); *Toh Realty Corp. v. City of New York*, No. 88-20435 (N.Y. Sup. Ct. Jan. 30, 1989), *aff'd*, 154 A.D.2d 267, 546 N.Y.S.2d 357 (1989), *appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990).

equal protection, they could appeal as of right to the court of appeals.³¹

IV. Conclusion

The lesson to be learned is that the development of important public projects like Forty-second Street, which have overwhelming public support, are in serious trouble. The litigation boom has generally made lawsuits easier to bring, and the expansion of causes of action have enabled people to bring these suits in a variety of guises and under a variety of legal theories with impunity. We hope that the last lawsuit will finally be won and the Project will go forward. It is possible, however, that the lawsuits will be so prolonged that the Project won't be built at all. In my view, that would be a real shame for the city and the people of the State of New York.

31. *New York Design Center, Inc. v. New York State Urban Dev. Corp.* No. 88-21426 (N.Y. Sup. Ct. Feb. 9, 1989), *aff'd*, 154 A.D.2d 269, 546 N.Y.S.2d 541 (1989), *appeal dismissed*, 75 N.Y.2d 808, 551 N.E.2d 603, 552 N.Y.S.2d 928 (1990).