

**Affidavit by Dr. Tom Angotti**

**August 4, 2011**

I, **Thomas Angotti**, Ph.D., submit this affidavit on behalf of the New York Environmental Law and Justice Project in the matter of *St. Nicholas Houses vs. The City of New York, NYCHA, et al.*

I have a Ph.D. in Urban Planning and Policy Development from Rutgers University.

Since 2001, I have been a full professor in the Department of Urban Affairs and Planning at Hunter College, City University of New York. I am also the Director of the Hunter College Center for Community Planning & Development where I oversee numerous projects with community-based partners in New York City. I previously chaired the Pratt Institute Graduate Center for Planning and the Environment, and was a senior planner in the New York City Department of City Planning and the Department of Housing Preservation and Development.

I have written numerous books and articles on urban planning and related issues including land use, housing, and community-based planning. These include *Metropolis 2000*, *Housing in Italy* and most recently, *New York For Sale: Community Planning Confronts Global Real Estate*.

Additionally, I serve as a Land Use columnist for Gotham Gazette and am an editor for *Progressive Planning Magazine*, *Latin American Perspectives* and *Local Environment*.

I have been called upon by elected officials, the press and public bodies as an expert on land use and zoning issues in New York City. In 2010, for example, I was invited to contribute research and testimony to the city's Charter Commission covering the city's land use review and planning procedures.

## **Statement**

The following is based on my review of all case-related material including the SEQRA Environmental Assessment Form prepared by the Department of Development at NYCHA and the City Planning Report published by the City Planning Commission. It is also based on my extensive professional and research experience on land use, planning and environmental concerns.

In the following I show that the project under discussion was approved by the City Planning Commission although it failed to comply with federal, state and local law, particularly New York City's zoning law. It does not meet the requirements of New York City's zoning laws and evades the legal requirement of approval by the Board of Standards and Appeals for an exception. The approval of the disposition of city-owned property was improper. Finally, there are potentially significant negative environmental impacts that were not considered in the Environmental Assessment and the project therefore does not comply with federal, state and local environmental review requirements.

## **Background**

In March 2011, the City Planning Commission issued a report in response to the application (C110068 MMM) filed by NYCHA to eliminate the cul-de-sac located on West 129th Street thereby establishing an extension of the street westbound to Fredrick Douglas Boulevard. The cul-de-sac, which is currently under the jurisdiction of the Department of Transportation, is the site of a functional community space for the current NYCHA residents and is used for the purposes of gardening, recreation and automobile parking. The proposed extension of West 129<sup>th</sup> Street would discontinue the current public use of the land and allow for conveyance of 1,590 ft<sup>2</sup>

of land to NYCHA and an additional 487 ft<sup>2</sup> to the Department of Education. Furthermore, NYCHA proposes to dispose of an approximately 30,000 square foot parcel of land within the St. Nicholas Houses to be developed by Harlem Children's Zone (HCZ). HCZ, a nonprofit organization, intends to develop the property as a five-story charter school serving primary, middle school and high school students. NYCHA also proposes to dispose of a 13,500 ft<sup>2</sup> parcel of land within the St. Nicholas Houses to a private developer, yet to be determined, for the development of a 13-story, 175,500 ft<sup>2</sup> residential building with 200 units of affordable housing.

### **Zoning Compliance**

All residential units in New York City must comply with bulk regulations established by the New York City Zoning Resolution. The Zoning Resolution regulates bulk (the amount of floor area that can be built, or the Floor Area Ratio -- FAR), building height, and the minimum amount of unbuilt open space. According to section 23-02 of the Zoning Resolution, bulk regulations were purposefully, "...adopted in order to protect residential areas against congestion and to encourage the development of desirable and stable residential neighborhoods." St. Nicholas Houses is currently zoned under the R7-2 classification which is a medium density residential district that permits a maximum of 6.5 FAR for community facility uses and a maximum of 3.44 FAR for residential uses.<sup>1</sup> As indicated in both the CPC report and in the Environmental Assessment, the proposed HCZ development would not comply with all of the zoning regulations in the R7-2 District with regard to height and setback, and minimum distance between buildings. In an effort to evade compliance, the Department of Education, through the School Construction Authority, claims that it has appealed to the Deputy Mayor of Education and Community Development for a zoning override and that this override was granted. The city

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<sup>1</sup> New York Department of City Planning, *Zoning Handbook*, 2006, Pg: 32.

planning report states that “the City is exercising its option not to be subject to its zoning requirements when performing the governmental function.”

After careful review of federal, state and local law I can find no basis for any executive power that would avoid compliance with the zoning law by executive fiat. Under New York City’s land use regulations, all zoning changes are subject to the Uniform Land Use Review Procedure (ULURP) established in Section 197c of the New York City Charter. There is no mention in the Charter of any executive authority to override ULURP. All exceptions to the Zoning Resolution must be reviewed and approved by the city’s Board of Standards and Appeals (BSA). Article 7, Chapter 2 of the New York City Zoning Resolution specifically states, “When in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of [the zoning] Resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth [by the zoning text], vary or modify the provision so that the spirit of the law shall be observed, public safety secured and substantial justice done.” In this instance, NYCHA did not adhere to the required procedure and evaded an appeal to the BSA for a variance. NYCHA sent a memorandum dated September 21, 2010 to Deputy Mayor Dennis Walcott requesting an “override,” without citing any authority in law for an override. On November 10, 2010 in a brief two-sentence letter, Deputy Mayor Dennis Walcott “approved” the override in what amounts to a rubber stamp of NYCHA’s plan.

ULURP and BSA were established in order to guarantee that all land use changes not currently permitted as-of-right<sup>2</sup> be evaluated by official bodies established under law to determine whether they are in the public interest and consistent with sound planning practice. The Department of Education does not have the competency of a planning body that can make such a determination. Deputy Mayor Walcott's two-sentence approval letter shows that there was no independent analysis and consideration by those entrusted by the city charter with the power to grant exceptions to the city's zoning. The memorandum does not cite any legal authority for an override. Therefore, this is a selective violation of land use regulations by executive fiat and it undermines the public land use review process. It is not permitted in the City Charter. The selective evasion of land use regulations is arbitrary and capricious. In this case no compelling reasons were given concerning project design and layout that might justify an override even if it were permissible. The exception is simply announced. This is clearly not a public health or public safety emergency that would warrant the use of emergency powers by the executive; on the contrary, the action undertaken may have serious negative impacts on public health and safety, as argued later in this affidavit.

NYCHA and the Mayor's office cannot claim that since the property to be developed is for a school it enjoys the privilege of selective exemption from any local zoning regulations. The New York City Zoning Resolution, under Article II specifically establishes regulations governing community facilities, including schools, because regulation of school size and configuration is widely understood as in the public interest. The Zoning Resolution provides generous floor area bonuses for community facilities and, in consideration of many community concerns, unique restrictions. In other words, the Zoning Resolution already takes into account the special needs of

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<sup>2</sup> As-of-right refers to actions that do not require discretionary review as prescribed under the city's land use review procedure (ULURP).

schools and other community facilities. Any exceptions to the Zoning Resolution must be approved by the Board of Standards & Appeals in accordance with the City Charter.

Furthermore, there is no mention at all that the Charter School is a private enterprise receiving public support. It must be questioned, therefore, whether a private entity could ever be the beneficiary of an executive zoning override purported to be within its competency, even if such an override were to be deemed legal.

This project also violates state law. It is subject to New York State Public Housing law which explicitly states that “All projects shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable in the municipality in which the project is situated.”<sup>3</sup>

*The statutory language is crystal clear: public housing projects undertaken by municipal housing authorities, such as NYCHA, are subject to local zoning laws.* The transfer of NYCHA property to a city agency should not exempt it from compliance with city zoning laws. Indeed, the act of seeking an override implicitly acknowledges that NYCHA is required to follow local zoning. All city facilities in New York City are required to comply with city zoning laws. But in this case the new building, though under the jurisdiction of the city’s Department of Education, would continue to be part of the St. Nicholas Houses complex. Indeed, in its praise for the new charter school, the city administration has openly claimed that the school would be integrated with and benefit the St. Nicholas complex.

Finally, this project violates federal law. Section 18 of the Public Housing Act of 1937, Regarding the Disposition and development of Land, states that resident consultation at both the resident advisory board (RAB) level and at the tenant level, and evidence thereof, must be included with the application for disposition by the public-housing entity. Review of the City

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<sup>3</sup> N.Y. PUB. HOUS. LAW § 155.

Planning Report indicates that there was strongly expressed concern that NYCHA failed to adequately consult RAB members as well as tenants during this process. The City Planning Commission failed to examine these concerns and simply stated in the Considerations section of its report that it had received NYCHA's statement that public meetings were held and that in itself was deemed sufficient evidence. In other words, the City Planning Commission accepted at face value NYCHA's assertions but did not consider or accept as valid the testimony and public assertions of tenants, tenant representatives and advocates for alternative approaches regarding the adequacy of the process.

The Community Board's near-unanimous rejection of the proposal was a powerful statement of community agreement with those tenants opposing the action. In a vote of 31 to 1, with 2 abstentions, Community Board 10 adopted a resolution recommending disapproval of the application. A resolution issued by CB10 on January 6, 2011 stated, "Community Board 10 believes that this ULURP application highlights several problems with the regulations promulgated by the U.S. Department of Housing and Urban Development (HUD) pursuant to Section 18 of the Housing Act of 1937 (Section 18) governing the disposition and development of NYCHA property."<sup>4</sup>

Despite the failure to comply with federal, state and city law, and despite strong objections from the community board, the city planning commission wrongfully determined that the proposed project is appropriate.

### **Improper Disposition of City-owned Property**

The ULURP application approved by the City Planning Commission essentially authorizes the demapping of a public street and disposition of a portion of the land to a private developer via

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<sup>4</sup> ULURP Application No. C 110068 MMM- West 129<sup>th</sup> Street City Map Change by the New York City Housing Authority.

NYCHA and a portion to the Department of Education to facilitate construction of a private charter school. The ULURP application and City Planning report only discuss the merits of demapping the street but do not properly consider or deliberate upon the disposition of this city-owned property as required by the City Charter. The CPC Report approved “the proposed amendment to the City Map and any related acquisition or disposition to be appropriate....” The term “any related acquisition or disposition” is extremely broad and arbitrary and leaves NYCHA with undo discretion regarding the eventual disposition and use of the property.<sup>5</sup>

### **Wrongful Declaration of Negative Impact**

The City Planning Commission’s finding of no significant environmental impact in its Environmental Assessment failed to consider even the most obvious potential impacts of NYCHA’s project. The environmental review and land use documents that the city prepared contain false and misleading information including:

- Compliance with comprehensive plans. The EAS indicates the “proposed project would not result in a change to the site’s existing zoning since both the proposed charter school and residential zoning are permitted as-of-right under the site’s R7-2 zoning designation (p. 11). However, as-of-right, as defined in the New York City Zoning Handbook means that the proposed development “complies with all applicable zoning regulations and does not require any discretionary action by the City Planning Commission or Board of

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<sup>5</sup> While Section 197-c of the City Charter exempts dispositions for “low-income housing,” there is no evidence that the subject disposition would be for low-income housing. NYCHA claims that the site will be used for “affordable housing,” but this is not low-income housing. New York City generally considers low-income housing to be for households earning less than 60% of the Area Median Income (AMI) as determined by the federal government. “Affordable housing” has in practice served households earning up to 160% of the AMI, or roughly \$115,000 per year.

Standard and Appeals.”<sup>6</sup> As indicated previously, the proposed school is not compliant with the current R7-2 zoning regulations. This is a false and misleading statement.

- Compatibility and Urban Impact – The EA also indicates that the project is compatible with current land use conditions and would have no adverse effects. However, the imposition of a five-story community facility slated to accommodate hundreds of students as well as parents, teachers and other staff members, is bound to impact the land and residential community. This project would introduce a completely new use in the St. Nicholas complex.
- Displacement - The EA indicates that the proposed project would not directly displace any residents. However, it fails to recognize the potential to displace residents in the future, as NYCHA continues to privatize its projects and construct new housing units with higher income tenants on its property. We should note that NYCHA has publicly proposed the construction of higher-income housing at the St. Nicholas site. NYCHA proposes “affordable” housing, but does not define affordable. However, “affordable” has been defined so broadly that it can include middle- and upper-income households. For example, the City has in the past defined it as 160% of the Area Median Income (AMI). The AMI is defined by the federal Department of Housing and Urban Development for New York City and surrounding suburbs and the AMI is roughly twice as high as the median income of East Harlem residents. Thus, new “affordable” housing on the NYCHA site is likely to bring in tenants with much higher incomes, creating social and political pressures leading to displacement of existing low-income residents of NYCHA.

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<sup>6</sup> New York Department of City Planning, *Zoning Handbook*, 2006, Pg: 100

This is a common pattern and there is every reason to believe it could occur; it should have been considered as a potential negative socioeconomic impact.

- Open Space and Recreation – The proposal would result in the removal of at least two playgrounds. It would be replaced by private space controlled by the HCZ (the charter school) that will not be accessible to the public at large. The loss of public open space in a neighborhood with serious deficiencies in public space per capita is therefore on the face of it a compelling reason for an EIS. The EAS also failed to mention the destruction of a walking path funded by the NYC Department of Health as part of a diabetes prevention campaign, which specifically targets at-risk communities for the purpose of encouraging residents to engage in physical activities such as walking and jogging.<sup>7</sup> This suggests a negative impact.
- The current project undermines one of the basic planning principles that guided the city in its planning of public housing – the combination of densely populated towers with extensive open space, or the “tower in the park” model. The tower-in-the-park design of public housing was based on the need for light, air and open space as a matter of public health and welfare. According to Richard Plunz, an urban design expert and professor at Columbia University, the Tower in the Park model was to give inhabitants equal access to the precious amenities of sun, space and green.<sup>8</sup> The New York City 1961 Zoning Resolution, which established improved standards of zoning, established limits to building heights, setbacks, and distances between buildings, as well as minimum open space requirements, to guarantee access to light and air.<sup>9</sup> This standard continues to be used today. Removing the “park” from the “tower in the park” would result in extremely

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<sup>7</sup> City Health Information, *Promoting Healthier Choices to Prevent and Manage Diabetes*, May/June 2010, Pg. 18

<sup>8</sup> Plunz, Richard, *A History of Housing in New York City*, 1990, Columbia University Press. New York.

<sup>9</sup> *Ibid.*

dense towers and possible public health risks, depriving residents of the very amenities that were added in order to justify the higher density. Consider that many NYCHA towers were built with “park” amenities as an alternative to the densely packed 19<sup>th</sup> century tenements that were widely considered unhealthy due the lack of light and air, problems that housing and zoning laws of the 20<sup>th</sup> century sought to remedy.

- By approving a NYCHA proposal without diligently considering the proposed plan, the City Planning Commission is abdicating its own publicly declared and Charter-mandated objectives. Chapter 192(d) of the City Charter states: “The city planning commission shall be responsible for the conduct of planning relating to the orderly growth, improvement and future development of the city, including adequate and appropriate resources for the housing, business, industry, transportation, distribution, recreation, culture, comfort, convenience, health and welfare of its population.”
- The Uncalming of Traffic – New York City’s Department of Transportation supports the basic approach of traffic calming through its Sustainable Streets strategic plan, Complete Streets, Public Plaza and Bicycle programs.<sup>10</sup> Traffic calming is a widely accepted planning tool for reducing traffic and making the streets safer for all users, including pedestrians of all ages and abilities. The environmental and public health benefits of traffic calming are undisputed and often asserted by the Mayor’s Office, the Department of Transportation and the Department of Health. The cul-de-sac on 12<sup>9th</sup> Street is a superb example of traffic calming. Undoing this cul-de-sac and opening the street to through traffic could create a significant negative environmental impact and therefore should have been the subject of an EIS.

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<sup>10</sup> <http://home2.nyc.gov/html/dot/html/about/stratplan.shtml>.

- Increased Noise Levels - The proposed development would involve three separate construction projects including the street extension, the construction of the school and the future construction of the affordable housing units, all of which could take many years, perhaps a decade, to complete. The noise impacts are not likely to be temporary, as asserted in the EAS.
- Air Pollution – Construction impacts are likely to include increased particulate matter from construction. This is in an area where residents already suffer with the highest asthma rates in the city and among the highest in the country. The potential that particulates from construction can trigger asthma attacks and emergency hospital visits, and increasing mortality from asthma, is very real. Add to this the loss of playgrounds and potential pollution from through traffic, and the impacts on asthma risks are likely to be significant.<sup>11</sup>
- Failure to comply with zoning regulations regarding minimum distance between buildings will result in the loss of natural light and air for some of the residential units and for the school. The first New York City Zoning Resolution which was adopted in 1916 was enacted in to guarantee light and air in the interest of public health and welfare<sup>12</sup>. By violating the requirement for minimum distance between buildings, this action raises the question whether there will be a negative impact on public health and therefore requires an EIS.

The cumulative effect of all the above demonstrates that there may be a significant negative environmental impact warranting an EIS. The CPCs finding of no significant impact is not appropriate and inconsistent with the CPC’s mandate.

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<sup>11</sup> Stern, Rachel, “Asthma in New York: Old News, New Battles,” *City Limits*, May 12, 2010.

<sup>12</sup> New York Department of City Planning, *Zoning Handbook*, 2006, P. 1.

## **Conclusion**

The project under discussion was approved by the City Planning Commission although it failed to comply with federal, state and local law. The approval of disposition of city-owned property was improper. Finally, there are potentially significant negative environmental impacts that were not considered in the Environmental Assessment.

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Dr. Tom Angotti      August 4, 2011