Tuck-It-Away's

Preliminary Findings and Objections to the Finding of Blight in Connection with the Columbia University Educational Mixed Use Land Use Improvement and Civic Project

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The question of whether Manhattanville is "blighted" is central to the realization of Columbia University's proposed Manhattanville expansion plan. The university ("Columbia") has promoted its plan as having the benefit of revitalizing an area it describes as deteriorated and economically stagnant, and the Empire State Development Corporation ("ESDC") has referred to the proposed redevelopment as a "land use improvement and civic project"[1]. The Urban Development Corporation Law ("UDCL"), from which ESDC derives its authority, provides that a land use improvement project is conditional on the finding that the area is "substandard and insanitary", or blighted. Without such a finding, a land use improvement project can not go forward.

On July 17, 2008 ESDC adopted a General Project Plan ("GPP") drafted by Columbia proposing the use of eminent domain to realize Columbia's Manhattanville expansion plan. Columbia's GPP offers two studies of neighborhood conditions as the basis for a proposed finding of blight. Both of the studies on which ESDC proposes to rely are profoundly biased.

Both of Columbia and ESDC's neighborhood conditions studies are biased in their application of arbitrary and inconsistent standards to measure for conditions indicative of "blight". Both are biased in applying a standard of "underutilization" that pushes the concept of

[1]A "civic project" is a project or that portion of a multi-purpose project designated and intended for the purpose of providing facilities for educational, cultural , recreational, community, municipal, public service, or other civic purposes. Urban Development Corporation Law, § 3 (d), McK. Unconsolidated Laws, § 6253 (d). A civic project does not require a finding of blight.

blight over the boundary into simply "not as developed as it could be", a type of project that ESDC is not legally authorized to undertake. Both studies are biased in that they lift key terms such as "deteriorated" or "vacant" from their original context and meaning. They are both biased in that they leap from the occurrence of symptoms sometimes associated with blight to allegations of the existence of a depressed economic syndrome where none exists and where no causal relationship can be shown. And most importantly, both studies conspicuously ignore Columbia's direct and indirect role in creating, exacerbating and maintaining what conditions they find, almost all of which they find in Columbia owned or controlled buildings.

The first study of Manhattanville neighborhood conditions in search of a basis for use of eminent domain was conducted by the New York City Economic Development Corporation, through its consultant Urbitran, Inc. ESDC apparently decided not to use the Urbitran study and instead contracted for a second study. After first asking Columbia, in August, 2005, to find a basis for finding blight in Manhattanville, in March, 2006, ESDC retained the planning, engineering, and environmental consultant Allee, King, Rosen and Fleming, Inc. ("AKRF") to perform the second blight study.

AKRF was no neutral party in the search for blight in Manhattanville. AKRF had been working under retainer to Columbia for more than two years, helping it plan, promote and obtain regulatory approvals for its $7 billion expansion plan. Columbia retained AKRF to prepare an Environmental Impact Statement ("EIS"), a process that involves the consultant in project planning from the earliest stages of planning and in every aspect of the project's design. In the course of this work AKRF was a regular participant in ESDC and Columbia project meetings. AKRF also acted as Columbia's agent, negotiating regulatory issues with various agencies and

seeking necessary approvals on Columbia's behalf. Columbia also retained AKRF to prepare key parts of its GPP, the City Map Override Proposal, as part of its application to ESDC to act on Columbia's behalf. The City Map Override Proposal is the document that would enable Columbia to acquire the public property under the city streets to create a seven story deep, approximately 17 acre continuous basement, or "bath tub" under the entire project area.

On July 15, 2008, in a decision related to Tuck-It-Away's attempts to get information under the Freedom of Information Law ("FOIL"), the Appellate Division of the New York State Supreme Court, First Department found that, in all these activities, AKRF had acted in an advocacy role on behalf of Columbia, representing a party with an interest in the outcome of ESDC's decisions in regard to the Columbia expansion plan. The Appellate Division, First Department found AKRF's relationship with ESDC and Columbia to be "tangled".

The AKRF blight study was biased from the outset, designed in its methodology to yield the one result desired. AKRF had reviewed the aborted EDC/Urbitran study. AKRF presented preliminary findings alleging blight conditions, even before it was formally retained to conduct the study. ESDC claimed in sworn affidavits that the AKRF team working on the blight study was insulated from the team working for Columbia, separated by a Chinese Wall. It later conceded that such a wall had not in fact been maintained. In fact, AKRF had given drafts of the study to Columbia officials for review prior to its finalization.

After it became apparent in oral argument on December 11, 2007 that the Appellate Division, First Department, was likely to find AKRF had a conflict of interest in regard to its blight study, in January 2008, ESDC hired an environmental engineering consultant Earthtech, Inc. to "review" the AKRF study. Earthtech, on its web site claims no expertise or experience in

performing blight studies, much less any expertise or experience in urban planning or economic development. Earthtech did not analyze AKRF's methodology. It did not evaluate AKRF's application of criteria to particular conditions. It did not critically review AKRF's definition of terms. Instead, it followed ARKF's methodology to the letter, only adding further findings of minor conditions AKRF and AKRF's consulting engineer, Thornton Tomassetti had not deemed significant enough to include, and noting the further deterioration in Columbia owned buildings where Columbia was leaving leaking roofs and water infiltration unaddressed. As an ESDC staff member advised the ESDC board before it voted on July 17, 2008 to adopt Columbia's plan, Earthtech was hired to "replicate" the AKRF study.

The Earthtech study in no way clears ESDC from the taint of bias from its retention of AKRF, especially when ESDC staff affirmed their continuing reliance on the AKRF study at the ESDC board of directors meeting on July 17, 2008 in briefing the members before their vote to adopt the Columbia plan. The Earthtech study merely reproduces the same biases built into the AKRF study by adopting uncritically all of AKRF's methodological choices. The Earthtech study reflects the ongoing bias in favor of Columbia's project that has characterized ESDC's role throughout this development process. The project came to ESDC in 2003 with political endorsement and an understood green light. The process of finding blight in Manhattanville was an afterthought, addressed only *pro forma*, and only after the rest of the project was fully developed. ESDC's disclaimers not withstanding, the determination to proceed had in fact been made from the beginning.

Underlying this peculiar story of ESDC's repeated attempts to find blight in Manhattanville lies the vagueness of "blight" as a legal term. There are no substantive standards

for the determination of blight in New York State. Statutes only offer cumulative lists of conditions that have at one time or another been associated with distinct historical conditions, each in its day called "blight". No statute or regulation articulates any specific standard for how these conditions are to be measured or weighted. In identifying each listed blight condition, there remains a vast gulf of undefined norms. What constitutes a "dilapidated structure?" What does "under-utilized" mean? ESDC has denied possessing any written standard or methodology for how to measure or identify blight. As a consequence of this lack of standards for applying broad criteria to specific cases, "blight" has become a subjective and constitutionally suspect category, inviting arbitrary and discriminatory application.

Given that New York Courts have not reached the question of standards for the finding of blight, the best authority we have for what "blight" actually means in relation to any particular application is to look to the various statutes in which the term or concept is used, to identify common language, and recognize that blight is first and foremost a liability: a liability to neighborhood residents, to other property, to surrounding neighborhoods, or to public finances. Blight has to be a self-perpetuating, even contagious, economic syndrome of downward spiral, where threats to health and safety, deteriorating social conditions, complicated conditions of title or other obstacles prevent an area from developing on its own.

By comparing the statutes we can also associate individual terms in the long litanies of "blight conditions" offered in many statutes with particular historical conditions that lead such conditions to be included in cumulative statutory lists of blight conditions. Lack of light and air, for example, cited by Urbintran, refers to the crowded tenement conditions of the early twentieth century. The occasional shadows cast by the 125th street subway trestle is a different condition

from any condition the statutory language was ever originally meant to refer to. "Vacancy" similarly emerges as evidence of blight in the context of suburban flight and abandonment of the 1960s and 1970s, and presupposes depressed rental demand. Finding rental units unoccupied where their owner is keeping them off the market for strategic reasons is not the same phenomenon to which the statutes refer when they list "vacancy" as a blight condition.

And finally, we can give more meaning to the term blight by considering legal standards that have developed in other states, where courts have gone beyond deference to the agency's judgement, and have actually looked at the question of how blight is applied in particular instances.

We have applied a more complete, traditional, and legally and historically accountable definition of blight and its component conditions to our own physical and documentary survey of conditions in Manhattanville. The conditions we have been able to thus measure include real estate values over time, property utilization, health or safety hazards and inadequate maintenance as reflected in building code violations, illegal uses or occupancy, crime, planning defects, occupancy and cause of any vacancy, conditions of title and site conditions, such as diversity of ownership, and documented environmental concerns that might make redevelopment unlikely without government intervention. With the release of ESDC's findings and underlying blight studies we have been able to confirm AKRF and Earthtech's methodological choices, and by cross referencing the individual building conditions they cite, we have been able to identity inappropriate and inconsistent findings, and have further basis to assess the degree of responsibility Columbia bears in the property it owns or controls.

By New York State statutory intent, traditional standards, and national judicial standards,

the Manhattanville area that Columbia has targeted for its expansion plan is not blighted, and to the extent that blight-like conditions can be found, they are overwhelmingly created, maintained, or exacerbated by Columbia's actions or deliberate inaction.

First, Manhattanville does not meet the underlying concept uniting all blight definitions: that a blighted area represents a threat to public health and safety, that it represents a public liability, that it deters investment to such an extent the area will not improve without government intervention, and that it has a detrimental "blighting" effect on surrounding areas. Far from the downward spiral of declining demand and growing burdens to public health, safety and welfare, Manhattanville is an area under intense demand from competing development proposals and investor interest, with rising real estate values, high rental demand, and substantial new investment both within Columbia's target area and in surrounding West Harlem. Until Columbia started buying up property and pushing out tenant businesses, employment in Manhattanville in the 1990s was on the increase. Despite Columbia's activity, Manhattanville now is undergoing a significant and visible resurgence. Just in the past few years, no fewer than four up-scale restaurants have opened. Privately owned property that is not in Columbia's hands, as well as residential property in the area, have recently undergone significant renovations. Just this month, the finishing touches are being added to the Harlem Piers Park which lies adjacent to the study area. The piers will also allow for significant increases in tourism and traffic through the area, with ferry service and connection of the Hudson River greenway.

Second, Manhattanville is not "underutilized." It is currently well developed for the purposes for which it had been zoned prior to the December 17, 2007 re-zoning action of the New York City Planning Commission. Comparing utilization built to the prior zoning to the new

zoning is completely inappropriate for a finding of blight. All that was required, and what all parties, including EDC in its 2002 West Harlem Master Plan, Community Board 9 in its 197a plan, and Tuck-It-Away and another potential developer in their 197 (c) applications, sought was an increase to the permissible density in Manhattanville. All agreed such an increase was economically viable. The December 17, 2007 re-zoning allowed for the first time the ability to construct residential, commercial and student housing that had been excluded under the previous zoning.

With that re-zoning now accomplished, there is no evidence that private owners will not avail themselves of the opportunity to build. The prior zoning, by which alone it is appropriate to measure utilization, was intended as a low rise manufacturing and commercial area, reserved for those land uses that peculiarly need low rise development, like gas stations, or heavy equipment storage, or high shelf warehousing. Only by applying an arbitrary, biased and inappropriate percentage of maximum zoned floor area ratio, is it possible to describe the area as significantly "underutilized." AKRF, and Earthtech, without critical assessment, called "underutilized" any lot built to 60% or less of maximum allowable, precluding the option of a single story structure in an area zoned precisely for such uses.

Relying on "underutilization" alone, moreover, violates traditional and national standards, as it confuses and compromises the rationale for public intervention. When potential for greater economic development is the sole criterion for finding an area blighted, the finding of blight ceases to be a measure of a social or economic ill to be removed. It becomes instead a mere pretext for a very different project: the maximization of economic development. The benefits and costs of maximizing economic development are distributed differently from those of removing a

public liability like true blight. The political agreement, or social consensus, needed to remove a known evil, such as risk of fire or of tuberculosis, is more easily reached than it is in adding a speculative good, especially when the benefit accrues largely to a private party. Though the New York State legislature created ESDC's predecessor, the Urban Development Corporation, to, among other purposes, create jobs and stimulate economic growth, it explicitly limited the agency's activity to blighted areas, except for the special case of "Civic Projects," for which, we submit, the Columbia plan does not qualify.

Applying a threshold of 40% of maximum Floor Area Ratio ("FAR"), which allow for full range of land uses for which Manhattanville was previously zoned would render only 21% of the area properties under-utilized. AKRF found 43% of the project area properties blighted by this factor using a 60% standard. Earthtech declared the AKRF standard reasonable without any explanation. Earthtech went on to cite as evidence of blight the fact that only 51% of buildings are built up to the maximum allowable, implicitly invoking a standard that anything short of full maximization of development is blight. Both AKRF and Earthtech's blight finding for the whole project area relies heavily on this "under-utilization" to reach a count of 50% of the properties showing at least one blight condition.

Third, by traditional blight criteria, the evidence shows blight conditions appearing in less than half of the properties, and where such conditions are found, they are overwhelmingly in Columbia owned property. Deteriorated building conditions are found overwhelmingly in Columbia owned property, while non-Columbia owned properties are virtually all either in good condition or has been subject to recent restoration or repair. Comparison of conditions cited in the three surveys of the area by AKRF's subcontractor contractor, Thornton Thomasetti, AKRF,

and Earthtech, when correlated with Columbia's date of acquisition further show these conditions to have been overwhelmingly created by, exacerbated by, or maintained by Columbia. Using conditions that Columbia has created, exacerbated or maintained as the basis for finding blight in the area, is grossly inappropriate, as it rewards Columbia, a party with unclean hands.

By the blight criteria of the earliest era of public redevelopment policy, Manhattanville does not meet traditional blight criteria if causation of deterioration is factored in. Most of the buildings were in fair to good condition before Columbia started buying up the area. All non-Columbia owned buildings are in good to fair condition. From building department records, at most two out of the 67 lots in the area appear to show any inherently hazardous conditions, and both are owned by Columbia. Only four show uses contrary to their respective certificates of occupancy, and all but one of these is owned by Columbia. The sole non-Columbia property, at 3300 Broadway, has an application pending to amend its certificate of occupancy to allow for its continued use by a discount department store, a long standing community resource. The incidence of building code violations is no higher than in the comparable surrounding areas in West Harlem. Of the properties in the study area that show evidence of being inadequately maintained, only one is not owned by, or under contract for sale to Columbia, and it is owned by the City and used by the Department of Transportation. The remedy for making Columbia take care of its property should not be to take the property of others and give it to Columbia.

Risks to public health and safety are negligible. There are no abandoned buildings or dangerous uses posing unusual fire risk. Environmental concerns for the most part fall below the background conditions of petroleum leaks and groundwater contamination that is ubiquitous throughout New York City. Where elevated levels of contaminants were actually measured,

ESDC's consultants found these attributable to the urban fill on which properties were originally built. There is no indication of any imminent danger of public exposure to contaminants. There is also no evidence of any current heightened incidence of crime. Crime statistics that suggest otherwise come from precinct sector statistics that do not reflect local conditions, and allegations of criminal activity in the 1990s are irrelevant under today's social conditions. There is some graffiti, but it is to be found predominantly on Columbia owned buildings and reflects more Columbia's failure to maintain or secure its buildings than any indication of social decay caused by, eminating from, or exacerbated by, the industrial area.

By mid-20th century urban planning criteria of blight there are no planning failures that might be linked to the formation of a larger "blighted area." With the new park on the Hudson River waterfront, there is no lack of parkland and open space. Any school shortage or health care needs in the surrounding area are made no worse by the reservation of the area for commercial and manufacturing uses. The minor transportation issues that previously existed were addressed in the NYC EDC 2002 West Harlem Master Plan. There are no problems of public infrastructure or access. Road widths, lot sizes, curb cuts and loading and unloading facilities are all appropriate to the uses for which the area was zoned. To the extent any change in zoning is appropriate, these have already and actively been pursued by both Community Board 9 and various private 197-c applicants. And though there are seven residential and two quasi-residential buildings among the 67 total properties, there are no incompatibilities in practice, such that either residential or commercial and manufacturing uses area are impaired.

By later 20th century criteria identifying blight with impediments to economic development, Manhattanville is also not blighted. Diversity of ownership has posed no problem

to Columbia purchasing over 70% of its proposed project area over the last seven years. Another 26% of the area is owned by New York City, or public utilities, and can be transferred to Columbia by political directive. Of the 4% of the area remaining in private hands, all except one of these lots are located on the periphery of the area, enabling many different configurations of large scale development beyond the particular one Columbia is insisting on. Neither Columbia, nor any one else, is impeded in the least from economically viable development. There are no deficiencies of title in the area, nor are there tax issues either impeding development or imposing disproportionate burdens on municipal resources. There is no indication that such environmental conditions as exist can not be economically remediated in the normal course of private development.

The final remaining traditional blight criterion is vacancy. Vacancy emerged as a blight characteristic in the context of later 20th century conditions of suburban flight, industrial decline, and abandonment. Vacancy was held to be evidence of a downward spiral of depressed demand, and boarded up buildings were seen as a deterrent to economic development in turn. In Manhattanville today, demand for both rental and purchase remains high. The vacancy apparent in Manhattanville today did not exist before Columbia began aggressive acquisition in 2000. Every building except one that is now vacant was emptied only after or shortly before Columbia's acquisition or assumption of control. Prior to Columbia's assumption of control, virtually every one of these properties enjoyed 100% occupancy by a long standing successful businesses. Vacancy remains confined exclusively to Columbia owned property. All the remaining six commercial properties not in Columbia hands are operating at full or near full capacities. Anecdotal evidence from current and former Columbia tenants, and inquiries to lease,

reveals Columbia has maintained a practice of refusing to renew leases with existing tenants, and refusing new leases to businesses seeking space in Manhattanville, except for certain businesses favored by Columbia for inclusion in ground floor retail uses in its proposed development. To base any blight finding even in part on the prevalence of vacancy in Manhattanville, or to include vacancy as a factor in any cumulative tabulation of blight indicators without discounting for Columbia's causal relationship to it, is to reward the one party responsible for creating the condition.

Honest and methodologically transparent assessment of the neighborhood conditions of the Manhattanville area that Columbia has targeted for its expansion plan cannot yield a finding that the area is "blighted," or "substandard and insanitary" that is cognizable by traditional or national legal standards. If ESDC proceeds to make the finding Columbia has proposed, and if it does so in any degree of reliance upon AKRF, a party with deep vested interest in the realization of Columbia's project, or in reliance upon Earthtech, which failed to critically assess, and merely mimicked AKRF's methodology, its determination will have been made in bad faith. It will show the degree to which, in the feeding frenzy of development politics, the public interest and the public trust have been cast aside, and that the power of government has been abused in the service of favored private interests.