

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

In the Matter of the Application of

THE INCORPORATED VILLAGE OF FLORAL
PARK, NEW YORK,

Petitioner-Plaintiff,

For Judgment Pursuant to Article 78 of the New
York Civil Practice Law and Rules, and Declaratory
Judgment,

-against-

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT CORPORATION, NEW YORK
STATE FRANCHISE OVERSIGHT BOARD, and
NEW YORK ARENA PARTNERS LLC,

Respondents-Defendants.

**SUPPLEMENTAL AFFIRMATION
OF MICHAEL MURPHY IN
FURTHER SUPPORT OF
VILLAGE’S ARTICLE 78
PETITION AND IN OPPOSITION
TO RESPONDENTS-
DEFENDANTS’ MOTIONS TO
DISMISS**

Index No. 612399/2019

Hon. Roy Mahon

(Mot. Seq. 001, 002, & 003)

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

MICHAEL G. MURPHY, an attorney duly admitted to practice in the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am an attorney with Beveridge & Diamond, P.C., counsel for Petitioner-Plaintiff the Incorporated Village of Floral Park, New York (“Petitioner”/“Village”), and submit this supplemental affirmation in further support of the Village’s Article 78 Petition/Complaint and in opposition to Respondents-Defendants’ Motions to Dismiss. I make this affirmation on personal knowledge, unless otherwise indicated.

2. The Village respectfully submits this affirmation based on material new information the Village received from Respondent-Defendant Empire State Development (“ESD”) on January 10, 2020—merely three days after the return date of the Village’s Article 78 Petition—in response to a Freedom of Information Law (“FOIL”) request to ESD that had been pending for nearly five months. As further set forth below, the subject information directly support the Village’s claims, and the Village would have included the materials with its prior papers had ESD not improperly withheld the information until after the Village’s Petition was fully submitted.

3. The information ESD produced on January 10 is comprised of material evidence further supporting the Village’s contention that ESD, with the cooperation of Respondent-Defendant Franchise Oversight Board (“FOB”) and knowledge of other senior State officials—including officials within the Executive Chamber—engaged in a request for proposals (“RFP”) process with a predetermined outcome. The documentary materials provide further support for the Village’s claims that ESD and FOB intended to select Respondent-Defendant New York Arena Partners, LLC’s (“NYAP”) Project in advance of the commencement of the RFP process, and further explain why ESD pushed that Project through the State Environmental Quality Review Act (“SEQRA”) process without assessing impacts of critical importance to the communities surrounding Belmont Park, including the Village.

4. Not only did ESD withhold this information—produced in four documents—for nearly five months while the Village’s Petition was pending, but ESD should have produced this information over a year ago in response to the Village’s October 2018 FOIL request seeking information concerning the RFP process.

5. As set forth in the Village's Petition and Complaint, on November 17, 2016, Christopher Kay, President of NYRA, sent an email to several State officials, including to Robert Williams, head of Respondent-Defendant FOB. Mr. Kay's email provided a detailed overview of a "Master Plan" laying out a development strategy for Belmont Park, the major components of which were identical to the NYAP Project. Petition/Complaint Ex. C (NYSCEF Docket No. 3). Mr. Kay's email attached the Master Plan ("secret Master Plan") and stated that he looked "forward to reviewing the project with you on Monday" – November 21, 2016. *Id.*

6. In addition to Mr. Williams, other recipients of Mr. Kay's email attaching the secret Master Plan included Joseph Rabito, then understood to be the Deputy Secretary for Intergovernmental Affairs, Office of New York State Governor; Timothy Taylor, then Director of Revenue at the New York State Division of Budget; and Katharine Neer, then Assistant Secretary for General Government and Financial Services, Office of New York State Governor, overseeing policy and operations for a number of State agencies, including the NYS Department of Financial Services, NYS Department of Tax and Finance, and NYS Gaming Commission.

7. FOB produced the secret Master Plan to the Village in response to an October 3, 2018 Freedom of Information Law ("FOIL") request that had been submitted by our office. *See* Petition/Complaint Ex. B (NYSCEF Docket No. 2).

8. A substantively identical request was submitted to ESD in October 2018, yet ESD's belated production four months later in February 2019 failed to produce any documents pertaining to the secret Master Plan. *See* Exhibit 1 hereto. It is now known that ESD violated FOIL by improperly withholding such documents at that time.

9. As the Village has previously apprised the Court, on August 19, 2019, the Village sent a FOIL request to various State offices and departments, including to Respondent-Defendant

ESD and the Division of Budget (which oversees Respondent-Defendant FOB), seeking information on the secret Master Plan. Affirmation of Michael Murphy, dated Nov. 26, 2019, ¶ 3, Ex. B (NYSCEF Docket No. 166). That August 19 FOIL request sought:

Any and all records discussing, relating to, or concerning the attached draft Belmont Park Master Plan, dated November 14, 2016 (“Master Plan”), including, but not limited to all drafts of the Master Plan in the possession or control of any State official, employee, agent, consultant or other individual acting on the State’s behalf or at the State’s direction (collectively, “State Individuals”), including the name of the State Individual providing the record or document.

Any and all correspondence discussing, relating to, or concerning the Master Plan or any draft thereof by and between any State Individual(s) and/or between a State Individual and any other party or individual.

10. For nearly five months, ESD and FOB stonewalled and failed to produce any substantive response to the Village’s narrowly tailored request. Instead, the agencies, without meaningful explanation, repeatedly deferred the date of response. ESD’s deferrals strongly correlated with adjournments of the return date in this litigation (NYSCEF Docket No. 178).

11. As a result, on January 8, 2020, the Village sent follow-up letters to ESD and FOB asserting that the agencies had unreasonably delayed in providing a substantive response to the Village’s August 19, 2019 FOIL request, and stating that the agencies had failed to provide a reasoned basis for their inability to timely respond as mandated by FOIL. *See* N.Y. Pub. Off. Law § 84.2. The Village demanded that each agency promptly provide a substantive response to the Village’s request. Copies of the January 8th letters (including attachments) to ESD and FOB are attached hereto as Exhibits 2 and 3, respectively.

12. On January 10, 2020—three days after the return date for the Village’s Petition and Complaint and Respondents-Defendants’ motions to dismiss—ESD finally produced documents in response to the Village’s request. The four documents ESD produced show that

key figures at ESD received the secret Master Plan, even before it was sent to FOB, and that the secret Master Plan was distributed to other high level State officials, including several officials within the Executive Chamber.¹

13. Among the documents produced is another email from Mr. Kay, dated November 15, 2016, in which Mr. Kay sent the secret Master Plan to ESD officials accompanied by a message substantively the same as that sent to FOB two days later. *See* Exhibit 4 hereto. Mr. Kay sent the Master Plan to Howard Zemsky, Chair of the Board of Directors of ESD, and to Thomas Conoscenti, who upon information and belief is and has been Senior Vice President for Real Estate at ESD. Mr. Kay's email transmitting the secret Master Plan to ESD stated that he looked forward to meeting with the recipients "on Friday"—November 18, 2016. *Id.* Thus, the plan was expected and would be discussed further at the November 18th meeting.

14. Mr. Conoscenti rapidly distributed the Master Plan. Within four minutes of receipt, he forwarded Mr. Kay's email and the attached secret Master Plan to Elizabeth Fine and Simon Wynn, both at ESD, with the following cover note: "Any objection to me forwarding this to Dani and Adam?" *See* Exhibit 5 hereto (forwarded secret Master Plan omitted). Obviously, the recipients understood the relevance of the email because Mr. Conoscenti provided no other context in his email. It is also clear that Mr. Conoscenti received a favorable response because less than an hour later, Mr. Conoscenti forwarded Mr. Kay's email and secret Master Plan to Dani Lever and Adam Schuman. *See* Exhibit 6 hereto (forwarded secret Master Plan omitted). Upon information and belief, Ms. Lever is currently the Director of Communications to

¹ After producing the documents, the ESD FOIL officer contacted this office seeking to retract the production. When we spoke to the FOIL officer, we advised him that the documents had already been viewed. ESD has not sought to claw back the documents. The documents are clearly responsive to the Village's request and the issues in this litigation, and do not logically fit within any exempt category under New York Public Officers Law § 87.

Governor Cuomo and was Press Secretary for Governor Cuomo at the time she received the secret Master Plan. Upon information and belief, at the time Mr. Shulman received the plan, he was (ironically) Special Counsel for Public Integrity at the Office of New York State Governor.

15. Mr. Conosceni's email cover note states: "As follow-up to my email earlier today, attached is the draft master plan from NYRA. I will review this evening and provide a summary of key differences." Exhibit 6. The "email earlier today" almost certainly falls within the scope of the Village's FOIL request, yet it has not produced by ESD. Mr. Conoscenti's reference to "key differences" likely relates to the fact that the secret Master Plan itself is labelled an "Update" so there was an earlier version of the plan. Exhibit 4 (master plan attachment). This reinforces the Village's contention that the Master Plan was not a surprise to the recipients, but of course was all well hidden from the public, including the communities that would be impacted by the Project. Moreover, the Village's August 2019 FOIL request requests all versions of the Master Plan; yet no other version has been produced by either ESD or FOB. It is quite clear these agencies continue to hide relevant information.

16. The following morning, Mr. Conoscenti sent Mr. Kay's email and the secret Master Plan to Rachel Schatz, with a cover note stating "FYI These materials are confidential and should be treated as such." *See* Exhibit 7 hereto (forwarded secret Master Plan omitted).

17. The fact that Ms. Schatz was one of the recipients of the secret Master Plan and was directed to keep it "confidential" is consequential. In an affidavit submitted to this Court in this matter, Ms. Schatz explained:

I am Vice President of Planning and Environmental Review at Respondent Urban Development Corporation d/b/a Empire State Development ("ESD"). The statements made in this affidavit are based on my personal knowledge. I am responsible for managing environmental reviews for ESD and have over thirty years' experience in environmental review for the City and State of New York. I

supervised the technical team that prepared the draft and final Environmental Impact Statement (“EIS”) for the Belmont Redevelopment Project (the “Project”).

(NYSCEF Docket No. 117, para 1).

18. Thus, Ms. Schatz, the key individual at ESD (the Lead Agency) responsible for shepherding the Belmont Park Redevelopment Project through a legitimate SEQRA process—was given a copy of the secret Master Plan and told to keep it confidential.

19. The secret Master Plan was sent to and distributed among key individuals at ESD and FOB, as well as high level officials within the Governor’s Office and at other state agencies, with cover messages clearly indicating that the initial recipients were expecting to receive the plan and that the plan would be discussed at pre-scheduled meetings.

20. All of these officials received copies of the secret Master Plan and Mr. Kay’s email before:

- a. An earlier pending RFP was cancelled. Pet./Compl. Ex. D (NYSCEF Docket No. 5).
- b. FOB passed a resolution requesting ESD to undertake a new RFP process. Pet./Compl. Ex. E (NYSCEF Docket No. 6).
- c. ESD issued a new RFP conveniently tailored for the NYAP Project. Pet./Compl. Ex. G (NYSCEF Docket No. 7)
- d. ESD selected the NYAP Project. Pet./Compl. Ex. H (NYSCEF Docket No. 8)

21. Respondents-Defendants are insistent that the Village (and the public at large) must accept that the process to select the NYAP Project was undertaken through “a competitive process” as mandated by State law, *see* Racing, Pari-Mutuel Wagering and Breeding Law Section § 212(8)(a)(1), despite this growing evidence of a predetermined outcome.

22. This also explains why ESD, among other things, impermissibly segmented its review of the Project and NYRA’s planned improvements, and refused to undertake an

environmental assessment in key areas of critical importance to local communities, but which would show unacceptable localized traffic impacts and degradation of the community character of surrounding suburban communities.

23. This is not evidence of some random submission of no consequence. ESD and FOB's actions demonstrate otherwise. ESD failed to produce any documents in response to the Village's October 2018 FOIL request relating to the Master Plan, even though they were covered by the Village's request. FOB and ESD then delayed for months, without justification, to produce documents responsive to the Village's August 2019 FOIL request, repeatedly pushing back the substantive response date as the return date in this litigation was adjourned. ESD finally produced some responsive documents on January 10, 2020—three days after the January 7 return date--but is still withholding other documents it claims are not subject to disclosure under FOIL. ESD tried to retract the production of the few documents it did produce, even though there is no basis to do so. Meanwhile, FOB is still stalling for over five months and has made no substantive response to the Village's August 2019 FOIL request. This is not indicative of open government, or reflective of parties unafraid of what might be disclosed under FOIL or through discovery.

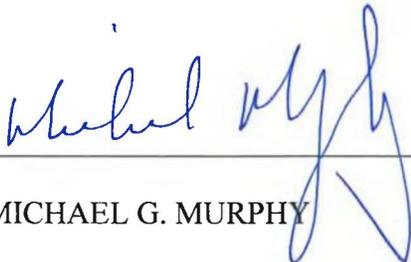
24. The Village respectfully requests the Court accept this supplemental submission. The Village could not have submitted this information before the return date as ESD failed to produce the information in the timely fashion under FOIL.

25. Further, the communication with the ESD production disclosed that other responsive documents are being withheld under any claimed exemption category, while FOB has yet to make any substantive response to the Village's August 2019 FOIL request. *See* Exhibit 3. Given the agency's clear abuse of FOIL and unjustified delay in responding to the Village's

narrowly tailored request to secure information relevant to this litigation, the Village requires the opportunity to undertake formal discovery to ensure that the veil of secrecy surrounding this process is lowered.

WHEREFORE, the Village respectfully requests that the Court grant the Petition and deny Respondents-Defendants' motions to dismiss.

Affirmed: January 17, 2020



MICHAEL G. MURPHY