



by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, and of areas reasonably accessible thereto[,] ... [to provide] educational, recreational and cultural facilities, and ... [to] encourage[] ... participation in these programs by private enterprise.

Urban Development Corporation Act (“UDC Act”) § 2, codified at McKinney’s Unconsolidated Laws of New York (“Unconsol. L.”) § 6252.

3. ESDC has authority under the UDC Act to adopt and approve various types of projects, including a “land use improvement project” and a “civic project.” UDC Act § 10(c) and (d), Unconsol. L. § 6260(c)–(d).

4. ESDC is directed to pursue its statutory mission by “encouraging maximum participation by the private sector of the economy, including the sale or lease of ... [ESDC’s] interest in projects at the earliest time deemed feasible.” UDC Act § 2, Unconsol. L. § 6252.

5. ESDC has been involved in the development of numerous successful land use improvement projects. Recent ESDC projects in New York City include: the 42<sup>nd</sup> Street Development Land Use Improvement Project, involving the construction of more than 8 million square feet of office, retail, hotel and entertainment space in the Times Square neighborhood of Manhattan, and the Hunters Point (Queens West) Waterfront Development Land Use Improvement Project, involving the construction of a 9 million-square-foot development along the East River in Queens.

6. ESDC has also been involved in the development or improvement of numerous sports facilities statewide, including the new Yankees and Mets stadiums currently under construction, the Ralph Wilson Stadium (home of the Buffalo Bills), and an arena for the Buffalo Sabres of the National Hockey League. Each of these sports facility projects was adopted and approved by ESDC as a civic project under the UDC Act.

7. The project at issue in this proceeding is the Atlantic Yards Land Use Improvement and Civic Project, which is also referred to as the Atlantic Yards Arena and Redevelopment Project (hereinafter, the “Project” or “Atlantic Yards Project”).

8. On December 8, 2006, ESDC adopted and approved the Project as both a land use improvement project and a civic project under the UDC Act. Administrative Record (“AR”) at 19929–31.

### **Initiation of Preliminary Planning**

9. When a development project in New York City or New York State is proposed as a public-private undertaking, it becomes subject to scrutiny by the City and State. For the Atlantic Yards Project to go forward, numerous government actions would be required, including funding from the City of New York (the “City”) and State, adoption of a General Project Plan (“GPP”) pursuant to the UDC Act by ESDC, condemnation by ESDC of certain properties at the proposed project site, and disposition by the Metropolitan Transportation Authority (“MTA”) of certain property interests at the proposed project site. The Project would therefore be subject to three separate governmental reviews: (a) the process for adopting a GPP under the UDC Act, (b) the condemnation process under the Eminent Domain Procedure Law (“EDPL”) and (c) the environmental review process under the State Environmental Quality Review Act (“SEQRA”), which is codified at Article 8 of the Environmental Conservation Law (“ECL”).

10. Each of these review processes provides for significant public participation. Before it is feasible to proceed with the review processes, however, projects of the magnitude of the Atlantic Yards Project require extensive preliminary planning and discussions

to define the proposed project to the point where plans are sufficient to allow effective consideration of all of its facets and environmental impacts.

11. For example, one of the first steps in the SEQRA review process is to release a draft scoping document to the public. *See* 6 N.Y.C.R.R. § 617.8. The draft scope describes the project and the analysis areas to be studied in the environmental impact statement (“EIS”). *Id.* § 617.8(f). As is evident from the SEQRA regulations and draft scope for the Atlantic Yards Project (AR 22707–47), such a document cannot be prepared until there is a considerable amount of information about the proposed size, location, programming and other aspects of a proposed project.

12. In addition, with respect to projects such as the Atlantic Yards Project, it is common for the developer – in this case, Forest City Ratner Companies and its affiliates (collectively, “FCRC”) – to reimburse ESDC for the cost of the various studies that ESDC must prepare to determine whether the project should be approved, modified or disapproved.

13. Thus, even prior to releasing a draft scoping document to the public under SEQRA, it is necessary for ESDC, other public agencies and the developer to engage in preliminary planning, which often necessitates the execution of letter agreements or memoranda of understanding so as to ensure that the developer reimburses ESDC for the planning costs. These documents are “non-binding” in that they do not in any way obligate ESDC to approve the project. Such documents were executed in connection with the Atlantic Yards Project, as described below.

**Letter dated February 18, 2004**

14. On February 18, 2004, James P. Stuckey, an Executive Vice President at FCRC, sent a letter (the “February 2004 Letter”) to Charles Gargano, the Chairman of ESDC,

setting forth the agreement of FCRC to pay “certain costs incurred by ... [ESDC] with respect to the proposed Atlantic Yards – Brooklyn Arena Mixed-Use Development Project.” AR 22748–54.

15. In the February 2004 Letter, FCRC agreed to pay the costs incurred by ESDC with respect to a “Scope of Work” comprising services to be performed in connection with the proposed Project. These included services to be provided to ESDC by (a) environmental consultants; (b) environmental, real estate and condemnation counsel; (c) appraisers with respect to the proposed condemnation; and (d) other consultants as necessary or appropriate to facilitate the proposed condemnation. AR 22748–49 (February 2004 Letter at 1–2).

16. The February 2004 Letter made clear that it did not constitute ESDC’s approval of the Project, did not commit ESDC to approving the Project in the future and did not even commit ESDC to completing the review process. It provided that “[n]otwithstanding this Letter, the parties hereto recognize and agree that ESD[C] shall have no obligation to commence, continue or conclude the Scope of Work.” AR 22750 (February 2004 Letter at 3). It also provided that FCRC “hereby agrees and acknowledges that ESD[C] ... shall not be deemed to have approved any FCR[C] proposal concerning the Project until, and only if, such approval is set forth in writing by ESD[C] and approved by the Board of Directors of ESD[C] and by any other required public authorities.” AR 22751 (February 2004 Letter at 4). Finally, FCRC acknowledged in the letter that ESDC “has not made any representations whatsoever ... concerning the: (i) outcome of the Scope of Work; or (ii) approval of any FCR[C] proposal concerning the Project by the Board of Directors of ESD[C] or by any other required public authorities....” *Id.*

17. The terms of the February 2004 Letter were agreed to and accepted by Kevin S. Corbett, Chief Operating Officer of ESDC, on February 25, 2004. AR 22752 (February 2004 Letter at 5).

**Arena Development Project MOU dated February 18, 2005**

18. On February 18, 2005, ESDC entered into a Memorandum of Understanding (the “Arena Development Project MOU”) regarding the proposed Project with the City, the New York City Economic Development Corporation (“NYCEDC”) and FCRC. AR 22303–25.

19. The Arena Development Project MOU concerned a proposed project site which included the entirety of Blocks 1118, 1119, 1120, 1121, 1127 and 1129 and eight lots on Block 1128 and three streetbed segments. AR 22303, 22315 (Arena Development Project MOU at 1 and Exh. A-1).

20. Among other things, the Arena Development Project MOU stated that subject to review and acceptance by ESDC, the City and NYCEDC of FCRC’s draft development plan, and in accordance with all statutory requirements, it was the intention of ESDC staff to seek certain approvals with respect to the proposed project, including a determination that ESDC should act as “lead agency” under SEQRA and the determinations that would be required for the proposed project under the UDC Act. AR 20305 (Arena Development Project MOU at 3).

21. The Arena Development Project MOU provided that ESDC, the City and NYCEDC would cooperate with FCRC to take the actions required to implement the Project only “[u]pon . . . completion of the SEQR[A] process.” *Id.* In addition, the Arena Development Project MOU provided that:

It is understood and agreed that the actions and approvals contemplated herein are subject to all applicable legal requirements, which may include, without limitation, compliance with, among others, the State Environmental Quality Review Act, the New York State Urban Development Corporation Act, the Eminent Domain Procedures Law.

AR 20310 (Arena Development Project MOU at 8).

22. The Arena Development MOU also provided that “[w]hether the transaction described herein shall be consummated or not,” FCRC would be required to bear all costs incurred by ESDC, the City and NYCEDC to prepare the environmental analysis required under SEQRA, legal fees, costs associated with the condemnation process and other related costs. *Id.* The document stated that “this MOU is non-binding and does not create or give rise to any legally enforceable rights or legally enforceable obligations or liabilities of any kind on the part of any party hereto [with the exception of the provision requiring FCRC to pay the agencies’ costs].” AR 20310–11 (Arena Development Project MOU at 8-9). Finally, it provided that it would be “terminable at will by the Public Parties [*i.e.*, ESDC, the City or NYCEDC], or FCRC upon 30 days written notice.” AR 20311 (Arena Development Project MOU at 8-9).

**ATURA Development Project MOU dated February 18, 2005**

23. On February 18, 2005, ESDC also entered into a Memorandum of Understanding (the “ATURA Development Project MOU”) with the City, NYCEDC and FCRC. AR 20296–302. ATURA refers to the Atlantic Terminal Urban Renewal Area.

24. The ATURA Development Project MOU concerned a project defined as “the design, development and construction of a mixed-use development consisting of residential development, commercial office space, and retail space” using the unused developments rights attributable to the Atlantic Center site on the north side of Atlantic Avenue (Block 2002, Lot 1) and Site 5 on the south side of Atlantic Avenue (consisting of the entirety of Block 927,

excluding the Brooklyn Bear's Pacific Street Community Garden on the eastern portion of the block). AR 20296.

25. Among other things, the ATURA Development Project MOU stated that, provided that FCRC proceeded with all necessary agreements with respect to the arena and the relocation of the New Jersey Nets to Brooklyn and the associated mixed-use development, as described in the Arena Development Plan MOU, ESDC staff would seek certain approvals with respect to the ATURA Development Project, including a determination that ESDC should act as "lead agency" under SEQRA and the determinations that would be required for the project under the UDC Act. AR 20297 (ATURA Development Project MOU at 2).

26. The ATURA Development Project MOU provided that:

The parties acknowledge that ESDC's participation in the project is conditioned upon the implementation of the Arena Development Project and all applicable legal requirements including compliance with, among others, the State Environmental Quality Review Act, the New York State Urban Development Corporation Act, [and] the Eminent Domain Procedures Law.

AR 20299 (ATURA Development Project MOU at 4).

27. The ATURA Development Project MOU also provided that "[w]hether the transaction described herein shall be consummated or not," FCRC would be required to bear all costs incurred by ESDC, the City and NYCEDC to prepare the environmental analysis required under SEQRA, legal fees, costs associated with the condemnation process and other related costs. *Id.* The document stated that "this MOU is non-binding and does not create or give rise to any legally enforceable rights or legally enforceable obligations or liabilities of any kind on the part of any party hereto [with the exception of the provision requiring FCRC to pay the agencies' costs]." *Id.* Finally, it provided that it would be "terminable at will by the Public Parties [*i.e.*, ESDC, the City or NYCEDC] or FCRC upon 30 days written notice." *Id.*

28. Ultimately, neither the Arena Development Project MOU nor the ATURA Development Project MOU was implemented in the manner described in those documents. Instead, the two ideas were combined into one project by adding Site 5 (excluding the community garden) to the Atlantic Yards Project that is the subject of this proceeding.

#### **Scoping Process and Coordinated Review Under SEQRA**

29. Pursuant to the requirements of SEQRA, ESDC developed a draft scope of analysis (the “Draft Scope”) and initiated a coordinated review of the proposed project.

30. On September 16, 2005, ESDC issued a Notice of Public Scoping and Intent to Prepare a Draft EIS (the “Public Scoping Notice”) and a Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement (the “Combined Notice,” together, with the Public Scoping Notice, the “Scoping Notices”). AR 20330–31, 20326–29.

31. In the Scoping Notices, ESDC announced its intent to serve as “lead agency” for the proposed Project under SEQRA. AR 20326, 20330; *see also* 6 N.Y.C.R.R. § 617.6 (procedure for establishing lead agency).

32. In the Combined Notice, ESDC also determined that the Project could have the potential to result in significant adverse environmental impacts and issued a Positive Declaration, constituting ESDC’s determination that a draft EIS would be prepared. AR 20327–28.

33. In the Scoping Notices, ESDC also announced the availability of the Draft Scope. AR 20328, 20331. The Draft Scope was posted on ESDC’s web site and widely distributed to public officials and agencies and other interested parties.

34. Finally, in the Scoping Notices, ESDC provided notice of the public scoping meeting scheduled for October 18, 2005, at the New York City College of Technology in Brooklyn, and advised that written comments on the Draft Scope would be accepted until October 28, 2005. AR 20328, 20331.

35. The Public Scoping Notice was published in the *Environmental Notice Bulletin* on September 21, 2005; the *City Record* from September 16 to September 19, 2005; and the *New York Daily News*, the *Brooklyn Daily Eagle* and the *Brooklyn Daily Challenge* on September 16, 2005. AR 20332-39.

36. In accordance with SEQRA requirements, the Combined Notice was sent to a number of parties, including all anticipated involved agencies, and was accompanied by Parts 1 and 2 of the Full Environmental Assessment Form (“EAF”), the Draft Scope and a reply form. In the Combined Notice, ESDC requested that agencies use the reply form to indicate whether they consented to ESDC’s serving as lead agency. As provided for in the SEQRA regulations (6 N.Y.C.R.R. § 617.6(b)(3)(i)), ESDC advised the agencies that if no objections were made within thirty days from the mailing of the Combined Notice, it would be assumed that the agencies concurred that ESDC serve as lead agency. AR 20328-29.

37. ESDC received no objections to its proposal to serve as lead agency. As contemplated by the SEQRA regulations, ESDC worked closely with the other involved agencies throughout the SEQRA review process.

38. In particular, MTA (and its constituent agencies, the Long Island Rail Road (“LIRR”) and MTA New York City Transit (“MTA-NYCT”)) and the City (through the Mayor’s Office of Economic Development and Rebuilding, the Department of City Planning and

the Department of Transportation (“DOT”)) participated extensively in the SEQRA review of the Project.

39. In addition, a number of other State and City agencies were consulted in the environmental review, including the New York State Office of Parks, Recreation and Historic Preservation (“OPRHP”), the New York City Landmarks Preservation Commission (“LPC”), the New York City Fire Department (“FDNY”), the New York City Department of Environmental Protection (“DEP”), the New York City Police Department (“NYPD”), the School Construction Authority, the Department of Education, and the New York City Department of Parks and Recreation.

#### **Public Participation in the Scoping Process**

40. The public scoping meeting that took place on October 18, 2005 was well attended. Eighty-five people gave oral comments.

41. The scoping comment period closed on October 28, 2005. More than 150 written comments were submitted, many of which were quite detailed.

42. Over the course of the next several months, ESDC reviewed and considered all comments on the Draft Scope and made significant changes to the scope in response to those comments. In particular, ESDC expanded the primary study area for land use, zoning and public policy impacts from ¼-mile to ½-mile around the project site; expanded the urban design and visual resources study area to include major view corridors; expanded the traffic study area to 93 intersections from approximately 65 intersections; added a quantitative analysis of on-street parking within ¼-mile of the project site; added a discussion of bicycle facilities in the vicinity of the project site; added a weekend post-game peak hour analysis to the transportation analyses; and added the consideration of lower-density alternatives such as the

specific proposals that had been identified during the scoping period (*i.e.*, the UNITY plan, the Extell Proposal and the Pacific Plan). AR 22657–706 (Final Scope).

43. Between fall 2005 and spring 2006, ESDC also participated in efforts to inform the public about the project and the review process, including the participation of and attendance by its staff and consultants at meetings of the Borough Board Atlantic Yards Committee established by the Brooklyn Borough President’s Office.

44. As a result of an ultimately unsuccessful lawsuit commenced by certain groups opposed to the Project (*Develop Don’t Destroy Brooklyn v. ESDC*, Index No. 100686/06 (Sup. Ct. N.Y. Co.)) on January 17, 2006, ESDC was forced to retain new environmental counsel for its review of the Project. ESDC’s new environmental counsel worked with ESDC and its consultants to become familiar with the proposed Project, the Draft Scope and the public comments on the Draft Scope.

45. The final scope of analysis, reflecting consideration of comments made during scoping, was issued on March 31, 2006 (the “Final Scope”). AR 22657–706. The Final Scope described the analysis to be included in the EIS for the Project.

#### **Preparation of the Draft Environmental Impact Statement**

46. In accordance with the Final Scope and in close consultation with involved and interested agencies, ESDC and its consultants prepared the draft EIS (the “DEIS”). AR 20386.

47. The DEIS examined sixteen environmental areas in great detail: land use, zoning and public policy; socioeconomic conditions; community facilities; open space and recreational facilities; historic and cultural resources; urban design and visual resources; shadows; hazardous materials; infrastructure; traffic and parking; transit and pedestrians; air

quality; noise; neighborhood character; construction; and public health. *See* AR 20387–397. Significant adverse impacts were identified in the following areas: community facilities (schools), historic and cultural resources, visual resources, shadows, traffic, pedestrians, noise and construction. AR 20443–69 (DEIS, Executive Summary, S-13 to S-39). The DEIS also identified a temporary significant adverse open space impact in a ¼-mile study area at the end of the first phase of construction until the open space is constructed over the course of the Project’s second phase. *Id.* Even after implementation of a comprehensive package of mitigation measures, the DEIS identified unmitigated impacts in the areas of historic and cultural resources, visual resources, shadows, traffic, noise and construction. *See* AR 21557, 21725 (DEIS at 19-1, 21–1).

48. ESDC studied a reasonable range of alternatives in detail, comparing their impacts in the sixteen environmental areas to those of the proposed project. The DEIS analyzed in detail the following alternatives: a No Action Alternative, a No Unmitigated Impact Alternative, an As-of-Right Alternative, a Reduced Density – No Arena Alternative and a Reduced Density – Arena Alternative. AR 21631–724 (DEIS, Chapter 20).

49. Under the No Action Alternative, the MTA would not dispose of the air rights for the rail yard and, therefore, the rail yard (Blocks 1119, 1120, and 1121) would remain in its current condition. For the No Action Alternative, the DEIS conservatively assumed, where appropriate, that the conditions currently present on the project site would remain the same in the future without the proposed project because this would result in a greater difference in development between the future with and without the proposed project. AR 20532 (DEIS at 2-7; *see also* AR 11966, 12415 (FEIS at 24-67, 24-516)).

50. Because no practical alternative could be developed that would fully mitigate all of the unmitigated effects of the Project, the No Unmitigated Impacts Alternative of the DEIS explored program modifications for each of the areas in which the Project was determined to cause unmitigated impacts in order to identify whether there were feasible changes in the Project to avoid these unmitigated effects. AR 21645–47 (DEIS at 20-15 to 20-17); *see also* AR 12416 (FEIS at 24-517).

51. The Reduced Density – No Arena Alternative was based on the proposal submitted by the Extell Development Company (“Extell”) in response to the MTA’s RFP for Vanderbilt Yard. AR 21648 (DEIS at 20-18). The Reduced Density – Arena Alternative was derived from the “Pacific Plan,” an alternative proposal that was submitted during the scoping process. AR 21685 (DEIS at 20-48). ESDC and its consultants obtained details of the Extell plan from Extell and the Pacific Plan from its creator so that the two alternatives could be accurately described and thoroughly analyzed.

52. The DEIS also contained a qualitative discussion of the “Unity Plan Alternative,” which was based on a plan developed in a workshop by local political leaders, residents and business owners. Extell reviewed the Unity Plan and incorporated the plan’s major concepts into its proposal, which, as noted above, was analyzed as the Reduced Density—No Arena Alternative. AR 21647–48 (DEIS at 20-17 to 20-18).

53. In addition, the DEIS discussed alternative sites in Brooklyn for an arena based on previous studies and reports, including Coney Island, the Brooklyn Navy Yard, the Brooklyn Army Terminal and Broadway Junction. AR 20480–83 (DEIS at 1-9 to 1-12). ESDC determined that “only the project site would be large enough to accommodate a cohesive, comprehensive development containing the arena and a mix of synergistic uses, while offering

extraordinary transportation access, proximity to a Central Business District, and substantial publicly accessible open space designed to foster pedestrian activity and promote connections with the surrounding neighborhoods.” AR 20483 (DEIS at 1-12).

54. Since the Project would involve the development of several elements over an extended period of time, two analysis years, 2010 and 2016, were considered in the DEIS. The 2010 analysis year (“Phase I”) was selected because a key component of the Project, the arena, was expected to be completed by fall 2009, with the remaining development on the western portion of the project site (Blocks 1118, 1119 and 1127 (the “arena block”) and on part of Block 927 (“Site 5”)) completed by the next year. AR 20530 (DEIS at 2-5). In addition to the arena, Phase I development includes office space, retail space, residential units, parking, possible hotel space, a publicly accessible Urban Room, the new subway entrance and related circulation improvements on the southeast corner of Atlantic and Flatbush Avenues, the reconstruction of the LIRR rail yard, interim parking on Blocks 1120 and 1129, upgrades to infrastructure, and the reconstruction of the 6th Avenue and Carlton Avenue bridges over the rail yard between Atlantic Avenue and Pacific Street. *Id.*

55. The remainder of the development program (“Phase II”) was anticipated to be complete by 2016 and would be built on the eastern portion of the project site (Blocks 1120, 1121, and 1129 and part of Block 1128). *Id.* A platform would be built over the upgraded rail yard (Blocks 1120 and 1121) to support six of the 11 buildings constructed during Phase II. *Id.* Phase II development includes residential units, retail space, community facilities, publicly accessible open space, and permanent parking. *Id.*

56. A construction schedule for both phases was submitted to ESDC. AR 22167 (DEIS App. F). The construction schedule provided a level of detail far greater than what

is typically used for analysis during environmental review, providing detailed construction phasing, along with associated equipment requirements, truck deliveries, labor requirements and location of equipment/work activity on the project site. ESDC's environmental consultant – AKRF, Inc. (“AKRF”) – examined the schedule for its general sensibility, questioned the project sponsor's construction team regarding various elements and assumptions of the construction phasing, and concluded that a ten-year construction period, while ambitious, was feasible.

57. The detailed nature of the construction schedule provided a sound basis for the workability of the timeline and also laid the foundation for a detailed analysis of construction impacts. The construction analysis identified the peak periods of activity and examined the impacts during those periods. Because it used specific information regarding the use and location of equipment and numbers of trucks and other vehicles entering and leaving the project site, the DEIS analysis was able not only to analyze potential impacts but also to identify numerous opportunities for the avoidance and minimization of construction impacts, including implementation of a state-of-the-art emissions reduction program that would minimize use of diesel engines, require exclusive use of ultra-low sulfur diesel, and make use of best available tailpipe reduction technologies. AR 21487–48 (DEIS at 17-62 to 17-63).

58. The DEIS also contained detailed analyses of traffic and transit. The traffic analyses considered five weekday and two weekend peak hours, based on the times when the Project's various components would be expected to generate their highest demand, and focused on locations where new traffic was expected to be most concentrated. AR 21124–25 (DEIS at 12-5 to 12-6). The analysis methodologies, planning assumptions, traffic study area, the intersections to be analyzed, and the traffic assignments utilized in the analysis were all developed in consultation with DOT.

59. The transit analyses focused on the 8-9 AM and 5-6 PM peak commuter hours, the 7-8 PM pre-game peak hour when the Project would generate its highest level of subway demand, and the 10-11 PM weekday and 4-5 PM Saturday post-game periods. AR 21223–26 (DEIS at 13-5 to 13-8). ESDC consulted with MTA-NYCT in the development of its planning assumptions.

60. Under SEQRA, ESDC is not required to analyze every conceivable impact, and the agency made reasoned and well-considered decisions not to include in the DEIS certain issues that had been suggested in comments on the Draft Scope.

61. For example, ESDC and its consultants determined that the Project's layout and massing would not create canyon-like designs that would result in significant wind issues. Nor would the Project's location indicate the potential for significant wind impacts since the Project would not be located near the ocean or in an area already characterized by narrow, canyon-like streets.

62. In addition, ESDC considered whether the issue of terrorism should be discussed in the DEIS. (The agency had received requests during the scoping process to incorporate terrorism implications into the final scope.) The agency considered whether such a discussion would improve the quality of the environmental review and serve the purposes of SEQRA. FCRC informed ESDC that it was involved in ongoing consultations with the NYPD's Antiterrorism Bureau and that it had retained a leading security consultant specializing in terrorism. FCRC also informed ESDC that the design of the Project was incorporating elements, such as screening areas, bollards, blast-proof building materials and security surveillance systems, to address certain risks. Ultimately, ESDC determined that the type of information that would be made public in a review of terrorism risks would not be information appropriate for

public disclosure and that publication of the information would be counterproductive from a SEQRA and public safety standpoint. ESDC also determined that, from a SEQRA perspective, the risk of a terrorist attack was speculative because there have been few such attacks in U.S. history and that, in addition, the risks and impacts would be very difficult, if not impossible, to analyze given the range of scenarios that could be hypothesized.

63. In reaching its conclusion that the EIS for the Project should not include an analysis of terrorism-related impacts, ESDC was also aware that recent EISs for other large projects in New York City did not specifically address the issue. In particular, ESDC was aware that the World Trade Center Memorial and Redevelopment Plan GEIS (April 2004), the Fulton Street Transit Center FEIS (October 2004) and MTA East Side Access-50th Street Facility EAS (January 2006)/East Side Access FEIS (March 2001) did not include any analysis of the environmental impact of a terrorist attack. ESDC knew, for example, that for obvious reasons, none of these documents disclosed with any specificity the details of the surveillance systems, blast proofing and other security elements incorporated into the design of these projects. Thus, after giving the issue careful thought, ESDC reasonably reached the conclusion that the issue of terrorism was not appropriate for review under SEQRA under the facts and circumstances presented by the proposed Project.

#### **Preparation of Other Project-Related Documents**

64. Design Guidelines for the Project were developed in close consultation with FCRC, the New York City Department of City Planning (“DCP”) and ESDC. The proposed and final Design Guidelines are in the record (AR 104–208 and 20099–207). They prescribe building envelopes and other elements to guide the development of the Project during the ten-year build out. DCP had advocated for the development of the Design Guidelines to set forth urban design goals and principles establishing an overall framework for the design and

development of the project site. As explained below, the Design Guidelines are an attachment to the GPP.

65. Prior to the release of the General Project Plan under the UDC Act, ESDC and its consultant AKRF also prepared, for eventual attachment to the GPP, the Blight Study. This report presented “an evaluation of conditions in the area proposed for the Atlantic Yards Arena and Redevelopment Project which themselves are evidence of blight or which may retard the sound growth and development of surrounding areas.” AR 221 (Blight Study at A-1).

#### **ESDC Directors’ Meeting July 18, 2006 and Post-Meeting Notices**

66. At its meeting on July 18, 2006, the ESDC Directors (the “Directors”) accepted the DEIS for the Project. AR 60. At the same meeting, the Directors adopted proposed Land Use Improvement Project Findings and Civic Project Findings and the GPP for the Project. AR 59. The Blight Study and proposed Design Guidelines were attached to the GPP so that they would be subject to public comment. AR 214–594, 104–208. The Directors authorized a public hearing as required under SEQRA, EDPL and the UDC Act. AR 57–60.

67. The Notice of Completion for the DEIS was issued on July 18, 2006, and copies of the DEIS, along with the Notice of Completion, were sent to public agencies, the Mayor of the City of New York, the Brooklyn Borough President’s Office, and the three community boards in the vicinity of the project site, as well as local members of the New York City Council, New York State Senate, New York State Assembly, and United States House of Representatives. AR 22455–56. Copies of the Executive Summary were sent to New York’s two Senators.

68. The DEIS was made available to the public on the ESDC web site, and hard copies were provided to the Central Library, Bedford Branch, Clinton Hill Branch, Pacific

Branch, and Walt Whitman Branch of the Brooklyn Public Library. Hard copies of the DEIS were also made available to the public at the Brooklyn Borough President's Office and the offices of Brooklyn Community Boards 2, 6, and 8. AR 22469.

69. In addition, the DEIS was available for inspection by the general public at the office of ESDC between 9:30 AM and 5:00 PM, Monday through Friday, public holidays excluded, and was also available for inspection at the public hearing and community forums. The executive summary of the DEIS and a CD-ROM including the entire DEIS were made available at no charge from ESDC upon request, and hard copies of the entire DEIS were available for purchase (at a price set to cover the costs of copying the document). *Id.*

70. Additional documents related to the DEIS were made available either in hard copy or on CD-ROM at the libraries where the DEIS had been made available, to Community Boards 2, 6 and 8 and the Brooklyn Borough President's Office, and at ESDC's office. These documents included a report prepared by HydroQual Environmental Engineers and Scientists, P.C. regarding "Impact of the Atlantic Yards Project on Local Sewer Infrastructure: Summary Report" and Phase 2 environmental site assessment reports prepared by Roux Associates Inc.

71. The GPP and its exhibits were also made available to the public on the ESDC web site, and hard copies of the GPP were available upon request from ESDC. The GPP and its exhibits were available for inspection by the general public at the office of ESDC between 9:30 AM and 5:00 PM, Monday through Friday, public holidays excluded and were also available for inspection at the public hearing and community forums. *Id.*

72. Pursuant to Section 16(2) of the UDC Act, ESDC filed a copy of the General Project Plan, and the findings required under Section 10 of the UDC Act, in the office of

the Clerk of Kings County and the office of the Clerk of the City of New York, and provided copies to the Mayor of the City of New York, the Borough President of Kings County, the Chair of the City Planning Commission, and the Chairs of Brooklyn Community Boards 2, 6 and 8. *Id.*

73. From July 24 to July 28, 2006, a notice (the "Hearing Notice") for a public hearing pursuant to Sections 6 and 16 of the UDC Act, Article 2 of the EDPL and SEQRA was published each day in the *New York Post* and *City Record*. AR 22471, 22474, 22477, 22504-06. The Hearing Notice announced that the hearing would take place on August 23, 2006 at the New York City College of Technology (Klitgord Auditorium), 285 Jay Street, Brooklyn, New York, from 4:30 to 8:30 PM. In addition, notice of the public hearing was published in the *Environmental Notice Bulletin* on July 26, 2006, and provided in the DEIS Notice of Completion. The Hearing Notice invited written comments and established a comment period extending to September 22, 2006. It also provided that comments could be made verbally at a community forum to be held from 4:30 to 8:00 PM on September 12, 2006 at which ESDC representatives would be present. The community forum would take place at the same location as the public hearing. AR 22470.

#### **Public Hearing August 23, 2006**

74. On August 23, 2006, ESDC held the public hearing pursuant to SEQRA, the EDPL and the UDC Act in the Klitgord Auditorium at the New York City College of Technology at 285 Jay Street, Brooklyn, New York. AR 9741-10134 (Public Hearing Transcript).

75. The location was selected because it could accommodate a large audience (the capacity is 850) and because of its proximity to the project site. AR 22615.

76. ESDC arranged for security guards to assist in maintaining order at the hearing, both inside and outside the facility, and also notified the NYPD of the event. ESDC

provided the security staff with a list of names of ESDC personnel, ESDC consultants, elected officials and FCRC employees who were to be allowed early entry into the auditorium. No other persons were sanctioned by ESDC to bypass the line. *Id.*

77. The hearing was scheduled to begin at 4:30 P.M. AR 22458. Due to a booking earlier in the day, ESDC was not allowed access to the facility to prepare for the hearing until 3:30 P.M. All information posted and released with respect to the hearing informed attendees that they would be allowed to enter the building at 4:00 P.M. AR 22615.

78. When the doors to the building were opened to the public, ESDC and AKRF staff members signed in speakers, manned the materials inspection desk (where the DEIS, GPP, Blight Study and other materials were made available for public inspection), ran speaker cards to the hearing officer, provided copies of project materials such as the Executive Summary of the DEIS and the GPP to the members of the public, and listened to the public presentations. *Id.*

79. The public hearing began shortly after 4:30 with an introduction by the independent hearing officer retained by ESDC to conduct the hearing, Edward Kramer, an attorney practicing in New York City. AR 9754.

80. The hearing officer's introduction was followed by presentations by Ann Hulka, Senior Vice President, Real Estate Development, ESDC, and two consultants representing the firms that assisted ESDC with the preparation of the EIS, Linh Do of AKRF and Philip A. Habib, P.E., Ph.D. of Philip Habib & Associates ("PHA"). Ms. Hulka provided a description of the Project. AR 9760–63. Ms. Do and Dr. Habib provided an overview of the DEIS and the significant adverse impacts it had identified. AR 9764–85.

81. Other ESDC officials in attendance included Eileen Mildenberger (Executive Vice President & Chief Operating Officer), Rachel Shatz (Director of Planning & Environmental Review), Steve Matlin (Senior Counsel), and Joe Petillo (Senior Counsel). AR 9742.

82. At the conclusion of the presentations, the hearing officer set forth guidelines that would be followed. In particular, he stated that public officials would be allowed to speak as soon as possible after their entrance into the hearing room, AR 9786, and asked that all speakers limit their remarks to three minutes. AR 9787–88. He also emphasized that “that there are no limitations on your submission of written statements, comments or materials at today's hearing, or at any time prior to close of the written comment period on September 22, 2006.” AR 9789.

83. After setting forth guidelines for the hearing, the hearing officer then proceeded to call elected officials who had signed in to provide oral testimony. AR 9793. After all elected officials had spoken, the hearing officer called on members of the public to provide their oral testimony. AR 9839.

84. Because ESDC staff members had noticed that project supporters were positioned at the front of the line and that there would therefore be a predominance of early speakers testifying in favor of the Project if speakers were called solely based on the order in which they signed up, ESDC took steps to provide some balance to the order of the presentations. In particular, as speakers signed in, ESDC staff members and consultants inquired as to speakers' positions with respect to the Project and attempted to order the speaker cards in a balanced manner. AR 22615–16.

85. ESDC held the hearing open for three hours beyond the scheduled closing time until 11:30 PM to accommodate as many speakers as possible. At the close of the hearing, the hearing officer indicated that the hearing record was closed. AR 10128–29. The hearing officer also indicated that ESDC would accept written comments through September 22 and would also accept oral comments at the community forum on September 12. AR 10128–32.

86. Ninety-nine people spoke at the public hearing. The number of speakers making comments in favor of the Project was approximately equal to the number of speakers who made comments opposing or criticizing the Project.

#### **Community Forums & Comment Period Extension**

87. The public was afforded additional opportunities to make oral comments at two community forums held on September 12, 2006, and September 18, 2006.

88. Initially, only the September 12 community forum was scheduled. This forum was announced in the Hearing Notice. AR 22470.

89. After issuance of the DEIS, ESDC received comments that the September 12 community forum coincided with primary day and that it would be inconvenient for interested members of the public to both attend the forum and vote or participate in other primary-related activities.

90. In response to these comments, ESDC scheduled the September 18 community forum to provide another opportunity to give oral comments on the Project. AR 22502–03.

91. In response to requests that ESDC extend the public comment period, ESDC also extended the public comment period for one week, until 5:00 P.M. on Friday, September 29, 2006. *Id.*

92. The September 18 community forum and the extension of the comment period were announced on the ESDC web site and in the *New York Post* on September 1, 2006, the *City Record* on September 1, 2006, and from September 5 to September 7, 2006, the *Brooklyn Daily Eagle* on September 13, 2006, and the *Brooklyn Papers* on September 9, 2006, and September 16, 2006. AR 22504–14.

93. ESDC representatives attended both community forums, but, unlike the public hearing, the community forums did not begin with presentations about the project by ESDC officials and consultants. Because the public hearing format used by ESDC provided the most efficient means for gathering oral comments, the community forums were run in the same fashion as the August 23 public hearing. The forums began with brief introductions by Edward Kramer, who had also presided at the public hearing, followed by the comments of attendees. *See* AR 10135–270, 10271–465 (Community Forum Transcripts).

94. A total of 104 people spoke at the two community forums, 41 at the September 12 forum and 63 at the September 18 forum. All attendees who signed up to speak at the forums were able to make their comments.

95. On September 29, 2006, the comment period ended. ESDC continued to receive some public comments after the end of the comment period; ESDC exercised its discretion to consider these comments as well. In total, ESDC received written comments from over 1,800 people and organizations.

#### **The Community Advisory Committee**

96. Section 4 of the UDC Act, Unconsol. L. § 6254(7), requires that a Community Advisory Committee (“CAC”) be established on a project-specific or area-specific basis to advise ESDC on projects it is undertaking.

97. Under the UDC Act and Court of Appeals precedent, ESDC has discretion to constitute the CAC before a project is approved or, alternatively, to constitute the CAC after a project is approved to give ESDC advice on its implementation.

98. In the case of the Atlantic Yards Project, ESDC determined that it would constitute the CAC prior to publication of the DEIS for the Project.

99. Under the UDC Act, it is within ESDC's discretion to determine the composition of a CAC. For the Project's CAC, the ESDC determined that the Committee would have six members representing six constituencies: (i) Brooklyn Community Board 2 ("CB2"); (ii) Brooklyn Community Board 6 ("CB6"); (iii) Brooklyn Community Board 8 ("CB8"); (iv) the Brooklyn Borough President; (v) the City, through NYCEDC; and (vi) the State, through ESDC.

100. Local community boards – such as CB2, CB6 and CB8 – are established by the New York City Charter to advise the City with respect to local matters, including development projects proposed within the district boundaries of the community board. *See* New York City Charter, Chapter 70. New York City Charter § 2800 states that Community Board members must “have a residence, business, professional, or other significant interest in the district.” The same provision of the Charter states that Community Board members must “consider the needs of the district which [the Community Board] serves.”

101. The Project's geographic footprint covers or borders CB2, CB6 and CB8, making them a logical choice to participate in the CAC. Representatives from the Brooklyn Borough President's office and the City were included in the CAC because the Project is located in Brooklyn and New York City.

102. On March 16, 2006, ESDC Chairman Charles Gargano sent a letter to each of the Chairpersons of Community Boards 2, 6, and 8, to the Brooklyn Borough President,

and to NYCEDC seeking their recommendations as to who should fill the respective CAC seat. AR 22621–25.

103. As Mr. Gargano described in the letter, the role of the CAC was to be that of an advisor to ESDC and liaison between ESDC and the local community. *Id.*

104. The ESDC determined that a six-person CAC, as opposed to a much larger committee, would facilitate the discussion, consultation and advice between the ESDC and CAC.

105. Ultimately, the six members of the CAC were (a) Shirley A. McRae, the Chairperson of CB2; (b) Jerry Armer, the Chairperson of CB6; (c) Robert Matthews, the Chairperson of CB8; (d) Doug Jones, a Senior Associate in Government and Community Relationship at NYCEDC; (e) Delia Hunley-Adossa, who has many ties to the local community and who served as the Brooklyn Borough President’s nominee; and (f) Dr. Una Clarke, who was the Director of the ESDC Community Network Office, which helps local businesses and community organizations take advantage of government resources. *See* AR 22628–29. Dr. Clarke is a former NYC Council member from Brooklyn’s 40th District.

106. There were also three alternate members of the CAC, all of whom were Community Board members: Robert Perris from CB2; Craig Hammerman from CB6; and Doris Alexander from CB8. *Id.* The purpose of having an “alternate” member of the CAC from each Community Board was to make it more likely that a representative of each of the three affected Community Boards was present at each of the CAC meetings.

107. Further, when the Community Board CAC members asked ESDC if the full Executive Committees from Community Boards 2, 6, and 8 could attend CAC meetings, ESDC indicated that they could attend. AR 22630.

108. The CAC for the Project held its first meeting on June 29, 2006.

109. Three additional meetings of the Project CAC were held, all of them prior to the close of the public comment period on the GPP. Those meeting dates were August 9, 2006, September 7, 2006, and September 26, 2006.

110. In response to a July 24, 2006 letter from three CAC members – CB2’s Shirley McRae, CB6’s Jeremy Armer, and CB8’s Robert Matthews – ESDC set forth, in a letter dated July 31, 2006, the specific areas as to which ESDC sought the CAC’s advice. AR 22630. The July 31, 2006 letter requested that the CAC advise it on the DEIS, the GPP, the Design Guidelines and the fiscal and economic impacts anticipated from the Project. *Id.*

111. ESDC also stated in its July 31, 2006 letter that ESDC wanted to schedule three CAC meetings at which ESDC representatives and consultants would participate and be available to the CAC for comments and questions. ESDC offered suggested dates for those three meetings. *Id.*

112. In light of the fact that ESDC had already retained consultants for the Project (AKRF and PHA), ESDC declined CAC’s request to fund additional consultants to advise the CAC. AR 22631.

113. On August 9, 2006, the CAC held its second meeting at the Brooklyn Borough President’s offices. Among those in attendance were the three Community Board Chairs, the three CAC Community Board alternates and members of the three Community Boards’ respective Executive Committees. The Brooklyn Borough President’s CAC nominee, Delia Hunley-Adossa, also attended. ESDC representatives and its consultants AKRF and PHA presented an overview of the DEIS to the CAC, focused on, among other things, transportation and construction impacts and proposed mitigation measures. AR 22644. The CAC and other attendees made comments and asked questions of ESDC, AKRF and PHA. *See* AR 22655. A

lively exchange took place, with the CAC advising ESDC of concerns relating to community facilities, cultural resources, urban design/visual resources, shadows, noise, traffic and parking, mass transit, pedestrians, construction impacts, schools, and issues affecting the Police and Fire Departments. *Id.* Among other things, CAC members asked for clarification of proposed street directional changes, suggested that ESDC prioritize consideration of on-site co-generation plants, asked ESDC to consider sunlamps to mitigate any loss of sunlight, expressed concern regarding emergency response times due to construction, and voiced other construction-related concerns including air pollution and noise. *Id.* Further, CAC members suggested at the August 9 meeting that an additional subway access point be constructed on Site 5, and that the ESDC should work to gain an MTA commitment of increased post-game train frequency. *Id.* Many of these concerns were addressed in the Project's Final Environmental Impact Statement ("FEIS"). *See, e.g.,* AR 11364 (FEIS at 13-3 (any significant adverse impact on platform conditions after games would be addressed with additional train service)); AR 10604, 11413 (1-25, 13-45 (new emergency subway exit on Site 5)).

114. At the September 7, 2006 CAC meeting, ESDC made available to the CAC Charles Webb, Esq. of Berger Webb LLP, ESDC's special condemnation counsel, in order to provide additional information and to answer questions concerning the condemnation process, property value determination, and the relocation program described in the GPP. ESDC's Ann Hulka and ESDC senior counsel Steven Matlin and Joseph Petillo also attended the meeting to respond to questions about the GPP and condemnation processes and to hear the concerns of the CAC. The bulk of the issues raised by the CAC at the meeting involved traffic and mass transit.

115. At the September 26, 2006 meeting, the attendees included three CB2 members, one of whom also served on the Atlantic Avenue Betterment Association, and two

CB6 members (including CAC member Jerry Armer). ESDC provided the CAC with direct access to consultants Dr. Philip Habib of PHA, Seth Wright of PHA, Linh Do of AKRF and Chi K. Chan of AKRF. At this meeting, AKRF and PHA made presentations on construction practices and issues related to traffic, parking, and transit. AR 22644–54. As occurred at the earlier meetings (and, in particular, the August 9<sup>th</sup> meeting), there was an active dialogue between the community representatives and AKRF and PHA, in the presence of the ESDC representatives. Attendees voiced concerns and made suggestions concerning traffic issues, parking issues, additional trains, pedestrian safety, a potential pedestrian bridge, impact on businesses and impacts on the City’s electric grid. Specific advice given to ESDC by CAC members included requests to consider a vehicular tunnel or bypass, a residential parking permit program, a pedestrian bridge and co-generation. Other suggestions that the CAC expressed to ESDC and the Project consultants at the meeting concerned logistics and enforcement of a computerized parking system and charter bus staging and layover problems. The CAC voiced concern over the loss of police parking spots at the 78th Precinct due to Project construction. Several of these concerns were addressed in the FEIS. *See, e.g.*, AR 10836 (FEIS at 5-7 (FCRC would provide off-street parking within the project site at a location proximate and convenient to the 78th Precinct for the up to 24 police vehicles that would be displaced); AR 12208, 12209, 12212, 12218, 12223 (FEIS at 24-309, 24-310, 24-313, 24-319, 24-324 (describing consultation with DOT)); AR 12228 (FEIS at 24-329 (addressing concerns regarding lay-by lanes)); AR 11710–18 (FEIS at 19-12 to 19-16 (pre-game traffic planning)).

### **Preparation of the Final Environmental Impact Statement**

116. After the close of the public comment period on September 29, 2006, ESDC proceeded to prepare the FEIS. The FEIS reflected modifications to the Project, as well

as the refinement of mitigation measures and changes made to the DEIS in response to public and agency comments. AR 10509–11 (FEIS at F-1 to F-3).

117. The principal modifications to the Project were made at the recommendation of the City Planning Commission (“CPC”). Pursuant to Section 16 of the UDC Act, a planning board or commission, in this case CPC, may recommend approval, disapproval or modification of a GPP, whenever such plan requires the override of local law or regulations for implementation or the acquisition of property by eminent domain. *See* Unconsol. L. § 6266(3)(c). After a review session on September 25, 2006, at which representatives of ESDC and City agencies responded to Commissioners’ questions, CPC issued its comments on the GPP in a September 27, 2006 letter in which it expressed strong support for the Project but suggested certain modifications. AR 13994–14001. The letter stated that “[t]he Commission believes that the Project builds on the City’s ongoing efforts to continue the growth of Downtown Brooklyn, the city’s third-largest central business district, by utilizing the area’s excellent transit infrastructure to provide new entertainment, commercial and residential uses.” AR 13995. The letter went on to note that CPC was “pleased that the ESDC and the developers have consulted with the Department of City Planning during the course of the design of this Project, and that this has resulted in several major improvements to the Project’s urban design features and amenities,” noting that the Urban Room in particular would “function as an important public gathering place.” AR 13996. CPC also noted its satisfaction with the development of detailed Design Guidelines (for which DCP had advocated) to govern the project site’s building forms, signage, streetscape and open space, stating that the Design Guidelines “will reflect design excellence and enhance the future urban fabric of the area.” *Id.* CPC then recommended modifications to the Project’s design that included reductions in the heights of three of the Project’s buildings and an

increase in the open space component from “at least seven acres” to eight acres. AR 13997–98.

Finally, CPC concluded:

As a transit-oriented development with new connections to the borough’s largest transit hub, and given its unique location in Downtown Brooklyn, in close proximity to other high-density commercial uses, and at the intersection of three of the borough’s major commercial thoroughfares, the Project is appropriate for significant density and a mix of entertainment, commercial, retail and residential uses. The changes proposed herein would enhance the architecture and urban design of the Project while reducing the overall size by eight percent, an amount equivalent to approximately 616,385 zoning square feet of floor area, and are consistent with project goals and objectives that recognize the unique opportunities afforded by the site’s location.

AR 13999. ESDC incorporated CPC’s recommendations into the GPP (and the revised Design Guidelines attached thereto) and the project analyzed in the FEIS. *See* AR 20052–96, 20099–207 (Modified GPP and revised Design Guidelines); AR 10509–11 (FEIS at F-1 to F-3).

118. In preparing the FEIS, ESDC also strengthened the mitigation program. Specific plans were developed to mitigate shadow impacts at the Church of the Redeemer and the Atlantic Terminal Houses open space, and a plan for the construction of a new elementary and intermediate school on the project site was developed in conjunction with the Department of Education. AR 11707–08 (FEIS at 19-9 to 19-10) (shadows); AR 11700 (FEIS at 19-2) (schools). FCRC also committed to working with the New York City Department of Parks and Recreation (“DPR”) to supplement DPR’s planned improvements to the Dean Playground near the project site with additional amenities that would make the playground attractive to a wider spectrum of users and more enjoyable to the general public. AR 11706–07 (FEIS at 19-8 to 19-9). By taking this action, FCRC would partially mitigate a temporary noise impact on the playground due to construction activities and an operational noise impact from increased traffic on Dean Street, as well as help to address the temporary significant impact on open space

availability that would occur between completion of Phase I of the project in 2010 and the creation of the Project's open space during Phase II. *Id.*; AR 11783, 11790 (FEIS at 19-72, 19-79).

119. In addition, the FEIS provided further analysis of why it would not be feasible to adaptively reuse the two properties on the project site that were eligible for listing on the State and National Registers of Historic Properties. AR 10948–53, 13231–95 (FEIS at 7-27 to 7-32, App. B). The Office of Parks, Recreation and Historic Preservation concurred with the determination that reuse of the two eligible properties was not prudent or feasible, AR 12473, and entered into a Letter of Resolution with ESDC and FCRC regarding mitigation measures to be taken with respect to the Project. AR 13305–11.

120. Concerning traffic, the comprehensive package of demand management strategies included in the DEIS (which included transit price incentives for arena patrons, discounted remote parking facilities and on-site high occupancy vehicle requirements for on-site parking) was expanded to incorporate input from MTA-NYCT and to include free charter buses to shuttle Nets fans between the arena and park-and-ride lots on Staten Island. AR 11710–18 (19-12 to 19-16). In addition, ESDC continued to work closely with DOT in preparation of the traffic analyses for the FEIS. AR 12217 (FEIS at 24-318). Upon completion of the FEIS analyses, DOT advised ESDC that it concurred with the findings included in the FEIS with respect to these subject areas and also advised ESDC that it found the traffic mitigation measures identified in the FEIS to be feasible. AR 14006–07 (FEIS at App. I).

121. The other primary task in completing the FEIS was the preparation of a new chapter for the FEIS, Chapter 24, "Response to Comments," which contained ESDC's responses to the hundreds of substantive comments on the DEIS. In addition, where appropriate,

changes were made to the rest of the EIS (Chapters 1 through 23) to reflect suggestions made by the public. Every comment that was submitted was reviewed by ESDC and its consultants and, if it raised a substantive issue, was addressed in Chapter 24. Where comments raised similar concerns, they were grouped together.

122. In addition to summarizing the comments in Chapter 24, the FEIS included copies of the actual comments themselves on a CD ROM. AR 10511 (FEIS at F-3). All of the documents in the CD ROM are included in the Administrative Record. AR 14011–19916.

123. ESDC and its consultants specifically considered each comment and prepared appropriate responses to them.

124. In particular, ESDC took heed of detailed comments received regarding wind impacts, including comments regarding impacts on the Brooklyn Bear’s Pacific Street Community Garden (“Bear’s Garden”). AR 17222–34 (comments submitted by Bear’s Garden). Although ESDC and its consultants had determined in preparing the DEIS that the Project would not possess characteristics that would create the potential for significant adverse wind impacts, the agency determined that in response to comments it would evaluate future wind conditions to determine whether there was a risk of adverse wind impacts at the Bear’s Garden or other locations on and near the project site. A study was prepared by an outside consultant that indicated there would be no significant adverse wind impacts, and this information was reflected in the FEIS’s Response to Comments. *See* AR 12431–33 (FEIS at 24-532 to 24-534), 22591–612 (wind study). According to the wind study, the Project would result in a 1 mph increase of the 80<sup>th</sup>-percentile average wind speed at the Bear’s Garden, AR 22608, a *de minimis* increase

validating the earlier determination of ESDC's staff and consultants that the Project would not cause a significant increase in wind speeds.

125. Some comments concerned issues or questions that had been addressed in the DEIS, and in these cases ESDC's responses referred to the relevant sections of the DEIS. In a few instances, commenters raised issues that they felt should have been addressed in the DEIS. In these cases, ESDC explained its rationale for not including the issue in the analysis of the Project's impacts. For instance, with respect to the issue of terrorism, ESDC explained that

[i]n accordance with SEQRA, the DEIS focuses on the impacts of the potential reasonable worst case from construction and operation of the proposed project. Emergency scenarios such as a large-scale terrorist attack similar to the World Trade Center attack, a biological or chemical attack, or a bomb are not considered a reasonable worst-case scenario and are therefore outside of the scope of the EIS. However, as indicated in Chapter 1, "Project Description," the proposed project would implement its own site security plan, which includes measures such as the deployment of security staff and monitoring and screening procedures. In addition, as noted in the FEIS, the project sponsors have consulted with the FDNY regarding access needs of emergency vehicles and other safety considerations, such as evacuation plans for places of public gathering and fire protection and security measures, and have met with NYPD to review the overall project and public safety and security measures. Consultation with NYPD and FDNY has been taking place and would continue should the project move forward. Disclosing detailed security plans is not appropriate for an EIS.

AR 12437 (FEIS at 24-538).

126. Ultimately, ESDC reviewed approximately 1,800 comments on the DEIS, many of which commented on the Project in great detail. ESDC and its consultants carefully considered each comment, and responded in good faith to each substantive issue that was raised.

### **ESDC Directors Meetings (November 2006): Approval of the FEIS**

127. On November 15, 2006, the Directors accepted a “Final Environmental Impact Statement.” AR 599. However, soon after the November 15 acceptance, it came to ESDC’s attention that a number of comments on the DEIS had been inadvertently left out of the FEIS. *See* AR 10468. ESDC announced its intent to prepare a corrected and amended FEIS and engaged in an exhaustive, far-reaching effort to ensure that all comments sent to the agency were logged and considered. A corrected and amended FEIS was prepared to include responses to these additional comments on the DEIS. AR 10468–69.

128. The ESDC Directors accepted the corrected and amended FEIS on November 27, 2006, and a Notice of Completion was issued. AR 10470, 14008. Throughout this Answer, “FEIS” refers to the corrected and amended FEIS dated November 27, 2006.

129. The FEIS was duly circulated and made available at the same locations as the DEIS had been made available, including the ESDC web site. All persons who had requested a copy of the November 15 FEIS were sent a copy of the corrected and amended November 27 FEIS.

130. After ESDC’s November 27 acceptance of the corrected and amended FEIS, ESDC received nine comments on the FEIS. AR 20223-67.

131. ESDC staff and ESDC consultants AKRF and PHA reviewed the comments on the FEIS as they were submitted. In addition, although SEQRA regulations do not require it, a written response to these comments was prepared. This response was finalized and submitted to Rachel Shatz, the ESDC Director of Planning and Environmental Review, on December 8, 2006. AR 20268-95.

132. None of the comments on the FEIS raised material issues that either had not been addressed in the FEIS or would affect the conclusions of the FEIS. A mathematical

error regarding open space impacts was identified in one response to comment on one page of Chapter 24, but this error did not affect the analysis of open space impacts in the FEIS chapter on Open Space (Chapter 6). AR 20278. Most of the comments on the FEIS reiterated comments made on the DEIS and had therefore already been addressed in the FEIS.

133. The nine comments on the FEIS were distributed to ESDC board members prior to the December 8 board meeting with a Status Briefing Memorandum from Rachel Shatz to ESDC Chairman Charles Gargano. *See* AR 20222. The Status Briefing Memorandum stated:

ESDC staff and consultants have reviewed in detail the comments submitted on the FEIS received up until today. These comments generally addressed issues related to process, the adequacy of the FEIS responses to comments and whether there was an appropriate level of analysis for technical areas such as traffic transit, security/terrorism, urban design, open space, socioeconomics, blight, wind and shadows. After careful consideration of these comments, we have determined that no new issues have been raised and there is no need for any additional analysis in light of the information and conclusions in the FEIS.

*Id.*

#### **ESDC Directors Meeting (December 8, 2006): Approval of the Project**

134. The memorandum from Chairman Charles Gargano dated December 8, 2006 summarizes the actions that the Directors were asked to take at the December 8 meeting. AR 19919–28. The memorandum also responds to the comments that ESDC received on the Blight Study during the public comment period. AR 19924–26.

135. The Resolution enacted by the ESDC Directors at their December 8 meeting effected a variety of determinations with respect to the Project. AR 19929-31. By the Resolution, the Directors adopted the Findings Statement required by SEQRA (hereinafter, the “SEQRA Findings Statement,” at AR 1–25.69); adopted the Determination and Findings pursuant to Article 2 of the EDPL (AR 26–49); and made several determinations required by the

UDC Act, including affirmation of the modified GPP (AR 20053–96), which describes the Project and its funding sources and sets forth the basis for the “land use improvement” and “civic project” findings required by Section 10 of the UDC Act. In addition, the Resolution authorized ESDC to enter into a funding agreement with FCRC with respect to certain Project costs, in an amount not to exceed \$100 million. AR 19931.

### **Summary Description of the Project**

136. The Project as approved by the ESDC Directors at their December 8, 2006 meeting is described in very considerable detail in several places in the record. *See* AR 20053–96 (Modified GPP); AR 20099–207 (Design Guidelines); AR 1–25.69 (SEQRA Findings Statement); AR 1–25.69 (FEIS Chapter 1). The discussion below is intended to provide a brief overview only.

137. The Project will be located in the Atlantic Terminal area of Brooklyn. (Atlantic Terminal is a terminus for a major LIRR line serving downtown Brooklyn and, via subway connections, Lower Manhattan.) The project site is situated immediately to the south of Downtown Brooklyn in an area that lies at the junction of several Brooklyn neighborhoods. Portions of the project site are within the Special Downtown Brooklyn District created by the New York City Zoning Resolution. The Project will occupy an approximately 22-acre area, roughly bounded by Flatbush and 4th Avenues to the west, Vanderbilt Avenue to the east, Atlantic Avenue to the north, and Dean and Pacific Streets to the south. AR 6, 14–15 (SEQRA Findings Statement at 5, 13–14).

138. The Project’s arena, residential units and commercial office space will be constructed in a location that is well suited to high-density development, situated in proximity to Brooklyn’s existing commercial center, at the intersection of ten subway lines (with two

additional lines nearby), eleven bus routes, and the LIRR Atlantic Terminal. Concentrating such an integrated mix of uses in this manner is “smart growth,” which will facilitate the return of major league sports to Brooklyn and accommodate projected regional growth in a manner that will promote mass transit. AR 19 (SEQRA Findings Statement at 18).

139. The Project will include the development of an arena, 16 buildings for residential, office, retail, community facilities, parking, and possibly hotel uses, and 8 acres of publicly accessible open space. The Project will also include a reconfigured and improved LIRR rail yard serving the Atlantic Terminal and a new direct entrance to the Atlantic Avenue/Pacific Street subway station complex. Finally, the Project will include an Urban Room that will serve as a spacious gateway to the escalators for the new subway station entrance and host concerts and other community events throughout the year. AR 6 (SEQRA Findings at 5).

### **SEQRA Findings**

140. The SEQRA Findings Statement sets forth the agency’s determination that the requirements of SEQRA have been met and that

consistent with social, economic and other essential considerations from among the reasonable alternatives available, the Project is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that the FEIS and this Findings Statement have identified as practicable.

AR 25.69 (SEQRA Findings at 93). In making these findings, ESDC described the Project and its purpose and need, then proceeded to consider the environmental impacts in all of the areas of analysis both before and after the implementation of mitigation measures. For areas where the Project would result in unmitigated adverse impacts, ESDC examined the impacts that remained and considered whether impacts had been mitigated to the maximum extent practicable. AR

25.33, 25.34–25.35, 25.35–25.36, 25.41–25.42, 25.43–25.44, 25.44–25.46 (SEQRA Findings at 57 (schools), 58–59 (cultural resources), 59–60 (visual resources), 65–66 (traffic), 67–68 (noise) and 68–70 (construction)). The SEQRA Findings Statement also described the enforcement measures that would be in place to ensure that FCRC fulfilled its obligations to implement measures to avoid and minimize impacts. AR 25.46 (SEQRA Findings at 70).

141. In elaborating its findings, ESDC found that the Project would have “many significant social, environmental, civic and economic benefits” and went on to enumerate a host of benefits: elimination of long-standing blight, creation of eight acres of publicly accessible open space, the creation of visual and physical links between neighborhoods currently divided by an open rail yard and blighted conditions, a new subway entrance, an improved LIRR rail yard, architecturally distinctive buildings certified as “green” buildings, a new arena that will bring back a major professional sports team to Brooklyn and provide a venue for other recreational, cultural, educational and civic events, and thousands of new housing units, including 2,250 affordable units. AR 25.65–25.66 (SEQRA Findings Statement at 89–90). In addition, ESDC found that the Project would foster efficient regional growth by locating a significant new development at a major transit hub and thereby encouraging the use of mass transit and that the Project will stimulate the New York City and New York State economies. AR 25.65 (SEQRA Findings Statement at 89).

142. In its findings, ESDC carefully enumerated and considered the unmitigated significant adverse impacts that would result from the Project, particularly in light of the benefits and impacts of the alternatives that had been studied. ESDC also noted that alternative sites identified in the FEIS, including those suggested in comments on the DEIS, suffered from one or more deficiencies (unavailability, lack of accessibility by mass transit or

size) that led ESDC to conclude that locating an arena at an alternative location was not a reasonable alternative. AR 25.66 (SEQRA Findings Statement at 90). ESDC then weighed the benefits of the Project against lower-density alternatives both with and without an arena. AR 25.66–25.69 (SEQRA Findings Statement at 90–93); *see also* AR 25.47–25.62 (SEQRA Findings Statement at 71–86).

143. In considering the Reduced Density – No Arena Alternative, ESDC noted that while the arena would result in significant traffic impacts, those impacts would be mitigated to the maximum extent practicable with a comprehensive package of physical improvements to the traffic network, operational improvements and an innovative set of demand management strategies. AR 25.66–25.67 (SEQRA Findings Statement at 90–91). Ultimately, ESDC found that the additional traffic impacts caused by the arena would be “far outweighed by the social, economic and civic benefits that an arena would offer.” AR 25.67 (SEQRA Findings Statement at 91).

144. In considering the Reduced Density – Arena Alternative, which would reduce the number of residential units in the project, the primary difference in impacts noted by ESDC was with respect to traffic. For the AM traffic peak hour, ESDC found that

[t]hese differences [in traffic impacts] are significant when considered in relation to the operation of the specific intersections and traffic movements that will be affected. However, when the network is viewed in its entirety, considering the very large number of intersections analyzed in the study area, these differences between the Project and the Reduced Density – Arena Alternative in the AM peak hour would not result in a markedly different driving experience in the area.

AR 25.67–25.68 (SEQRA Findings Statement at 91–92). ESDC reached the same conclusion with respect to the PM peak hour. AR 25.68 (SEQRA Findings Statement at 92). Viewing the relative benefits and impacts of the Project and the Reduced Density – Arena Alternative as a

whole, ESDC noted that the alternative would provide much less market rate and affordable housing, commercial space and open space. *Id.* ESDC further found that “[f]rom a regional planning standpoint, accommodating anticipated growth at a major in-City transit hub such as the project site is good public policy and offers distinct environmental benefits by encouraging the use of mass transit and re-use of urban land” and that “[d]ue to careful planning and the incorporation of sustainable design features, the Project will accommodate the density of the housing and other development located at the project site with minimal impacts to many aspects of the environment.” *Id.* ESDC determined that the density of the project site was appropriate and that the social, economic and environmental benefits of its density outweighed the marginal reduction in environmental impacts that could be achieved through a reduction in density. *Id.*

#### **UDC Act Findings**

145. As noted above, on December 8, 2006, ESDC also ratified its findings pursuant to the UDC Act that the Project was both a land use improvement project and a civic project. AR 20084–92 (Modified GPP at 32-40).

146. In determining that the Project satisfied the statutory findings for a land use improvement project, ESDC found that the site is characterized by blighted conditions as documented in the Blight Study; that the Project will include remediation and redevelopment of the project site; that the redevelopment will generate substantial tax revenues and other economic benefits; that it will generate new jobs and much needed affordable housing; that the City will benefit from the Project’s transit improvements and eight acres of publicly accessible open space; and that, as required by the UDC Act, the plan maximized the opportunity for participation by private enterprise, consistent with the sound needs of the City as a whole. AR 20084-87 (Modified GPP at 32–35).

147. In determining that the Project satisfied the statutory findings for a civic project, ESDC found that the arena will provide a needed venue for the return of a major professional sports team to Brooklyn; that the arena will provide a needed venue for the athletic teams of local colleges and high schools; that the arena will provide needed support for cultural and community events such as concerts and graduation ceremonies; that the Urban Room adjacent to the arena will serve as a significant public amenity; that the eight acres of publicly accessible open space will be a significant public amenity in a community that is presently underserved by open space resources and that, in addition, the eight acres of open space will play an important part in the area's storm water management system by significantly reducing runoff to the Gowanus Canal; that the new subway entrances on the south side of the Atlantic Avenue and Flatbush intersection will significantly improve circulation to and from the 10 subway lines directly serving this major transit hub and improve public safety by providing an entrance to the subway system at the southeast corner of the intersection of Atlantic and Flatbush Avenues; that the upgraded LIRR rail yard is needed to accommodate the modern transportation demands of LIRR's new fleet of rail cars and will benefit the public by improving the functionality and efficiency of the rail yard, which serves the adjacent LIRR Atlantic Terminal; that ESDC will retain ownership of the land under the arena through the initial term of its lease to an ESDC-established non-profit Local Development Corporation (the "LDC"); that ESDC or the LDC will retain ownership of the arena during the initial term, which is expected to be 30 to 40 years; that the eight acres of open space will be owned and operated by a Conservancy or other non-profit entity governed by a board that will include community representatives; that the MTA will maintain ownership of its subway and LIRR facilities; and that the plans assure or will assure adequate light, air, sanitation and fire protection. AR 20088-92 (Modified GPP at 36-40).

### **MTA Approval of the Project on December 13, 2006**

148. On December 13, 2006, the Boards of the MTA, LIRR and MTA-NYCT adopted SEQRA findings and authorized the Chairman, Executive Director and their respective designees to take any further actions including entering into and executing agreements, leases, contracts and other documents.

### **PACB Approval of the Project's Finances on December 20, 2006**

149. After the ESDC Directors' approvals of the Project on December 8, 2006, ESDC submitted to the Public Authorities Control Board ("PACB") materials regarding the Project, including the modified GPP and certain other materials that were before the Directors at their December 8 meeting. ESDC also submitted financial information about the Project developed by ESDC's financial consultant, KPMG LLP.

150. On December 20, 2006, PACB passed a resolution approving the financial aspects of ESDC's participation in the Project.

### **ESDC Took the Requisite "Hard Look" under SEQRA**

151. The FEIS is extraordinarily comprehensive and exhaustive and far exceeds the requirement to take a "hard look" at the relevant environmental impacts.

152. The FEIS is more than 3,500 pages in length (AR10471-14007), not counting almost 6,000 pages of public comments that were included in the FEIS so that the information in the public comments would be available to the public and the decisionmakers.

153. By way of comparison, the federal environmental impact review regulations promulgated under the National Environmental Policy Act (after which SEQRA is modeled) provide that the "text of final environmental impact statements . . . shall normally be

less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.” 40 C.F.R. § 1502.7.

154. The FEIS for the Atlantic Yards Project is not merely lengthy, however. It is thorough, identifying each of the major issues of environmental concern and analyzing them with the appropriate methods and data.

155. The SEQRA Findings Statement – which itself is 93 pages long – evidences ESDC’s very thorough environmental review of the Project and the FEIS. As required by SEQRA, it imposes a host of measures to mitigate, to the maximum extent practicable, the significant adverse impacts of the Project. AR 25.32–25.46 (SEQRA Findings Statement at 56-70). The Petition does not even mention the SEQRA Findings Statement, much less allege that it is defective.

#### **Project Description (Chapter 1)**

156. Chapter 1 of the FEIS describes the Project and explains the rationale for locating an arena on the project site (at the corner of Atlantic and Flatbush Avenues) rather than some other place in Brooklyn. AR 10563–625 (FEIS Chapter 1).

157. Petitioners’ principal criticism of Chapter 1 is that they disagree with the discussion on pages 1-11 and 1-12 (AR 10575–76), which concludes that the project site is a better location for the arena than Coney Island.

158. In summary, the FEIS concluded that sites currently available in Coney Island are inferior to the project site because: (a) Coney Island is less transit accessible and more remote than the project site, and it is therefore likely that there would be a higher share of automobile trips through the area’s limited number of access corridors; (b) the number and variety of events and the capacity of the arena make it likely that the arena will draw visitors

