To be Argued by:
PHILIP E. KARMEL

New York County Clerk's Index No. 104597/07

New York Supreme Court

Appellate Division—First Department

In the Matter of DEVELOP DON'T DESTROY (BROOKLYN); COUNCIL OF BROOKLYN NEIGHBORHOODS, INC.; ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC.; BERGEN STREET BLOCK ASSOCIATION, INC.; BOERUM HILL ASSOCIATION, INC.; BROOKLYN BEARS COMMUNITY GARDENS, INC.; BROOKLYN VISIONFOUNDATION, INC.; CARLTON AVENUE ASSOCIATION, INC.; CARROLL STREET BLOCK ASSOCIATION BETWEEN FIFTH AND SIXTH AVENUES, INC.; CENTRAL BROOKLYN INDEPENDENT DEMOCRATS by its President JOSH SKALLER; CROWN HEIGHTS NORTH ASSOCIATION, INC.; DEAN STREET BLOCK ASSOCIATION, INC.; EAST PACIFIC BLOCK ASSOCIATION, INC.; FORT GREENE ASSOCIATION, INC.; FRIENDS AND RESIDENTS OF GREATER GOWANUS by its President MARILYN OLIVA; NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC. ("NYPIRG"); PARK PLACE-UNDERHILL AVENUE BLOCK ASSOCIATION by its President LINNEA CAPPS; PARK SLOPE NEIGHBORS, INC.; PROSPECT HEIGHTS ACTION COALITION by its President PATRICIA HAGAN; PROSPECT PACE OF BROOKLYN BLOCK ASSOCIATION, INC.; SIERRA CLUB, INC.; SOCIETY FOR CLINTON HILL, INC.; SOUTH OXFORD STREET BLOCK ASSOCIATION by its President ABBOT WEISSMAN; SOUTH PORTLAND BLOCK ASSOCIATION, INC.; and ZEN ENVIRONMENTAL STUDIES INSTITUTE, LTD.,

Petitioners-Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENT-DEFENDANT-RESPONDENT URBAN DEVELOPMENT CORPORATION D/B/A EMPIRE STATE DEVELOPMENT CORPORATION

DAVID PAGET
DAN CHOROST
SIVE, PAGET & RIESEL, P.C.
460 Park Avenue, 10th Floor
New York, New York 10022-1906
(212) 421-2150

PHILIP E. KARMEL
J. KEVIN HEALY
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for Respondent-Defendant-Respondent Urban Development Corporation d/b/a Empire State Development Corporation

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment

– against –

URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION; FOREST CITY RATNER COMPANIES, LLC; METROPOLITAN TRANSPORTATION AUTHORITY; and NEW YORK STATE PUBLIC AUTHORITIES CONTROL BOARD,

Respondents-Defendants-Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

PRELIMINARY STATEMENT

Respondent-Defendant-Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") approved the Atlantic Yards Project (the "Project") on December 8, 2006 when it affirmed a modified General Project Plan (the "GPP") for the Project under the Urban Development Corporation Act ("UDCA"), issued a Findings Statement for the Project under the State Environmental Quality Review Act ("SEQRA"), and issued its Determination and Findings under the Eminent Domain Procedure Law ("EDPL"). In this Article 78 proceeding, Appellants-Plaintiffs-Appellants ("Appellants") challenged the first two of these approvals made under the UDCA and SEQRA, and now appeal from the dismissal of their petition.

The Atlantic Yards Project will have significant social, environmental, civic, and economic benefits, including the elimination of long-standing blight; the creation of eight acres of publicly accessible open space; the creation of visual and physical links among neighborhoods currently divided by an open rail yard; a new subway entrance; an improved Long Island Rail Road rail yard; 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; thousands of new housing units, including 2,250 affordable units; and the stimulation of the economy. R19-20, R25.65-25.66.

ESDC followed an exacting process to consider, modify, refine and ultimately approve the Project under the UDCA, SEQRA and the EDPL. That process entailed an extended public comment period, a hearing, community forums, consultation with a citizen advisory committee, preparation of an environmental impact statement ("EIS") and other administrative documents and extensive discussions with other involved agencies, including the City of New York and the Metropolitan Transportation Authority. In their papers filed with the lower court, Appellants launched a fusillade of procedural challenges to the approval process, but the lower court definitively rejected each of them. Appellants do not raise any of these points on appeal.

All that is left of their case is their effort to challenge the substance of ESDC's decision-making. Appellants ask this Court to pick apart the 22,754-page Administrative Record upon which ESDC based its decisions to overturn (i) ESDC's determination that the project site is "substandard and insanitary" (*see* Point I, *infra*); (ii) ESDC's determination that the Arena meets the UDCA criteria for a "civic project" (*see* Point II, *infra*); and (iii) the conclusions in the EIS and SEQRA Findings Statement with respect to (a) whether the environmental impacts of a terrorist attack on the Project should be

considered "reasonably likely" (Point III.A, *infra*); (b) the construction schedule for the Project used to derive the "build year" (Point III.B, *infra*); and (c) ESDC's rationale for rejecting alternatives to the Project (Point III.C, *infra*). Appellants have dropped all of the other substantive challenges they presented to the lower court.

Appellants also challenge the determination of the Public Authorities Control Board ("PACB") under section 51 of the Public Authorities Law ("PAL") with respect to ESDC's financial participation in the Project: they argue that after ESDC made comprehensive SEQRA Findings, PACB was required to make its own environmental findings in connection with its review of the financial aspects of the Project. *See* Point IV, *infra*.

The lower court dismissed all of these claims in a comprehensive decision. ESDC respectfully submits this brief in opposition to the appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question 1: Did ESDC present an "adequate basis" upon which to conclude that the project site was a "substandard and insanitary area" where ESDC relied upon a detailed land use study of the project site (the comprehensive 378-page Blight Study) that documents in detail, on a block-by-block and lot-by-lot basis, the blighted conditions of the project site? This question should be answered in the affirmative. *See* Point I, *infra*.

Question 2: Did ESDC interpret its organic statute (the UDCA) rationally in concluding that the 18,000-seat arena would serve an educational, cultural, recreational, and other civic purpose (and thereby meet the challenged requirement of a "civic project") where 225 events at the arena are expected to be held annually, including professional basketball games, college athletic meets and other educational functions, concerts, shows and other community events? This question should be answered in the affirmative. *See* Point II, *infra*.

Question 3: Did ESDC act arbitrarily or capriciously or abuse its discretion when it determined that the environmental impacts of a terrorist attack on the Atlantic Yards Project should not be included in the reasonable worst case scenario that served as the basis for the impacts analysis in its EIS? This question should be answered in the negative. *See* Point III.A, *infra*.

Question 4: Did ESDC act arbitrarily or capriciously or abuse its discretion when it used a 2016 Build Year for the Project after taking a hard look at the issue by reviewing and analyzing a construction schedule prepared by Turner Construction Company, a respected construction management firm? This question should be answered in the negative. *See* Point III.B, *infra*.

Question 5: Did ESDC act arbitrarily or capriciously or abuse its discretion when it selected the Atlantic Yards Project over alternatives that

failed to achieve its significant social, environmental, civic and economic benefits? This question should be answered in the negative. *See* Point III.C, *infra*.

Question 6: Did PACB's determination to approve the financial aspects of ESDC's participation in the project constitute an "action" under SEQRA? This question should be answered in the negative. *See* Point IV, *infra*.

STATEMENT OF FACTS

The Project and ESDC review process are described below.

A. The Atlantic Yards Project Is An Important Mixed-Use, Transit-Oriented Development Project With Numerous Public Benefits.

The Atlantic Yards Project is an important mixed-use, transit-oriented development project approved by ESDC as both a land use improvement project and a civic project under the UDCA. The 22-acre project site is immediately south of Downtown Brooklyn at the site of a major transportation center in an area that lies at the junction of several Brooklyn neighborhoods. The transit hub at the Long Island Rail Road ("LIRR") Atlantic Terminal provides direct service from the LIRR and ten subway lines and is proximate to 11 bus routes and two additional subway lines. R19, R20055. The project site is roughly bounded by Flatbush and Fourth Avenues to the

west, Vanderbilt Avenue to the east, Atlantic Avenue to the north, and Dean and Pacific Streets to the south. The site comprises all of Blocks 1118, 1119, 1120, 1121, 1127 and 1129 and portions of Blocks 927 and 1128, as well as sections of Pacific Street and Fifth Avenue. R6, R20054, R10580. A useful site plan identifying the location of these Blocks is set forth at R10581.

A portion of the Project will be built on a platform to be constructed over the below-grade LIRR Vanderbilt Yard (the "rail yard"), which, together with a New York City Transit ("NYCT") yard for retired buses, occupies approximately nine acres of the project site. R13. The open cut of the below-grade yard currently inhibits development, as well as connections among the neighborhoods in the area. R18. The Project will rid the project site of this physical and visual barrier. R20.

The Project has significant social, environmental, civic and economic benefits. R19-21, R25.65-25.66, R10577-625, R20056-57. It will eliminate longstanding blight at the project site and concentrate development at the largest mass transit hub and commuter rail facility in Brooklyn. The centerpiece of the Project will be an Arena designed by the noted architect Frank Gehry for the National Basketball Association team currently known as the New Jersey Nets. The Arena will also host a variety of musical, entertainment, educational, social and civic events, as well as provide an

athletic facility for the City's colleges and local academic institutions. In addition to the Arena, the Project will include sixteen other buildings for office, retail, possible hotel, residential and community facility uses. The residential component of the Project will include 2,250 units of affordable housing as well as thousands of units of market-rate housing. All of the new buildings, including the Arena, will be designed and constructed as "green buildings." *Id.*

Eight acres of publicly accessible open space will be created in connection with the Project. A new subway entrance constructed at the southeast corner of Flatbush and Atlantic Avenues will improve subway access and pedestrian safety, and the construction of a relocated, improved and covered rail yard will enhance the LIRR operations at Atlantic Terminal. Over its life cycle, the Project will result in thousands of new jobs and billions of dollars of new tax revenues. *Id.*

The Project will be constructed in two phases. Phase I development includes the Arena, office space, retail space, residential units, parking, possible hotel space, a publicly accessible atrium known as the Urban Room, the new subway entrance and related circulation improvements on the southeast corner of Atlantic and Flatbush Avenues, the reconstruction of the rail yard, interim parking on Blocks 1120 and 1129, and upgrades to infrastructure. R10631, R20060-67. The remainder of the development program will be

constructed in Phase II and will include publicly accessible open space and eleven buildings housing residential units, retail space, permanent parking and community facilities. Six of the Phase II buildings will be built on the platform over the upgraded rail yard. R10631, R20067-69.

B. ESDC Undertook an Extensive Public Review Process for the Atlantic Yards Project.

For the Atlantic Yards Project to go forward, numerous government actions were required, including the preparation of an EIS, funding from the City and State, adoption of the GPP, a determination to condemn portions of the project site, and disposition by the MTA of certain property interests at the project site. A brief overview is set forth below.

1. ESDC Participated In Preliminary Planning Efforts For The Project.

Projects of the magnitude and complexity of the Atlantic Yards Project require extensive preliminary planning to define the proposed project to the point where plans are sufficient to allow effective consideration of all of its facets and environmental impacts. An agency cannot, for example, prepare and release to the public a draft SEQRA scoping document that adequately describes a proposed project and the analysis areas to be studied in an EIS until there is a considerable amount of information about the proposed size, location, programming and other aspects of the project. *See* 6 N.Y.C.R.R. § 617.8(f). In

addition, it is common for the private project sponsors – in this case, Forest City Ratner Companies and its affiliates (collectively, "FCRC") – to reimburse agencies for the cost of the various studies they must prepare to determine whether projects should be approved, modified or disapproved. *Id.* §§ 617.9(a)(1), 617.13.

Thus, even prior to releasing a draft scoping document to the public under SEQRA, the preliminary planning efforts of the public agencies and sponsor often entail the execution of letter agreements or memoranda of understanding ("MOUs") so as to ensure that the sponsor reimburses the agency for planning and review costs. These documents are "non-binding" since they do not in any way obligate agencies to approve the project. Such documents were executed in connection with the Atlantic Yards Project. R22748-54, R20303-25, R20296-302.

2. The Review Process for the Project Was Commenced in Accordance with All Applicable Requirements.

On October 18, 2005, ESDC held a duly noticed public meeting to address the scope of analysis for the EIS. R20326-31, R20327-28. Thereafter, on March 31, 2006, ESDC issued the final scope for the EIS (the "Final Scope") that included significant changes made in response to public comments. R22657-706.

ESDC and its consultants then prepared a draft EIS ("DEIS") in conformance with the Final Scope. R20386. As contemplated by the SEQRA regulations, ESDC worked closely with other involved agencies in the preparation of the DEIS. In particular, MTA (and its constituent agencies, LIRR and NYCT) and the City (through the Mayor's Office of Economic Development and Rebuilding, the Department of City Planning ("DCP") and the Department of Transportation ("DOT")) participated extensively in the SEQRA review of the Project. 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 New York City Department of Education and the New York City Department of Parks and Recreation.

As the DEIS preparation proceeded, ESDC also developed a GPP for the proposed project pursuant to the UDCA. Among other things, the GPP described the Project and its goals; specified the site acquisition, lease and financing structure; set forth the basis for ESDC's findings under the UDCA; and laid out the local zoning regulations that ESDC would override should the

Project be approved. R62-101. The GPP also incorporated Design Guidelines, which ESDC developed in close consultation with DCP and FCRC, to guide the Project's development throughout its build-out. R148-209. Preparation of the GPP also entailed "an evaluation of conditions in the area proposed for the … Project which themselves are evidence of blight or which may retard the sound growth and development of surrounding areas." R221. This evaluation was presented in a Blight Study prepared for ESDC by its consultant. *See infra* at 14-15.

3. In July 2006, The ESDC Board Set In Motion The Public Comment And Hearing Period Of The Review Process.

At their meeting on July 18, 2006, the ESDC Directors (the "Directors") accepted the DEIS, adopted the GPP and authorized the holding of a public hearing. R57-60. After the meeting, the DEIS and GPP and its exhibits were distributed, filed and made available to the public in accordance with applicable requirements, including posting on the ESDC web site. R22468-77, R22504-06.

On August 23, 2006, ESDC held the public hearing pursuant to the UDCA, SEQRA and EDPL. R9741-10134. The public was also afforded the opportunity to make oral comments at community forums held on September 12 and 18, 2006, and the public comment period was extended until September 29, 2006. *Id.*; R22504-14.

4. As The Public Comment Period Continued, ESDC Proceeded With Other Consultation Under The UDCA.

In accordance with UDCA § 4, Unconsol. L. § 6254(7), ESDC established a Citizens Advisory Committee and determined that the Committee would have members representing the three affected community boards, the Brooklyn Borough President, the City and the State. R22621-25. The Committee held meetings with ESDC on June 29, August 9, September 7 and September 26, 2008. R22642-56, R1657a-62a.

In accordance with UDCA § 16(3)(c), Unconsol. L. § 6266(3)(c), the New York City Planning Commission ("CPC") issued its recommendation with respect to the GPP in a September 27, 2006 letter to ESDC. R13994-14001. In its letter, CPC expressed strong support for the Project but also recommended reductions in the heights of three of the Project's buildings and an increase in the open space component. R13995. ESDC incorporated CPC's recommendations into the Project. R20052-96, R20099-207, R10509-11.

5. After the Close of the Public Comment Period, ESDC Proceeded with Its Review of the Public Comments and Prepared the FEIS.

After the close of the public comment period on September 29, 2006, ESDC proceeded to review the comments received and prepare the final EIS ("FEIS"). In total, ESDC received written comments from over 1,800 people and organizations, in addition to the approximately 200 comments

received at the public hearing and community forums. ESDC prepared responses to these comments (R11898-R12454) and where appropriate made changes to other portions of the EIS in response to the comments. Additional changes to the EIS reflected modifications to the Project and the refinement of mitigation measures. R10509-11.

6. The ESDC Board Approved the FEIS in November 2006.

On November 15, 2006, the Directors accepted a "Final Environmental Impact Statement." R599. 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. R10468. ESDC announced its intent to prepare a corrected and amended FEIS to ensure that all comments were considered. R10468-69.

The ESDC Directors accepted the corrected and amended FEIS on November 27, 2006, and a Notice of Completion was issued. R10470, R14008. The corrected and amended FEIS was duly circulated and made available on ESDC's web site.

C. Having Completed Its Review Processes, the ESDC Board Approved the Project on December 8, 2006.

At their meeting on December 8, 2006, the ESDC Directors approved the Project by means of a resolution adopting a SEQRA findings statement pursuant to ECL § 8-0109(8) and 6 N.Y.C.R.R. § 617.11(d);

affirming the modified GPP (including the UDCA statutory findings for a land use improvement project and civic project) pursuant to UDCA §§ 10, 16(2), Unconsol. L. §§ 6260, 6266(2); and adopting the determination and findings pursuant to Article 2 of the EDPL. R19929-31, R19924-26.

At the time of their decision-making, the ESDC Directors also had before them public comments on the FEIS, along with a memorandum from ESDC's Director of Planning and Environmental Review stating that the comments raised no new issues that had not been addressed in the FEIS or that would affect the conclusions of the FEIS. R20222-67. ESDC staff and consultants had reviewed the comments on the FEIS as they were submitted, and although SEQRA regulations do not require it, had prepared a written response to these comments. R20268-95.

D. The December 8 ESDC Approvals Were Supported by Thoroughly Documented Studies and Analyses that Provided a Basis for ESDC's Findings Pursuant to the UDCA and SEQRA.

1. Blight Study

ESDC's land use improvement project findings, which were adopted on July 18, 2006 and ratified on December 8, 2006, were supported by the Blight Study. The Blight Study evaluated each lot on the project site using six categories of blight characteristics: unsanitary and unsafe conditions; indications of structural damage; building code violations; vacancy status;

underutilization; and environmental concerns. R245-46. Buildings or lots exhibiting signs of significant physical deterioration, buildings that were at least 50 percent vacant, and lots that were built to 60 percent or less of their allowable Floor Area Ratio under current zoning, as well as vacant lots were identified as parcels exhibiting blight characteristics. R246. The Blight Study found that the 22-acre project site was characterized by blighted conditions, including structurally unsound buildings, debris-filled vacant lots, environmental concerns, high crime rates and underutilization, and that these conditions were unlikely to be removed without public action. R216, R219. Seventy percent of the lots on the project site, constituting 86 percent of the project site's land area, exhibited one or more blight characteristics. R217.

The Blight Study noted that five of the project site's eight blocks (Blocks 927, 1118, 1119, 1120 and 1121) are located within the boundaries of the Atlantic Terminal Urban Renewal Area ("ATURA") created by the City in 1968. R216. These blocks constitute 63 percent of the total square footage of the site. R224. The Blight Study found that the non-ATURA portions of the project site (*i.e.*, Blocks 1127 and 1129 and the western ⅓ of Block 1128) were also blighted. R217, R228, R231, R311-483.

2. The FEIS and SEQRA Findings Statement

The SEQRA Findings Statement adopted by the ESDC Directors on December 8, 2006 was based on the analyses and conclusions of the FEIS. The FEIS 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. R10474-86.

The analyses performed in preparing the EIS were extensive. As an example, the document examined the potential for traffic impacts in a large study area encompassing 93 separate intersections. The traffic analyses considered seven different peak periods, based on the times when the Project's various components would be expected to generate their highest demand. R1648a. The EIS was equally meticulous in its examination of each of the other areas of environmental concern.

Since the Project would involve the development of a number of elements over an extended period of time, the FEIS evaluated the Project's impacts for two analysis years, 2010 and 2016. The 2010 analysis year 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 completed by 2010. R10631. The year 2016 was used for the full build-out of the development program. *Id.* These analysis years were selected based on a construction schedule for both phases submitted to ESDC by Turner Construction Company, a respected construction management firm retained by FCRC to plan the construction for the Project. R11566, R13102-13149. ESDC's staff and consultants reviewed the schedule and questioned the project sponsor's construction team regarding various elements and assumptions of the construction phasing. R10, R12338-39. The review included the preparation of a narrative description of the construction sequence, including truck deliveries and construction workers during each quarter of the construction through the last quarter of 2016. R11564-87.

In accordance with SEQRA, the FEIS studied a reasonable range of alternatives in detail, comparing their impacts in the sixteen environmental areas to those of the proposed project. The alternatives analyzed in detail were as follows: 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. R11792-888.

In its hard look at the Project's impacts, the FEIS identified significant adverse impacts in the following areas: schools, historic and cultural

resources, visual resources, shadows, traffic, pedestrians, noise and construction. R10512. The FEIS 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. R10541.

The FEIS identified numerous practicable measures to mitigate the impacts it identified. Among other things, those measures included a package of strategies aimed at reducing traffic generated by the Arena, including transit price incentives, discounted remote parking facilities, on-site high occupancy vehicle requirements, and free charter buses to shuttle Nets fans between the Arena and park-and-ride lots on Staten Island. R25.37-25.43. Even after implementation of a comprehensive package of mitigation measures, the FEIS identified unmitigated impacts in the areas of historic and cultural resources, visual resources, shadows, traffic, noise and construction. R11699, R11889.

In its SEQRA Findings Statement, ESDC weighed the benefits of the Project against its adverse environmental impacts, and considered this balance in light of the impacts and benefits of the alternatives analyzed in the FEIS, as required by ECL § 8-0109(8) and 6 N.Y.C.R.R. § 617.11(d). R25.65-25.69. ESDC determined that the benefits of locating a mixed-use development with an arena at the project site would outweigh its significant adverse

environmental impacts. *Id.* Consequently, ESDC, after imposing the comprehensive package of mitigation measures identified in the FEIS, determined that the Project satisfied SEQRA's findings requirements. *Id.*[1]

STATEMENT OF THE CASE

On April 5, 2007, Appellants commenced the instant proceeding seeking to annul the determinations of the ESDC, the PACB and the MTA approving the Project. With its initial papers, Appellants moved for a temporary restraining order and preliminary injunction to stop the ongoing demolition and construction work. Justice Joan A. Madden denied the application for a temporary restraining order in a written opinion on April 20, 2007. 568a-574a.

On April 25, 2007, ESDC served the ESDC Administrative Record containing 22,754 pages in 38 volumes (R1-R22754), together with its answer (R1633a-R1769a), an affirmation (R22864-927) and its memorandum of law. The other respondents also served their responsive pleadings, affidavits and legal memoranda on April 25, 2007. R575a-R1632a. Appellants neither moved for discovery pursuant to CPLR § 408 nor an evidentiary hearing

---

[1] An agency may approve the proposed action even if it would result in significant, unmitigated adverse impacts: "SEQRA ... does not require an agency to impose every conceivable mitigation measure, or any particular one. Rather, in accordance with its balancing philosophy, SEQRA requires the imposition of mitigation measures only 'to the maximum extent practicable' 'consistent with social, economic and other essential considerations.'" *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 421-22 (1986) (quoting ECL § 8-0109(8)).

pursuant to CPLR § 7804(h). On May 2, 2007, Appellants served their reply papers. R22748-R22863.

On May 3, 2007, Justice Madden presided over a three hour oral argument on the Article 78 petition and the matter was marked submitted. On January 11, 2008, Justice Madden issued a thorough 71-page opinion addressing all of Appellants' arguments and dismissing the proceeding. R10a-R85a.

With the exception of a proceeding filed on August 1, 2008, which is still pending, all of the lawsuits challenging the December 2006 Project approvals have been dismissed. *See Goldstein v. Pataki*, 488 F.Supp.2d 254, 287 (E.D.N.Y. 2007) (rejecting Takings Clause challenge to ESDC's condemnation of the project site on the ground that the Blight Study establishes that the project site, including the 2⅓ non-ATURA blocks, are blighted), *aff'd*, 516 F.3d 50 (2nd Cir.), *cert. denied*, 2008 WL 891093 (2008); *Anderson v. New York State Urban Dev. Corp.*, 45 A.D.3d 583 (2nd Dep't 2007) (rejecting EDPL and SEQRA challenge to the EDPL Determination and Findings and FEIS); *Anderson v. New York State Urban Dev. Corp.*, 44 A.D.3d 437 (1st Dep't 2007) (dismissing for lack of jurisdiction challenge to the EDPL Determination and Findings).

POINT I

ESDC MADE A RATIONAL DECISION THAT THE PROJECT IS A LAND USE IMPROVEMENT PROJECT

ESDC properly found that the Project meets the statutory criteria for a land use improvement project under the UDCA. To make this finding, ESDC determined, as required by the UDCA, that the area in which the Project is located is a "substandard or insanitary area." UDCA § 10(c)(1); Unconsol. L. § 6260(c)(1).

The terms "substandard" and "insanitary" – which are also used in the State Constitution (Art. XVIII § 1) and Urban Renewal Law (Gen. Mun. L. §§ 502, 505) – have been given a "liberal … definition" by the courts to include not only slums but areas characterized by "economic underdevelopment"; "diversity of land ownership making assemblage of property difficult"; "pollution"; "outmoded and deteriorated structures"; or "even … vacant land." *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 481, 483-84 (1975); *see also Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 218 (1st Dep't) (area may be found to be "substandard and insanitary" based on circumstances such as "improper land use, 'outmoded and deteriorated structures' and unutilized development rights"), *aff'd*, 76 N.Y.2d 962 (1990).

If blighted conditions exist in an area, eminent domain may be used to address "the area as a whole." *Berman v. Parker*, 348 U.S. 26, 35

(1954). In connection with an urban renewal project, "[p]roperty may of course be taken for [the] ... redevelopment which, standing by itself, is innocuous and unoffending." *Id.* Thus, "once it has been shown that the surrounding area is blighted, the state [ESDC] may condemn unblighted parcels as part of an overall plan to improve a blighted area." *G. & A. Books, Inc. v. Stern*, 770 F.2d 288, 297 (2nd Cir. 1985) (citing *Berman v. Parker* in reviewing an ESDC land use improvement project); *see also Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 45 (2nd Cir. 1985) (upholding land use improvement project that included a non-blighted building on the periphery of the core area of blight); *Kaskel v. Impellitteri*, 306 N.Y. 73, 78 (1953) (upholding urban renewal plan where "a substantial part of the [six-block] area [was] substandard and insanitary by modern tests").[2]

Appellants concede that Blocks 927, 1118, 1119, 1120 and 1121 are blighted, but ask this Court to second guess ESDC's decision to include the adjoining Blocks 1127 and 1129 and the western ⅓ of Block 1128 in the land use improvement project. Under the foregoing authorities, these adjoining 2⅓ blocks may be included in the land use improvement project as part of the overall strategy to eliminate blighted conditions on the five concededly blighted

---

[2] *See also First Amended South Jamaica I, Urban Renewal Area*, 72 A.D.2d 582, 582 (2nd Dep't 1979); *Fix v. City of Rochester*, 50 Misc.2d 660, 664 (Sup. Ct. Monroe Co. 1966); *Spadanuta v. Inc. Village of Rockville Centre*, 16 A.D.2d 966, 966-67 (2nd Dep't 1962), aff'd 12 N.Y.2d 895 (1963).

blocks. But the 2⅓ blocks are themselves blighted, as documented in ESDC's comprehensive 378-page Blight Study. Appellants claim otherwise, but Justice Madden properly rejected their argument based on her review of the Blight Study.

In *Goldstein v. Pataki*, U.S. District Judge Garaufis also found these 2⅓ blocks to be blighted, holding that "the blight study conducted by the ESDC … indicates that the [2⅓ blocks] Takings Area is blighted." 488 F.Supp.2d 254, 287 (E.D.N.Y. 2007) (citing to pages C-70 to C-242 of the Blight Study, the pages discussing the 2⅓ blocks), *aff'd*, 516 F.3d 50 (2nd Cir.), *cert. denied*, 2008 WL 891093 (2008). Although Appellants assert that *Goldstein v. Pataki* involved "a completely different issue," DDDB Br. at 74 n.33, the federal court's decision under the federal Takings Clause jurisprudence directly supports ESDC's finding that the project site is "substandard and insanitary" under UDCA § 10(c). New York State courts have looked to caselaw establishing the parameters for blight under the Takings Clause in reviewing agency determinations that an area is "substandard and insanitary" under New York State law. *See Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 483-84 (citing *Berman v. Parker* in discussing the "liberal … definition of a 'blighted' area" under New York law); *Tribeca Community Ass'n, Inc. v. New York State Urban Dev. Corp.*, 200 A.D.2d 536, 537 (1st Dep't

1994) (citing *Yonkers Community Dev. Agency v. Morris* in upholding ESDC's blight finding under UDCA § 10(c)).

The facts established by the Blight Study, as well as the other record evidence, provide the rational basis required for ESDC's determination that the area of the project site is "substandard and insanitary." Appellants' scattershot arguments are based on a superficial presentation of bits and pieces of the record. Appellants ignore the relevant standard of review, disregard the liberal definition of "substandard and insanitary area" noted above, and fail to discuss (much less refute) the record evidence that provides overwhelming support for ESDC's blight finding.

A. ESDC Has Wide Discretion in Deciding Which Areas Are Appropriate for Urban Renewal and Its Decision-Making Is Subject to Limited, Deferential Review by the Courts.

Every case that has addressed a challenge to the designation of a land use improvement project or urban renewal area has emphasized the limited scope of judicial review. In a case decided under the General Municipal Law,[3] the Court of Appeals addressed an allegation that the taking of certain land in Manhattan was for the purpose of obtaining federal funds rather than to clear the area of blight. In upholding the taking, the Court ruled that the challengers

---

[3] Sections 502 and 505 of the General Municipal Law empower municipalities to undertake urban renewal projects in areas that a municipality has found to be "substandard or insanitary." The definitions of "substandard or insanitary" in the UDCA and General Municipal Law are functionally identical.

were required to establish either actual fraud or illegality in order to succeed in their claim. *Kaskel v. Impellitteri*, 306 N.Y. at 79.

Judicial deference is not only given to whether blight exists but to the boundaries of the urban renewal area or land use improvement project aimed at addressing the blighted conditions:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area.... [T]he amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the [condemning agency].

Berman v. Parker, 348 U.S. at 35-36.

The legislature has vested "extensive authority to make the initial determination that an area qualifies for renewal as 'blighted' ... in the agencies and the municipalities; courts may review their findings only upon a limited basis." *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 484 (citing *Kaskel v. Impellitteri*, *supra*). Thus, "the law ... leaves to the agencies wide discretion in deciding what constitutes blight." *Id.* A blight finding will be upheld if the condemnor "presents to the court an adequate basis upon which it concluded that the land was substandard"; the condemnee must then "show that the agency's determination is without foundation." *Id.* at 486.

Instead of acknowledging this highly deferential standard of review, Appellants assert that the deference ordinarily given to a municipality is

inapplicable to ESDC. DDDB Br. at 87. Appellants' contention is plainly wrong. The New York Court of Appeals, this Court and the federal courts have all given deference to ESDC's determinations as to the existence of blight and geographic scope of a land use improvement project. *See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 424-25; *West 41st Street Realty LLC v. New York State Urban Dev. Corp.*, 298 A.D.2d 1, 7 (1st Dep't 2002); *Goldstein v. Pataki*, 516 F.3d at 60; *G. & A. Books, Inc. v. Stern*, 770 F.2d at 297.

Next, Appellants assert that no deference is appropriate because the blight determination was made "at the behest of a private developer." DDDB Br. 87. No evidence is cited for this allegation, which is the very suggestion of conspiracy the Second Circuit dismissed in *Goldstein v. Pataki*, 516 F.3d at 60, as utterly without merit. Appellants' allegation that ESDC was acting at the "behest" of FCRC does not change the applicable standard of review, as the Second Circuit explicitly held in *Goldstein v. Pataki*. *See* 516 F.3d at 62-65.

It is well established that economic development agencies may work closely with the private sector in advancing urban renewal. In *Yonkers Community Dev. Agency v. Morris*, the Court of Appeals noted that Yonkers had worked closely with Otis Elevator Company on the economic development project at issue in that case. The Court held that there was nothing wrong with

condemning blighted property to promote economic development, and that it was hardly surprising that Yonkers had worked closely with Otis as the project sponsor. The Court noted that "[t]he very purpose of urban renewal subsidies is to attract new or existing sponsors to undertake the land clearing, the construction and other [desired] commitments ... where the cost of acquiring the land privately, on a piece by piece basis, would be sufficiently expensive or difficult to deter private entities." 37 N.Y.2d at 483. Yet, it is in *Yonkers Community Dev. Agency v. Morris* that the Court of Appeals articulated the deferential standard of review quoted above with respect to an agency's blight finding. Thus, it is clear that this standard of review applies to the blight finding whether or not the agency is working with a private developer to develop blighted land.

The UDCA specifically directs ESDC 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." UDCA § 2, Unconsol. L. § 6252. Accordingly, this Court has observed: "[t]hat a private business may obtain substantial benefits does not call into question the use of eminent domain...." *West 41st Street Realty LLC v. New York State Urban Dev. Corp.*, 298 A.D.2d at 7; *see also Tribeca Community Assoc., Inc. v. New York State Urban Dev. Corp.*, 200

A.D.2d at 537 (applying deferential standard to uphold blight finding for a new commodities exchange notwithstanding the "incidental private benefit" to the exchange); *East Thirteenth Street Community Ass'n v. New York State Urban Dev. Corp.*, 189 A.D.2d 352 (1st Dep't 1993) (apply deferential standard of review to uphold blight finding in a case where ESDC was working closely with the private sector), *aff'd*, 84 N.Y.2d 287 (1994). Appellants do not cite any authority for their contention that ESDC is not entitled to deference with respect to its blight finding simply because it is acting in accordance with the statutory directive that it work with the private sector.

Appellants also claim, without reference to any supporting legal authority, that no deference should be given to ESDC's blight determination because the Blight Study was allegedly a "Post-Hoc Rationalization of a Pre-Planned Action." DDDB Br. at 69. But the rule barring consideration of post hoc agency rationalizations operates where an agency has provided a particular justification for a determination at the time it is made in a final agency decision and then provides a different justification thereafter that is not in the administrative record because it was developed *after* the agency rendered its final decision. *See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 631 n.31 (1980); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Here, the final agency decisions being challenged are the GPP and

SEQRA Findings Statement approved by ESDC's Board of Directors on December 8, 2006. The Blight Study was prepared five months *before* this final decision and is thus not a post-hoc rationalization.

In addition, Appellants mischaracterize the record in asserting that as of the February 2005 MOU, ESDC "had not identified how the Project might be authorized under the UDCA." DDDB Br. at 70. All Appellants have established is that this particular MOU did not identify ESDC's statutory authority, but there is no legal principle requiring that a document of this sort present the statutory basis for proceeding with a project.

All of the cases cited by Appellants applied a deferential standard of review to an agency's blight determination. Not a single one vacated the blight determination. There is no basis for Appellants' contention that ESDC's blight determination here should be subject to a different standard of review than the one applied to the determinations of ESDC and municipalities in all prior cases.

B. The Record Provides Overwhelming Support for ESDC's Land Use Improvement Project Findings.

ESDC's decision to include Blocks 1127 and 1129 and the western ⅓ of Block 1128 in the land use improvement project was rational and is supported by the record. Although Appellants would have this Court believe that these 2⅓ blocks were a "thriving" residential neighborhood (DDDB Br. at

71), this claim is squarely contradicted by the objective information in the record. The Blight Study contains a narrative description of the physical characteristics of each lot within the land use improvement project and photographs of each lot. The Blight Study distinguishes between properties that became vacant only upon their acquisition by FCRC (which has purchased most of the private property on the project site) and those that were vacant for years. R246. In the discussion below, if a property is mentioned as vacant, it was vacant before its purchase by FCRC.

Block 1127

Block 1127 is one block from the largest subway station complex in Brooklyn, with 10 subway lines that would take a resident to almost any corner of the City, and within a very short walk to the Borough's only Long Island Railroad Terminal. R19, R20055. Ordinarily, such a location would be intensively developed and well maintained. Yet the Blight Study found:

(i) on Lot 1, a gasoline station with a history of gasoline spills that have resulted in severe soil contamination and groundwater pollution on a grossly underutilized lot, *see* R311-14, R11210;

(ii) on Lot 12, a garbage-strewn yard with a barbed wire fence and two small buildings that have been vacant for years, have accumulated 22 open building code violations, and have deteriorated graffiti-strewn façades, peeling

exterior paint and a large vertical crack running almost the entire length of one façade, *see* R321-24;

(iii) on Lot 13, a vacant lot featuring a sunken concrete slab, weeds and a barbed wire fence, *see* R328-28;

(iv) on Lot 19, an auto repair shop that was in such a dangerously dilapidated state as to require its emergency demolition, *see* R331-34[4];

(v) on Lot 20, another building so dangerously dilapidated as to require its emergency demolition; *see* R335-38;

(vi) on Lot 22, a single-story former manufacturing building, most recently occupied as a construction field office, using less than 20 percent of the lot's development potential, with graffiti on its façade, *see* R342-43, R11211;

(vii) on Lot 29, a small two-story building and garage using 25 percent of the lot's development potential, used as a warehouse and office by an importer, *see* R347-49;

(viii) on Lot 47, a garbage-strewn informal parking lot surrounded by a barbed wire fence, *see* R365-66;

(ix) on Lot 48, a one-story building whose stucco coatings had fallen off, exposing crumbling brickwork and chipped lintels, with a boarded-up window and a front door decorated with graffiti, *see* R367-89;

---

[4] *Develop Don't Destroy Brooklyn v. ESDC*, 31 A.D.3d 144, 154-55 (1st Dep't 2006) (upholding emergency demolition of numerous buildings on project site).

(x) on Lot 54, a vacant two-story office building with numerous open Building Code violations, graffiti above the second-floor windows and on the front doorway and water-damaged interiors with peeling paint and water-damaged interior brickwork, *see* R375-77;

(xi) on Lot 55, two brick buildings that were so dangerously deteriorated as to require their emergency demolition, *see* R379-83; and

(xii) on Lot 56, a four-story brick building that was so dangerously dilapidated as to require its emergency demolition. *See* R384-88.

Notwithstanding these facts, Appellants assert that only Lots 19, 20, 55 and 56 on Block 1127 are blighted. DDDB Br. at 81. ESDC acted rationally in finding otherwise and determining that Block 1127 is blighted. In addition, Block 1127 is adjacent to Block 1119, a block appellants concede to be blighted. ESDC properly exercised its discretion to include Block 1127 in the land use improvement project.

Western ⅓ of Block 1128

The Blight Study also documents the condition of the western portion of Block 1128 that is included in the project site. In this small fraction of a block, the Blight Study found:

(i) on Lots 1 and 2, empty lots used for parking and to store broken-down automobiles, with weeds taller than the automobiles, surrounded by a barbed wire fence, *see* R389-92;

(ii) on Lot 4, a commercial building with 24 open building code violations and graffiti painted on its walls and garage door, *see* R393-95;

(iii) on Lot 85, a two-story single family home using less than 40 percent of the development potential of its lot, *see* R396-97;

(iv) on Lot 87, a vacant three-story two-unit residential building with 17 open building code violations, including a citation for unsafe conditions, *see* R401-02; and

(v) on Lot 89, a three-story building with a vacant commercial store front, a cracked, crumbling and poorly patched sidewalk, graffiti-decorated façade, and five open code violations. *See* R404-06.

Appellants assert that none of the lots on Block 1128 evidences any indicia of blight. DDDB Br. at 81. ESDC acted rationally in finding otherwise and determining that the western ⅓ of Block 1128 is blighted. In addition, Block 1128 is adjacent to blighted Block 1120 (to the north) and blighted Block 1127 (to the west). ESDC properly exercised its discretion to include the western ⅓ of Block 1128 in the land use improvement project.

Block 1129

The largest building on Block 1129 is a very large 5-story industrial building on Lot 25 that occupies more than 30% of the land on the Block. R422-31. The building has not been used for years and is in a state of gross disrepair. *Id.* Its windows have been filled with cement blocks; its walls are covered with graffiti; there are large cracks visible in the façade; parts of the building are open to the outside allowing water to pool on the floor and causing water damage; and it has five open building code violations, the most recent of which indicates that the current condition is hazardous. *Id.*

Even apart from this hulking wreck, Block 1129 includes:

(i) on Lots 1 and 3, abandoned cars, miscellaneous debris and a drum, *see* R408-19;

(ii) on Lot 4, broken-down cars, car parts and debris, *see* R410-12;

(iii) on Lots 5 and 6, a surface parking lot, *see* R413-15;

(iv) on Lot 13, a predominantly vacant former industrial building with 23 open building code violations, *see* R416-18;

(v) on Lot 39, an industrial building with a graffiti-decorated façade that is presently used for storage, *see* R432-33;

(vi) on Lot 43, a residential building with walls and ceilings that have suffered significant water damage, severely worn and dirty floors in the

common space, a dented and chipped wooden front door, falling paint and plaster and graffiti, *see* R434-39;

(vii) on Lot 45, a vacant one-story former industrial building that uses 25% of its lot's development potential and is in poor condition from years of neglect, resulting in a large, poorly patched crack in the brickwork of its façade, graffiti on the garage entry, window and front door, holes in parts of the ceiling exposing electrical outlets and wiring and serious water damage to the ceiling and walls, *see* R442-44;

(viii) on Lot 46, three deteriorated buildings, including a one-story vacant diner with a partially collapsed ceiling, rusted-metal siding decorated with graffiti, water-damaged timber floor framing, water-damaged and peeling ceilings and walls, surrounded by weeds and trash; a residential building with cracks in its façade, crumbling bricks, areas damaged by water and rust, a leaning masonry chimney, a rooftop fire-damaged shack, floors that sag severely towards the center-most points of the building, floor timber joists that are rotted in numerous locations, severely damaged interior ceilings and walls with falling ceiling tiles, falling insulation and peeling paint, and a basement littered with trash that is accessible via wooden steps that are falling down; and an auto garage with a sagging roof, degraded brickwork, water-damaged roof joints, surrounded by auto-repair-related debris, *see* R445-55;

(ix) on Lot 49, a partially vacant residential building with graffiti on the inside of its front door and on an exterior door, severe water damage on several walls and ceiling, visible mold inside the building, pools of moisture within portions of the walls and ceiling that have caused the paint to bubble and peel and large sections of dry wall separated from the wall due to moisture damage, *see* R456-62;

(x) on Lot 50, an auto repair garage using less than 25% of its lot's development potential, with a tin roof that has rusted to the point of disintegration in some areas, *see* R463-66;

(xi) on Lot 54, a five-story industrial building featuring extensive graffiti, windows that have been permanently sealed with cinder block, missing brickwork above its entranceway, a rusted metal door, crumbling concrete below the door, a filled former entrance with concrete steps that are chipped and broken, paint flaking off of many of the walls and ceilings, and small cracks in many of the walls; two one-story dilapidated structures with partially missing roofs and large holes in their walls, and a trash-strewn adjacent unused parking lot surrounded by a chain link fence and barbed wire, *see* R467-74; and

(xii) on Lot 81, a vacant two-story industrial building that was so dangerously dilapidated as to require its emergency demolition. *See* R479-83.

Appellants assert that "objectively only 4" lots on Block 1129 should have been deemed blighted. DDDB Br. at 81. ESDC acted rationally in finding otherwise and determining that Block 1129 is blighted. In addition, Block 1129 is adjacent to blighted Block 1121. ESDC properly exercised its discretion to include Block 1129 in the land use improvement project.

C. Appellants' Specific Criticisms Are Without Legal and Factual Basis.

Appellants put forward a litany of reasons as to why ESDC erred in deciding to include Blocks 1127, the western ⅓ of Block 1128 and Block 1129 in the land use improvement project. None of these criticisms is remotely sufficient to establish that ESDC lacked the requisite rational basis for its decision-making.

1. The Blight Study Contains the Requisite Analysis.

Appellants criticize the Blight Study for not containing any "analysis upon which a reviewing court can determine if the [blight] determination is rational." DDDB Br. at 80. This criticism is baseless. The Blight Study contains an extensive introduction and a discussion of its methodology (R221-39, R245-46), a summary of its findings with respect to each block on the project site (R240-45), a description of each lot on each of these blocks (R247-R483) and other relevant information (R484-R591). This

extensive analysis provides this Court with all the information needed to determine whether ESDC's blight finding was rational.

Appellants assert that the "best and most objective evidence of blight" would be a "market study" investigating the area's "attractiveness and potential," DDDB Br. at 73, and criticize ESDC for relying upon the Blight Study rather than such a market study. Citing the same couple of newspaper articles they cited to Justice Madden and some new extra-record "evidence" culled from the internet, Appellants assert that the substandard and insanitary conditions at the project site would improve over time, with or without ESDC action under the UDCA. DDDB Br. at 61-67, 73. Appellants present no competent evidence to support this claim, which is mere speculation.

Appellants' hypothesized future market-led revival is irrelevant to this Court's review of ESDC's statutory finding, as a matter of law. ESDC has the statutory authority under the UDCA to proceed with a land use improvement project upon a finding that the area is blighted as of the date findings are made. The fact that at some point in the future it might become less so without ESDC involvement – even if true – would provide no basis to overturn the statutory finding required for a land use improvement project.

2. ESDC Did Not Ignore Comments on the Blight Study.

Appellants claim that ESDC ignored the comments on the Blight Study. DDDB Br. at 80. This is untrue, as ESDC prepared a memorandum responding to these comments. R19924–26. Appellants' real complaint is that ESDC did not agree with their comments. But ESDC acted within its discretion in relying on the objective information in the Blight Study rather than Appellants' fanciful descriptions of the neighborhood as "thriving."

3. The Errors in the Blight Study that Appellants Purport to Identify Are Trivial or Are Not Errors At All.

Appellants repeatedly criticize the Blight Study, but put forward few specific allegations that the information it contains is erroneous. Those allegations that Appellants do advance are either trivial or wrong.

Appellants complain that the Blight Study map should have deemed Lot 55 on Block 1127 to be blighted. DDDB Br. at 81 n.38. This minor omission hardly undermines the conclusions of the Blight Study, which contains objective information about Lot 55 clearly demonstrating that the parcel is blighted. R379-83.

Appellants complain that three photographs in Section B of the Blight Study (photos C, H and I, *see* R19118) do not indicate blighted conditions on Blocks 1119, 1120 and 1121. DDDB Br. at 81. The photos illustrate the blighting effect of the rail yard on the adjacent area. R230, R233-

34, R236. There are dozens of photos in Section C of the Blight Study that show blight on these 2⅓ blocks. R311-R483.

Appellants claim that the blight is due to FCRC's acquisition of parcels for development. DDDB Br. at 78. As with their other arguments, they fail to present any evidence that this is so. Many of the conditions documented in detail in the Blight Study are longstanding conditions, and, where the information was available, the Blight Study noted any recent changes in building conditions or occupancy status. R246.

Appellants seek to add a patina of substance to their characterization of Blocks 1127, 1128 and 1129 by calling them part of Prospect Heights. The FEIS contains a detailed description of Prospect Heights (R11540, R11548-49, R11556-57) but concludes that the project site "contains virtually none of [its] …. neighborhood characteristics or vitality." R11536. The fact that Blocks 1127, 1128 and 1129 – like the blocks to their north that Appellants concede to be blighted – are in Prospect Heights says nothing about their physical condition, which is accurately documented in the Blight Study.

4. ESDC Has Authority to Include Non-ATURA Blocks in the Land Use Improvement Project.

Appellants complain that Blocks 1127, 1128 and 1129 are not within the ATURA urban renewal area designated by the City of New York. DDDB Br. at 72. The Blight Study acknowledges this fact. R225. It explains

that ESDC's blight determination is based on other considerations, including the poor physical condition of many of the properties on these blocks, underutilization of many of the lots, the vacancy of many of the industrial, commercial and even residential buildings on the project site, environmental contamination, diversity of ownership by multiple parties (which greatly complicates redevelopment) and other factors. R217-18.

As a state agency, ESDC may act independently of the City and locate a land use improvement project outside of a municipality's urban renewal area. Blight findings have consistently been upheld where the subject property had not previously been slated for urban renewal by a municipality. *See, e.g., Kaskel v. Impellitteri*, 306 N.Y. at 78; *West 41st Street Realty LLC v. New York State Urban Dev. Corp.*, 298 A.D.2d at 4-5. Moreover, the City established the basic boundaries of ATURA some 40 years ago when much of the Non-ATURA Blocks were characterized by active manufacturing and commercial uses. Thus, no inference can be drawn that the City subsequently made any determination – one way or another – with respect to the parcels simply because they were never added to the urban renewal area.

Appellants assert that it was "irrational to analyze the two areas [*i.e.,* ATURA and non-ATURA] as if they were a single, homogenous whole." DDDB Br. at 72. But the Blight Study does not analyze any of the blocks

within the project site as if they were a "single, homogenous whole." Rather, that study contains a detailed, lot-by-lot analysis, and then draws conclusions about the presence of blight in the area based on that detailed analysis. This methodology is eminently reasonable.

Appellants assert that the conditions of Blocks 1127, the western ⅓ of Block 1128, and Block 1129 are "clearly distinct" from those of the adjoining ATURA blocks that Appellants concede to be blighted. DDDB Br. at 71. But Appellants present nothing to establish that their contention is accurate. The Blight Study amply documents the blighted conditions of this portion of the land use improvement project. *See* Point I.B, *supra.*

5. The Two Condominium Buildings on Block 1127 Do Not Undermine the Blight Finding.

Appellants emphasize that Block 1127 contains two recently renovated condominium buildings located at 636 Pacific Street and on Sixth Avenue. DDDB Br. at 61-62. The Blight Study acknowledges the presence of these buildings. R344-46, R356-58. As Appellants concede (DDDB Br. at 71), an area may be deemed blighted even if there are individual lots within the area that are not substandard and insanitary. *See supra* at 21-22. ESDC acted within its discretion in including Block 1127 in the land use improvement project due

to the blighted conditions on this block and its immediate proximity to other blighted blocks.[5]

6. The Condominium Building on the Eastern ⅔ of Block 1128 Is Outside the Project Site and Does Not Undermine the Blight Finding.

Appellants' brief describes the Newswalk condominium building that is on the eastern portion of Block 1128 that is *outside* the project site. DDDB Br. at 63-64. The condition of the Newswalk building does not compromise ESDC's conclusion that the project site is blighted, for the obvious reason that Newswalk is not on the project site.

Nevertheless, Appellants assert (DDDB Br. at 65) that the presence of the three condominium buildings – two on Block 1127 and Newswalk on Block 1128 – calls into question the Blight Study's statement that one of the reasons for the blighted conditions on Blocks 1127 and 1129 and the western ⅓ of Block 1128 is their proximity to the open railroad yard on the adjoining blocks to the north. R235-37. But the accuracy of this statement is not diminished by the presence of these three buildings. As discussed above, Blocks 1127 and 1129 and the western ⅓ of Block 1128 are characterized by blighted conditions, and one reason for this is that they are immediately across the street from the open railroad yard to the north. R219. An open railroad cut

---

[5] In addition to being blighted, Block 1127 is required for the construction of the arena to be built on Blocks 1118, 1119 and 1127. R10515.

is a classic example of a land use with a potentially blighting influence on surrounding properties. *See* Gen. Mun. L. § 506(1)(a) (municipality may acquire air rights "for the elimination of the blighting influences of … railway or subway tracks … or other similar facilities which have a blighting influence on the surrounding area"); *Florida E. Coast Ry. v. City of West Palm Beach*, 110 F.Supp.2d 1367, 1370 (S.D.Fla. 2000) (railroad line a "corridor of blight"); *Jersey City Chap. of the Property Owner's Protective Assoc. v. City Council of Jersey City*, 55 N.J. 86, 90, 259 A.2d 698, 701 (1969) ("blighting influence" of railroad cut); *People v. Chicago RR Term. Auth.*, 14 Ill.2d 230, 233, 151 N.E.2d 311, 313 (1958) (railroad terminal contributes to "blight in adjacent and surrounding areas").

7. The Crime Data Do Not Establish that The Non-ATURA Blocks Are Not Blighted.

Appellants assert that the aggregation of the crime data from the ATURA and Non-ATURA Blocks overstates crime levels in the area outside of ATURA. DDDB Br. at 74-76. Appellants attribute the above average crime rates on the project site to the ATURA blocks and argue that the crime rate in the Non-ATURA Blocks is much lower. *Id.*

The Blight Study accurately depicts the crime statistics for the precincts and sectors covering the Project site. Such information is "based on consultation with the New York City Police Department." R19925-26. The

Project site falls within three police sectors with the majority of the area in Sector 88E, which has the highest crime rate of the three sectors. *Id.* While the other two sectors in the Non-ATURA Blocks have lower crime rates, block-by-block crime statistics are unavailable. The Non-ATURA Blocks make up only a small percentage of the area within the NYPD Precinct Sectors for which data are available. R486. Accordingly, contrary to Appellants' assertions, the crime data say little about actual crimes rates in the specific Non-ATURA Blocks in the project site. Moreover, crime statistics are but one of the many criteria that were considered. The overall blight determination was based on a consideration of all the factors, none of which is determinative on its own. *See Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 483 ("Many factors and interrelationships of factors may be significant").

8. ESDC Properly Relied On Underutilization As One Factor In Its Blight Determination.

Appellants claim that ESDC "relied heavily on what it characterized as 'underutilization' of properties." DDDB Br. at 82. Appellants' contentions concerning "underutilization" are wrong, factually and legally.

They are wrong factually because underutilization was only one factor ESDC considered in its findings. ESDC also relied on the poor physical condition of many of the buildings on the project site, the vacancy of numerous

buildings, the blighting influence of the railroad cut, pollution, the multiple ownership that is a barrier to redevelopment and other factors. R216-220, R245-46.

In support of their underutilization argument, Appellants contend that the gas station on Lot 1 of Block 1127 is a viable business enterprise and should not have been characterized as blighted. DDDB Br. at 86. But this gas station has caused numerous gasoline leaks that have resulted in severe environmental contamination. R311-14, R11210. Such pollution is one indicia of blight. *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 483. ESDC also acted rationally in considering one indicia of blight to be the gasoline station's use of only 3% of its lot's development potential. R311. The presence of a facility that consumes a small fraction of the development potential of its site is one indicia of blighted conditions, since without such blighted conditions, the build-out of the property could be expected to reflect its prime location near the Borough's largest transit hub. The reliance upon underutilization as a factor in determining whether an area is blighted is well established by the caselaw. *See Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 481, 483-84 ("underdevelopment" and "vacant land" are indicia of "substandard and insanitary" conditions); *see also Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d at 218; *G&A Books, Inc. v. Stern*, 770 F.2d at 293;

Haberman v. City of Long Beach, 307 A.D.2d 313 (2d Dep't 2003); *Sunrise Properties, Inc. v. Jamestown Urban Renewal Agency*, 206 A.D.2d 913 (4th Dep't 1994); *NRDC v. City of New York*, 672 F.2d 292, 294-95 (2d Cir. 1982); *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d at 46. Appellants' claim to the contrary is wrong as a matter of law.

Appellants' efforts to distinguish *Jo & Wo Realty Corp.* and *G & A Books, Inc.* are not convincing. In *Jo & Wo Realty Corp.*, this Court held that an area may be found to be "substandard and insanitary" based on circumstances such as "improper land use, 'outmoded and deteriorated structures' and *unutilized development rights*." 157 A.D.2d at 218 (emphasis added). In *G & A Books, Inc.*, the Second Circuit rejected a constitutional challenge to ESDC's condemnation of properties on the ground that the project at issue in that case served "the substantial governmental interests of improving the buildings in the area and *promoting use up to the permitted zoning potential*...." 770 F.2d at 296 (emphasis added). The point is also academic because *Yonkers Community Dev. Agency v. Morris* and other decisions cited above have held that underutilization is one indicia of blighted conditions.

In determining whether an individual lot is underutilized, it was reasonable for ESDC to consider the development potential of the lot under existing zoning. The concept of "unutilized development rights" (*Jo & Wo*

Realty Corp.) and "permitted zoning potential" (*G & A Books, Inc.*) calls for a comparison between the development on a lot and its development potential under existing zoning. Appellants criticize this methodology as "absurd," DDDB Br. at 83, but they cite no alternative benchmark for an agency to use in deciding whether a lot is underutilized.

Appellants also lodge complaints about the Blight Study's discussion of two other properties on the project site – a small three-story multifamily residential building (Block 1127, Lot 18) and a single family home (Block 1128, Lot 85). DDDB Br. at 80, 86-87. In each instance, Appellants complain that these lots should not have been deemed to be underutilized simply because much larger buildings could be built on the sites under current zoning. But, as discussed above, underutilization is one factor that may be considered in determining an area to be blighted. In any event, these two small residential buildings are hardly material to ESDC's conclusions with respect to the blighted conditions on the project site.

Finally, Appellants criticize Justice Madden for not following *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 191 N.J. 344, 924 A.2d 447 (2007). DDDB Br. at 83-84. In *Gallenthin*, the court applied New Jersey law to vacate the condemnation of "a sixty-three-acre parcel of largely vacant wetlands" where the "sole basis" for the condemnation was that the

undeveloped land was "not fully productive." 191 N.J. at 348, 924 A.2d at 449. *Gallenthin* is irrelevant because it is based on New Jersey law; underutilization is one factor to be considered in determining whether an urban area is "substandard and insanitary" under New York law. Moreover, ESDC did not rely upon underutilization as the "sole basis" for its blight finding. Finally, there is a significant difference between environmentally *desirable* wetlands in a non-urban setting and underutilized, transit-accessible urban property that lacks any redeeming ecological features in its current condition. R10638. Justice Madden did not err in following New York law rather than *Gallenthin*.

POINT II

ESDC MADE A RATIONAL DECISION THAT THE ARENA IS A CIVIC PROJECT

Appellants challenge ESDC's finding that the Arena is a "civic project" under the UDCA. The Court need not decide the issue because the Atlantic Yards Project was properly designated a "land use improvement project" as discussed above. Nevertheless, if the Court reaches the question, it is clear that ESDC has authority to undertake the Arena as a civic project.

A. Appellants' Description of the Arena Distorts the Record.

At the outset, it is important to correct misstatements of fact in Appellants' brief. Appellants claim, without record citation, that the Arena will be a "privately-owned and operated, for profit professional sports arena."

DDDB Br. at 93. But Appellants are wrong: the Arena will be owned by ESDC or a non-profit Local Development Corporation under ESDC's control (the "LDC"), for at least 30 to 40 years. R20076-77. Thus, characterization of the Arena as "privately-owned" is inaccurate. It will be publicly-owned.

Appellants are also wrong to characterize the Arena exclusively as a "professional sports arena." The Arena is expected to host approximately 225 events per year, but only 41 regular-season Nets basketball games. R14. The Arena is expected to host a wide variety of other recreational, cultural, educational and other events, including college basketball games, other college and high school athletic events, concerts, family shows, graduation ceremonies and other community events. R10592-93; R20088. As discussed below, the Arena would be a "civic project" even if the Nets games were the principal activity there, for reasons Justice Madden explained in detail in her opinion. R40a-R45a. Nevertheless, Appellants' effort to narrow the scope of activities that will occur at the Arena is a distortion of the record.

Finally, Appellants labor to fortify their argument by calling the Arena the "Barclays Center." There is no record evidence that this name will be used, although this name has been reported in the press. In any event, the name of the facility does not change its civic character. The New York State Theater at Lincoln Center will not cease to be the cultural facility it has been

since its creation simply because a captain of industry recently purchased the naming rights for $100 million.[6]

B. The Court Should Give Deference to ESDC's Determination that the Project is a Civic Project.

The reading given by an agency to its own governing statute is determinative so long as it is not irrational:

> In reviewing the finding of an administrative agency, the construction placed on the statute ... by an agency is entitled to great weight and is to be upheld if reasonable. Nor may a court substitute its judgment for that of the administrative agency. Where the factual determinations are neither arbitrary nor capricious, nor an abuse of discretion, they must be upheld.

Barklee Realty Co. v. NYS Div. of Hous. & Community Renewal, 159 A.D.2d 416, 416 (1st Dep't 1990). Accordingly, so long as ESDC was not irrational or unreasonable in its interpretation of the term "civic project" or in applying that statutory definition to the facts before it, its determination may not be disturbed. *See Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971).[7]

ESDC has consistently interpreted the term "civic project" in the UDCA to include professional sports facilities. Thus, ESDC has participated

---

[6] *See* www.lincolncenter.org/press_release/StateTheaterNamingNews_FINAL_7-9-08.pdf (announcing that the New York State Theater will be renamed the David H. Koch Theater in honor of his generous $100 million donation).

[7] The legislature intended the provisions of the UDCA to be interpreted broadly: "This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purpose." UDCA § 34; Unconsol. L. § 6284.

(and is now participating) in the construction or renovation of the new Yankees and Mets stadiums currently under construction, the Ralph Wilson Stadium (home of the NFL Buffalo Bills) and an arena for the NHL Buffalo Sabres. R1634a. Each of these projects serves (or will serve) as the home of a professional sports franchise, and each was undertaken by ESDC as a "civic project" under the UDCA. *Id.* ESDC's steadfast interpretation of its organic statute to permit it to participate in these types of facilities as a "civic project" is entitled to deference.

C. ESDC's Determination that the Arena Supports the Civic Nature of the Project was Based on a Rational Application of the Statutory Provisions Governing Civic Projects to the Facts in this Case.

ESDC determined that the Arena fits within the statutory definition of a "civic project," and that each of the findings required under the UDCA could be duly made with respect to that Project component.

A "civic project" is defined in the UDCA as "a project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes." UDCA § 3, Unconsol. L. § 6253(6)(d). To proceed with a civic project under the statute, ESDC must find that: (i) there is a "need for the educational, cultural, recreational, community, municipal, public service or other civic facility to be included in the project";

(ii) the project includes "facilities which are suitable for educational, cultural, recreational, community, municipal, public service or other civic purposes"; and (iii) the project "will be leased to or owned by the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose." UDCA § 10(d), Unconsol. L. § 6260(d).

ESDC duly made each of those determinations and findings with respect to the Project. In a section of the GPP denominated "Civic Project Findings," ESDC explained in some detail the reasons it concluded that the UDCA § 10(d) findings could properly be made in this case. R20088-92.

ESDC found the facility will "provide a needed venue for the Nets professional basketball team"; "a venue for the City's colleges and local academic institutions, which currently lack adequate athletic facilities"; "needed support for cultural and community events such as concerts, family entertainment and graduation ceremonies"; and "generate economic benefits for Brooklyn and for the City and State, while promoting civic pride." R20088. Thus, ESDC satisfied UDCA § 10(d)(1).

Fulfilling § 10(d)(2), ESDC found that "[t]he Arena will be designed to accommodate the types of events described in th[e Plan] and will be

suitable for the [purposes described in the § 10(d)(1) finding]." R20089. The FEIS sets forth in some detail the civic benefits that would be derived from the Arena. "The arena ... would have a capacity of approximately 18,000 seats and serve as home of the Nets; the arena would also host concerts and other events throughout the year." R10579. Scheduled events would include "concerts, family shows and community shows." R10587. The "arena is expected to host approximately 225 events per year [including] ... a minimum of ten events [which] would be available for use by community groups." R10593. ESDC observed that the "alternative of not building an arena would fail to achieve a principal benefit of the Project – providing Brooklyn, a 'city' in its own right of nearly 2.5 million people but without an arena or major professional sports team – with a facility and team in keeping with the proud sports legacy of the Borough." R20023.

With respect to UDCA § 10(d)(3), ESDC found that "ESDC will retain ownership of the land under the Arena through the initial term of its lease" to the LDC to facilitate the financing of the Project, and "ESDC or the LDC will retain ownership of the Arena during the initial term." R20090, R20075-76. Even after the initial term of the lease, which is expected to be 30 to 40 years, the Arena will continue to serve a community, municipal, public

service or other civic purpose by continuing to operate as an arena. *See infra* at 57-58.

The determination and findings of the GPP, along with the FEIS and SEQRA Findings, confirm that the Arena will serve the recreational, cultural, community, educational, and civic functions of a "civic project." Justice Madden – in a holding that Appellants do not challenge on appeal – properly found that attending sporting events is a "recreational" activity. R42a. Moreover, a facility that hosts concerts, theatrical performances, and entertainment events undeniably serves a "cultural" function, while hosting graduation ceremonies and interscholastic sporting events serves the community by promoting "educational" programs. For these reasons ESDC's determination that the Arena is a component of the civic project was a rational one.

D. The Arena Does Not Forfeit Its Status as a "Civic Project" Under the UDCA As A Result of Being Operated by FCRC Under Lease From ESDC or the ESDC-Controlled LDC.

Appellants argue that even if the Arena were to be a "civic project" if it were to be owned and operated by ESDC, the Arena forfeits that status as a result of being owned and operated by FCRC. DDDB Br. at 94. As noted above, the Arena will not be owned by FCRC. ESDC (or the ESDC-controlled LDC) will own the Arena. Thus, the only issue to be addressed is whether

FCRC's operation of the Arena under lease causes the Arena to lose the status of "civic project" that it would otherwise enjoy under the statutory language.

The fact that the Arena will be run as a commercial operation in no way affects the conclusion that the Arena is a civic project. The UDCA specifically encourages ESDC to maximize private participation in its projects, and the civic functions of the facility are served equally whether it is run by a commercial, municipal or not-for profit enterprise.

ESDC was created to "encourag[e] … *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, … in programs … to … *construct ... commercial, educational, recreational and cultural facilities*." UDCA § 2, Uncons. L. § 6252 (emphasis added). Similarly, the statute declares it State policy for ESDC to use its authority

> to promote the … welfare of the people … and to promote … sound growth and development … through … [the remediation of blighted conditions and] *the provision of educational, recreational and cultural facilities, and the encouragement of participation in these programs by private enterprise.*

Id. (emphasis added).

In structuring the transactions reflected in the GPP, ESDC was well aware of the legislature's intention that it maximize the participation of the private sector. In fact, ESDC specifically determined in the GPP (as it was

required to do under the law with respect to the land use improvement aspects of the Project, *see* UDCA § 10(c)(3), Unconsol. L. § 6260(c)(3)) that the plan affords "maximum opportunity for a participation by private enterprise." R20087.

Thus, Appellants are wrong to assert that the involvement of a commercial enterprise in the construction and operation of the Arena precludes the Arena from being approved by ESDC as a civic project. ESDC has reasonably interpreted its enabling statute as encouraging maximum private participation in all ESDC undertakings, including civic projects, and has taken pains to achieve that statutory purpose in this instance.

In light of the purposes articulated by the legislature in section 2 of the UDCA, there is no basis for Appellants' contention (DDDB Br. at 94) that since no finding is *required* with respect to the participation of a private enterprise in a civic project, such participation is not *permitted.* Such participation in a civic project is permitted – indeed, it is encouraged – even though it is not required.

The UDCA provides no basis for Appellants' assertion (DDDB Br. at 94) that the events which take place at the Arena cease to serve recreational, cultural, educational and civic purposes simply because the Arena is operated by a for-profit enterprise. *See Murphy v. Erie County*, 28 N.Y.2d 80 (1971)

(lease of stadium to for-profit private operator does not deprive the public of the benefit of attending sporting and cultural events at the stadium and thus does not detract from the stadium's "public purpose"); *Erie County v. Kerr*, 49 A.D.2d 174, 180 (4th Dep't 1975) ("The existence of a private profit motive by the lessee does not preclude the operation of the stadium from being a public purpose" because the Buffalo Bills NFL stadium "is being employed in furtherance of the exact purpose for which it was contemplated, *i.e.*, to provide the residents of Erie County the benefit of a first-class recreational, sports and cultural facility."). ESDC is authorized to "sell or lease ... any civic project to the state or ... to any municipality ... or to any other entity which is carrying out a ... civic purpose." UDCA § 9, Unconsol. L. § 6259(1). Just as the operation of a stadium by a commercial lessee can serve a "public purpose" of providing a "recreational, sports and cultural facility," there is no reason why a commercial lessee cannot, consistent with this provision, carry out a "civic purpose." The existence of a "profit motive" does not eradicate the recreational, cultural, or educational purposes served by hosting professional and scholastic sporting events, concerts, conventions, graduation ceremonies, community events, and various shows and performances.

E. Appellants' New Proposed Interpretation of the Term "Civic Project" Provides No Basis to Hold That ESDC Erred in Approving the Arena as a Civic Project.

Appellants present on this appeal a new interpretation of the statutory term "civic project" that they failed to brief or argue to Justice Madden. Before Justice Madden, Appellants argued that the Arena did not serve an educational, cultural or recreational purpose through the stratagem of ignoring all of the educational and cultural functions at the Arena and arguing that the Arena's function as a home for the Nets did not serve a "recreational" purpose, as required by UDCA § 3, Unconsol. L. § 6253(6)(d). R41a. Now that Justice Madden has established the obvious point that attending a basketball game is a recreational activity, Appellants have a come up with a new definition of "civic project" that would require that the Arena not only serve an educational, cultural or recreational purpose, but a *civic* educational, cultural or recreational purpose.

Appellants' argument, based on their new interpretation of "civic project," should be rejected. First, as it was not raised below, the argument is not cognizable on appeal and should not be considered. *See* Point II.E.1, *infra.* Second, if it is considered, the new interpretation should be rejected as contrary to the plain meaning of the statutory language. *See* Point II.E.2, *infra.* Finally, assuming *arguendo* that Appellants' new definition of "civic project" were held

to be the only rational interpretation of the term, the Arena is in any event a "civic project" even under that new definition. *See* Point II.E.3, *infra.*

1. Appellants' New Proposed Interpretation of "Civic Project" Should Not Be Considered on Appeal.

As previously noted, the statute defines "civic project" as "a project … designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or *other* civic purposes." UDCA § 3, Unconsol. L. § 6253(6)(d) (emphasis added). In arguing their case below, Appellants ignored the educational and cultural activities that will occur at the Arena and asked Justice Madden to rule that a facility designed to allow spectators to attend a Nets basketball game was not a facility with a "recreational" purpose as required by UDCA § 3, Unconsol. L. § 6253(6)(d). R41a-42a. In framing the issue in this way, Appellants conceded before the lower court that an ESDC project designed and intended for the purpose of providing facilities for a *bona fide* recreational purpose would meet the UDCA's definition of "civic project."

On appeal, Appellants now concede the obvious point that attending a basketball game is a recreational activity, but they ask this Court to adopt a whole new interpretation of "civic project." According to Appellants' new interpretation, the adjective "civic" at the end of this sentence (in the phrase "other civic purposes") must be read to modify each of the preceding

adjectives ("educational, cultural, recreational, community, municipal, [or] public service"). DDDB Br. at 90, 92-93. As Appellants would now have it, an ESDC project designed and intended for the purpose of providing facilities for an educational, cultural, recreational, community, municipal or a public service purpose would nevertheless fail to be a "civic project" if the educational, cultural, recreational, community, municipal or public service purpose served by the ESDC project is not "civic" in nature.

Appellants did not present this theory to Justice Madden and thus waived this contention. *See Atlantic Mut. Ins. Co. v. Goglia*, 44 A.D.3d 558, 562 (1st Dep't 2007); *Pirraglia v. CCC Realty NY Corp.*, 35 A.D.3d 234, 235 (1st Dep't 2006); *Perry v. Chase Manhattan Bank*, 290 A.D.2d 403 (1st Dep't 2002).

2. Appellants' New Interpretation of "Civic Project" Is Contrary to the Plain Meaning of the Statutory Term.

The UDCA definition of civic project (an ESDC "project … providing facilities for educational, cultural, recreational, community, municipal, public service or *other* civic purposes") is not susceptible to the new interpretation now advanced by Appellants on appeal.

Appellants' interpretation does violence to the basic rules of grammar. The word "civic" is an adjective in a list of other adjectives each of which modifies the word "purposes." There is no basis for construing "civic" –

the last item on this disjunctive list of adjectives – as modifying all of the other adjectives on the list. An adjective at the end of a sentence cannot modify adjectives that occur earlier in the sentence. In addition, adjectives do not modify other adjectives; they modify nouns. Contrary to Appellants' assertions, the word "civic" modifies the word "purposes," not the words "educational," "cultural," "recreational" or the other adjectives in the list.

In accordance with its plain meaning, the word "other" before "civic" – immediately following "educational," "cultural," "recreational" and the other adjectives on the list – conveys the idea that each of the aforementioned purposes falls within the category of "civic" purposes. Having listed several specific purposes that would qualify an ESDC-sponsored project as a "civic project," the Legislature ended with a catchall for "other civic" purposes.

This plain meaning reading produces a logical and clear meaning. By contrast, the interpretation put forward by Appellants introduces confusion and uncertainty. As interpreted by Appellants, each of the specifically listed purposes must be "civic" in nature to qualify, but the word "civic" is not defined in the statute, making the definition of "civic project" entirely circular.

Under the applicable standard of review, even if Appellants' new interpretation reflected a plausible reading of the statute (which it does not), it

would provide no basis to conclude that ESDC's more straightforward reading is irrational. Appellants seek to justify the departure from the plain meaning of the statutory language (which they embraced themselves below, albeit with a narrow definition of the word "recreational") on the ground that the plain meaning would lead to "absurdity and contradiction." DDDB Br. at 90. But there is nothing absurd or contradictory about Justice Madden's straightforward reading of the law as written.

3. The Arena Is a "Civic Project" Even Under Appellants' New Interpretation of that Term.

Assuming *arguendo* that an ESDC-sponsored project must have a "civic" educational, cultural or recreational purpose (as Appellants now argue), the Arena will serve such a purpose and thus would qualify as a "civic project" even under Appellants' definition of that term.

By virtue of its size, the Arena brings together 18,000 people for a common activity. By virtue of the number of fans, the public nature of Arena events, the fact that they are reported and broadcast in the mass media, and the civic pride that is created by a local team, Nets basketball games constitute a "civic" recreational activity. There are few more "civic" recreational activities than the phenomenon of local fans attending a game to root for their team.

In sum, Appellants are playing a new set of word games of their own devising: ESDC was hardly irrational in reading its own statute to

conclude that the Arena is precisely the type of facility serving educational, cultural and recreational purposes that is encompassed by the UDCA's broad definition of "civic project."

F. Appellants Wrongly Suggest that ESDC Cannot Proceed with a Civic Project Without a Project-Specific Authorization from the Legislature.

Appellants cite three session laws to concoct an argument that this Court should narrowly interpret the definition of "civic project" in the UDCA. *See* DDDB Br. at 96-99 (citing L. 1968, ch. 252; L. 1993, ch. 258, and L. 2005, ch. 238). The thrust of Appellants' argument is that since the legislature has on occasion enacted specific legislation concerning a particular stadium, or a particular funding program for certain sports facilities, ESDC must lack the authority to proceed with such projects under the UDCA. These arguments miss their mark.

The first session law cited by Appellants authorized the "Legislature of Erie County to enter into contracts and incur indebtedness in connection with the building of a stadium." *Murphy v. Erie County*, 28 N.Y.2d at 84 (describing L. 1968, ch. 252). Appellants trumpet the fact that this law was enacted "the same year the Legislature enacted the UDCA." DDDB Br. at 96. But the UDCA provides authority to ESDC – not Erie County. Since Erie County could not have built a stadium using the authority provided by the

UDCA, it would need different legal authority to do so, which the State Legislature supplied in the cited session law. The fact that the State Legislature granted Erie County the separate authority to build a stadium under this session law hardly implies that ESDC lacks its own authority to proceed with the construction of a stadium (or arena) under the UDCA.

The second session law cited by Appellants establishes the Sports Facilities Assistance Program, which provides monies for the construction of sports facilities. L. 1993, ch. 258. Contrary to Appellants' assertion (DDDB Br. at 98), this statute did not alter the definition of what constitutes a "civic project" under the UDCA. Rather, it established a new *funding* program for the construction of a particular subcategory of UDCA civic projects – those that involve the construction of a sports facility. Under the Session Law, a "project" eligible for the funding program was defined as "a *civic project* of the [ESDC] that entails the development or modernization of a sports facility." L. 1993, ch. 258 § 2 (emphasis added). This definition of "project" uses the term "civic project" as defined in the UDCA in establishing the sorts of projects – civic projects that involve sports facilities – eligible for the new funding program. The definition of "project" in the session law did not expand, contract or otherwise alter the UDCA definition of "civic project."

To the extent this session law has any relevance at all, it is in the legislative findings that accompanied its enactment, which declare:

> that sports facilities provide a recreational resource that enhances the quality of life for people of this state by providing family entertainment, including non-sports recreational events, and that the operation of a sports facility enhances the image of a community by attracting media coverage and establishing a focus of activity for the community.

L. 1993, ch. 258 § 1. These findings constitute a legislative determination that a stadium or arena is a "recreational resource" (L. 1993, ch. 258 § 1) and thus, when sponsored by ESDC, a UDCA "civic project" because it serves a "recreational" purpose.

Appellants suggest that since ESDC is required to make certain findings to provide *funding* under the Sports Facilities Assistance Program, it must follow that ESDC lacks authority to approve the Arena without making these same findings. DDDB Br. at 98. There is no logic to this suggestion: since Appellants concede that the Arena "is not part of this funding program," *id.*, the finding requirements of this program are inapplicable to that facility.

Appellants next assert that "[i]n 2005 the Legislature passed a law authorizing the leasing of public parkland in connection with the construction of the new Yankee Stadium." DDDB Br. at 96 (citing L. 2005, ch. 238). But this law was not enacted to fill any gap in ESDC's authority to proceed with Yankee

Stadium as a "civic project." It was enacted because the new Yankee Stadium is being built on land that was formerly a public park: "parkland is impressed with a public trust, *requiring legislative approval* before it can be alienated or used for an extended period for non-park purposes." *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630 (2001) (emphasis added). Since the Arena is not being built on parkland, this legal principle is irrelevant, and no state legislation is required for ESDC to exercise its UDCA authority.

Finally, Appellants argue that "[t]here has been no legislative determination here that a basketball arena for the New Jersey Nets located at Flatbush and Atlantic Avenues will serve a public purpose." DDDB Br. at 95-96. But in April 2006, the New York State legislature appropriated $100 million to ESDC to be used towards the new infrastructure required for the Atlantic Yards Project. R1362a. In making this appropriation of $100 million, it is evident that the State Legislature determined the Project to serve a public purpose. More fundamentally, however, Appellants' contention (even if it were accurate) is completely irrelevant because the UDCA does not require ESDC to receive project-specific legislation endorsing the public purpose of a land use improvement, civic or other type of project already authorized by the UDCA.

POINT III

THE LOWER COURT PROPERLY REJECTED THE CHALLENGE TO THE FEIS AND TO ESDC's SEQRA FINDINGS.

ESDC and its consultants produced an EIS that was extraordinarily thorough. Running for some 3,500 pages, with 1,500 pages of technical appendices, this three-volume document sets out in exacting detail the nature and extent of the impacts that may result from the Project's construction and operation with respect to sixteen environmental areas. R10471-14009; *supra* at 16. ESDC looked carefully at a reasonable range of alternatives, comparing their impacts in each of the sixteen environmental areas to those of the proposed project. R11792-888; *supra* at 17. The FEIS also included numerous mitigation measures. R11699-791.

As with the FEIS, the detailed 93-page SEQRA Findings issued pursuant to 6 N.Y.C.R.R. § 617.11(d) were prepared and considered with a level of care reflecting the complexity and importance of the Project. R1-25.69. *See supra* at 18-19.

In reviewing a substantive challenge to an FEIS, courts examine the record to determine "whether … the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (quoting CPLR § 7803[3]); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417. "[I]t is not the role of the

courts to weigh the desirability of any action or choose among alternatives." *Jackson*, 67 N.Y.2d at 416; *C/S 12th Ave. LLC v. City of New York*, 32 A.D.3d 1, 6–7 (1st Dep't 2006). Instead, the judicial role is simply to assure "that the agency itself has satisfied SEQRA, procedurally and substantively." *Jackson*, 67 N.Y.2d at 416.

When reviewing the adequacy of an EIS, courts examine the record to determine "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Id.* at 417; *Eadie v. Town Bd. of Town of North Greenbush*, 7 N.Y.3d 306, 318 (2006). The Court of Appeals has cautioned that under the "hard look" standard of review, "a court is not free to substitute its judgment for that of the agency on substantive matters." *Akpan v. Koch*, 75 N.Y.2d at 571; *see also Kenneth VV v. Wing*, 235 A.D.2d 1007, 1009 (3rd Dep't 1997) (court cannot substitute its judgment "even if a contrary result is viable"); *South Bronx Clean Air Coalition v. NYS Dep't of Transportation*, 218 A.D.2d 520, 522 (1st Dep't 1995). SEQRA "does not authorize the court to conduct a detailed *de novo* analysis of every environmental impact of, or alternative to, a proposed project which was included in, or omitted from, a FEIS." *Aldrich v. Pattison*, 107 A.D.2d 258, 267 (2nd Dep't 1985) ("the assessment of the environmental consequences of a

project, which frequently involves technical and scientific issues [is] more properly entrusted to the expertise of an agency, rather than to a court of general jurisdiction").

When applying this standard, courts are required to follow a rule of reason in determining whether environmental impacts have been adequately addressed. *See Jackson v. NYS UDC*, 67 N.Y.2d at 417 ("Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by … giving reasoned consideration to all pertinent issues revealed in the process.… [A]n agency's substantive obligations under SEQRA must be viewed in light of the rule of reason."); *Akpan v. Koch*, 152 A.D.2d 113, 117-18 (1st Dep't 1989), *aff'd*, 75 N.Y.2d 561; *Aldrich v. Pattison*, 107 A.D.2d at 266. It is well established that "[n]ot every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA." *Jackson v. NYS UDC*, 67 N.Y.2d at 417. Moreover, "the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. . . . Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence." *Id.* In short, a court's "role in reviewing

an agency action is not to determine if the agency action was correct . . . but rather to determine if the action taken by the agency was reasonable." *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 396 (1995).

On appeal, Appellants have narrowed their SEQRA challenge to their claims that the FEIS (i) should have presented an analysis of the environmental impacts of a terrorist attack on the Project; (ii) used the wrong "build year" for the Project; and (iii) set forth an irrational explanation for preferring the Atlantic Yards Project over its alternatives. As discussed below, Appellants' baseless assertions come nowhere close to making out a case that ESDC failed to satisfy its obligations under SEQRA in this matter.

A. ESDC Rationally Determined That A Terrorist Attack On The Atlantic Yards Project Should Not Be Included In the Reasonable Worst Case Scenario Analyzed in the EIS.

Appellants base their terrorism argument on a regulatory provision they never cited to the lower court. *See* Point III.A.1, *infra*. They then mischaracterize ESDC's decision-making as raising a question of law to be reviewed *de novo* rather than a rational determination on the facts of this particular case to be reviewed under the "rule of reason." *See* Point III.A.2, *infra*. ESDC's decision-making should be upheld as a rational exercise of agency discretion. *Id.*

Contrary to Appellants' contentions, FCRC's preparation of a "Threat and Risk Assessment" for Phase I of the Project (the "TARA") does not in any respect imply that a terrorist attack is "reasonably likely" or required to be subject to an environmental impacts analysis under SEQRA. *See* Point III.A.3, *infra*. The legal authorities Appellants rely upon are inapplicable, *see* Point III.A.4, *infra*, and they misconstrue the only other SEQRA case that has directly addressed the risk of a terrorist attack. *See* Point III.A.5, *infra.* Appellants also mischaracterize the EISs issued for other major projects in New York City to obscure the fact that not a single one of the them has ever set forth the type of analysis Appellants claim ESDC should have performed here. *See* Point III.A.6, *infra*. Finally, there is no basis for Appellants' contention regarding the potential environmental effect of security measures on aesthetic concerns and traffic. *See* Point III.A.7, *infra*.

1. This Court Should Not Consider Appellants' New Argument; In Addition, Appellants Abandoned Their Contention That The EIS Should Have Included The Environmental Impacts Of A Terrorist Attack, Precluding Them From Raising The Contention On Appeal.

In their Memorandum of Law below, Appellants argued that the EIS was deficient in that it failed to address the potential for a terrorist attack on the Project. In support of this argument, they cited one – and only one – provision of the SEQRA regulations: Section 617.9(b)(6), which provides

direction to agencies as to how they should approach situations where information about "reasonably foreseeable catastrophic impacts" to the environment is unavailable due to extraordinary cost or technical uncertainties. DDDB Mem. of Law dated April 4, 2007 at 24-25. They asserted that "[s]ince 9/11, the scope of reasonably foreseeable catastrophic impacts has increased" and the impact analysis called for by Section 617.9(b)(6) should be expanded to apply to "the attractiveness of a project as a terrorist target." *Id.* at 25.

In response to their argument, ESDC argued, *inter alia*, that the regulation cited by Appellants did not require an analysis of the possible impacts of a terrorist act on the Project, because it is aimed at catastrophic impacts that are "reasonably foreseeable." ESDC Mem. of Law dated April 27, 2007 at 59. ESDC also pointed out that the regulation itself makes clear the sorts of facilities with respect to which catastrophic impacts are "reasonably foreseeable." *Id.* at 60. Thus, the regulation provides that the analysis called for:

> would likely occur in the review of such actions as an oil supertanker port, a liquid propane gas/liquid natural gas facility, or the siting of a hazardous waste facility. It does not apply in the review of such actions as shopping malls, residential subdivisions or office facilities.

6 N.Y.C.R.R. § 617.9(b)(6).

Justice Madden's rejection of Appellants' argument was based on a careful reading of Section 617.9(b)(6). She took note of the regulatory language indicating that a catastrophic impact analysis "would likely occur" in the review of various inherently dangerous facilities, but not for "shopping malls, residential subdivisions or office facilities." Observing that "[t]he instant Project is more akin to the latter category of excluded facilities," Justice Madden – mindful of the "proscription against the Court's rewriting and expanding the scope of a regulation beyond its plain and express terms" – declined to extend Section 617(b)(6) to require that terrorism be analyzed in the EIS for the Project. R55a-56a.

Appellants do not appeal Justice Madden's decision on this point.[8] Instead, having relied exclusively on Section 617.9(b)(6) in support of their argument below, they now fault Justice Madden for having "erroneously concluded that … Section (b)(6), read alone, does not appear to address" the issue and for having "failed to construe SEQRA as a whole." DDDB Br. at 35. Appellants' brand new argument is that the potential for a terrorist attack on the Project should have been examined in the EIS pursuant to the provision appearing at Section 617.9(b)(5)(iii) of the SEQRA Regulations, which

---

[8] Appellants do, however mischaracterize Justice Madden's decision as being based on "a lack of precedent and the absence of a specific reference to terrorism in the SEQRA regulations." DDDB Br. at 27.

prescribes generally the required content of an EIS. In relevant part, that regulation calls for an EIS to "identify and discuss … only where applicable and significant … reasonably related short and long term impacts." 6 N.Y.C.R.R. § 617.9(b)(5)(iii).

As explained below, Appellants' new argument under Section 617.9(b)(5)(iii) is just as wanting as the old argument under Section 617.9(b)(6) they jettisoned along the path to this Court. But there are also two distinct procedural roadblocks to consideration of Appellants' new argument.

First, as explained above, Appellants did not make this argument to the lower court. Since a party is not permitted to raise an argument on appeal that was not raised below, *see supra* at 61, the Court should not consider Appellants' new argument.

Second, during the oral argument before Justice Madden, Appellants abandoned their contention that the FEIS should have set forth an analysis of the environmental impacts of a terrorist attack. Instead, Appellants limited what they were seeking to a narrative description of the security features of the Project at the level of generality presented in EISs for other major projects in New York City. *See* Transcript at 44, 119-20. Based on the colloquy before her, Justice Madden concluded that "[a]t oral argument, petitioners clarified their position on the issue of terrorism, stating that they are

'asking for the same level of detail' provided in the EISs prepared for four other projects in New York City." R55a. Since, as discussed below, the EISs for these four other projects contain no analysis whatsoever of the environmental impact of a terrorist attack, it is clear that Appellants abandoned their request for such an impacts analysis. Having abandoned that request before Justice Madden, it is inappropriate for Appellants now to resurrect that issue on appeal. *See People v. Kassebaum*, 95 N.Y.2d 611, 621-22 (2001); *People v. Graves*, 85 N.Y.2d 1024, 1027 (1995).

2. The Court Should Apply The "Rule Of Reason" To The Issue Of Whether The FEIS For The Project Should Have Discussed Further The Issue Of Terrorism And Hold That ESDC Acted Rationally And Within Its Discretion.

Appellants argue that "ESDC's determination that SEQRA does not require the consideration of the environmental impacts of a potential terrorist attack in the EIS … is subject to a *de novo* standard of review." DDDB Br. at 31. They characterize ESDC's determination as being a statutory interpretation and an interpretation of another agency's regulations, and contend that, as such, the determination is not entitled to deference. *Id.* But Appellants mischaracterize the nature of the ESDC determination at issue in this case. ESDC did not render a legal opinion as to whether terrorist acts come within the scope of SEQRA. Rather, ESDC determined, on the basis of the information

before it with respect to the Project, that a terrorist attack was not a "reasonable worst case" scenario that should be studied in the EIS.

Appellants contend that by making this determination, ESDC violated the requirement to "identify and discuss … only where applicable and significant … reasonably related short and long term impacts" of the Project. 6 N.Y.C.R.R. § 617.9(b)(5)(iii). Thus, the issue raised is whether ESDC complied with the substantive requirements of this provision to identify "reasonably related" impacts of the Project. Contrary to Appellants' claims, that issue is not reviewed *de novo*. It is governed by the "rule of reason." *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417; *Akpan v. Koch*, 152 A.D.2d at 117-18; *Aldrich v. Pattison*, 107 A.D.2d at 266. As explained below, the agency's determination here on the issue of terrorism was well within the ambit of its discretion.

ESDC prepared the analytical framework of the EIS by developing a series of "reasonable worst case" scenarios to be examined in the document. Those scenarios were based upon a variety of reasonable assumptions regarding how the Project would be constructed, and how it would operate upon completion of Phase I and Phase II. *See* R22677-79. The use of the "reasonable worst case" rather than the hypothetical "very worst case" is unquestionably appropriate. As this Court held in rejecting a challenge to a

different ESDC project, "consideration need only be given to such environmental consequences as are *reasonably likely* to result from the proposed action." *Wilder v. New York State Urban Dev. Corp.*, 154 A.D.2d 261, 262 (1st Dep't 1989) (emphasis added).

In preparing the DEIS, ESDC looked carefully at whether it should analyze in detail the threat of a terrorist attack and related security issues, and determined that to do so would not be appropriate. ESDC looked again at the issue in connection with its consideration of comments on the DEIS. ESDC's response to those comments provides a summary its rationale for not including a more detailed discussion in the EIS:

> In 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 [FCRC] have consulted with the FDNY regarding access needs of emergency vehicles and other safety considerations, such as excavation 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.

R12437. *See also* R11937, R12438-39, R12441.

Thus, having considered the matter, ESDC found the effects of a hypothetical terrorist attack as falling outside the scope of the reasonable worst case resulting from the Project, and this finding was equivalent to a determination that such effects are not "reasonably related" to the Project. It did so with the understanding that the Project is to be a mixed-use real estate development, and not some inherently dangerous facility like a nuclear power plant.

The reasonableness of ESDC's decision on this point is amply illustrated by considering the assumptions it would have had to make if ESDC had performed the analysis Appellants urge this Court to require. ESDC would have had to predict the form that a terrorist attack might take, making assumptions as to whether it would be an armed assault, a bomb, a chemical release, a "dirty bomb" or a biological attack; whether the weapon would be delivered by truck, by airplane, by U.S. mail or on the body of a suicidal terrorist; and if explosion were to be the method employed, whether one or more devices would be used. In addition, the power of any explosive used and the location and timing of the attack would have had to be predicted with

enough specificity to allow its consequences to be projected with some level of accuracy. Certainly, it was reasonable for ESDC to decline to engage in this sort of speculation in assessing the reasonably related environmental impacts of the Project. There is no requirement to examine speculative impacts under SEQRA. *See Indus. Liaison Comm. of the Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 143 (1988); *Neville v. Koch*, 79 N.Y.2d 416, 427 (1992); *Service Station Dealers of Greater New York, Inc. v. NYSDEC*, 145 A.D.2d 777, 781 (3rd Dep't 1988).

Moreover, ESDC's conclusion was in accord with the regulatory guidance embedded within the "catastrophic impacts" provision at Section 617.9(b)(6) of the SEQRA Regulations. As discussed above, that regulation requires disclosure of the potential for such impacts where they are "reasonably foreseeable" and describes the sorts of facilities where such impacts might reasonably be anticipated. According to that regulatory guidance, those facilities include "an oil supertanker port, a liquid propane gas/liquid natural gas facility, or … hazardous waste treatment facility" and not developments more akin to the Project such as "shopping malls, residential subdivisions or office facilities" 6 N.Y.C.R.R. § 617.9(b)(6). Although Appellants have abandoned their reliance on this regulatory provision, and instead rely on the general SEQRA provision calling for the examination of "reasonably related"

impacts, their new argument fails to account for the fact that the benchmark for requiring examination of an issue in an EIS under both provisions is essentially the same. Thus, if the catastrophic impacts caused by a terrorist act are not "reasonably foreseeable" with respect to real estate developments under one regulatory provision (§ 617.9(b)(6)), neither are they "reasonably related" to such projects under the other (§ 617.9(b)(5)(iii)). Moreover, since a terrorist attack of the kind Appellants mention would be a "catastrophic impact," the specific provision for catastrophic impacts codified at § 617.9(b)(6) – which makes clear that such analysis is not required with respect to a non-industrial real estate development such as the Atlantic Yards Project – should be looked to as guidance in this case in lieu of the more general regulatory provision cited by Appellants. *NYS Crime Victims Board v. T.J.M. Productions, Inc.*, 265 A.D.2d 38, 46 (1st Dep't 2000) ("the terms of a provision having specific application to a question will be accorded preference over the terms of a provision with only general application").

Moreover, under SEQRA, an EIS must study the "environmental impact *of the proposed action*." ECL § 8-0109(2)(b) (emphasis added). This provision points the attention of the reviewing agency to the "reasonably likely" (*Wilder v. New York State Urban Dev. Corp.*, 154 A.D.2d at 262) direct and indirect impacts of the project that is the subject of the agency's inquiry, and

not to impacts that are occasioned by something wholly distinct from the agency action, like the intervening criminal acts of terrorists. The impacts of a random terrorist attack should not be considered an impact of the agency action. As the lower court held, "neither SEQRA nor any SEQRA regulation requires that an EIS evaluate the potential adverse impacts *of terrorist acts*." R54a (emphasis added).

3. FCRC's Preparation Of A Security Planning Document (the TARA) Was Not An Acknowledgement that the Environmental Impacts of a Terrorist Attack Are "Reasonably Related" To The Project or "Reasonably Likely."

The linchpin for Appellants' argument is their contention that FCRC has "plainly recognized that the risk of terrorism is significant" by preparing a "Threat and Risk Assessment" or "TARA." DDDB Br. at 28. From that premise, Appellants contend that a terrorist attack is a "reasonably related" impact of the Project within the meaning of Section 617.9(b)(5)(iii) of the SEQRA regulations that should have been studied in the EIS. *See* DDDB Br. at 30.

Having learned that FCRC has prepared a security planning document (the TARA), Appellants jump to two wrong conclusions. First, they characterize that preventative planning exercise as signaling that there are "known environmental impacts associated with the risk of terrorism" and an

"undisputed, substantial risk of a terrorist attack on the Project." DDDB Br. at 27, 30. Piling legal error on top of this alarmist notion, they contend that the "known environmental impacts" and "substantial risk" they have conjured up are tantamount to a "reasonably related" impact of the Project that should have been studied under SEQRA.

Appellants' first error stems from a fundamental misunderstanding of the nature of a TARA, and the reason one was prepared in connection with the Project. As Jeffrey D. Venter, FCRC's security expert explained in his affidavit below: "[T]he process of addressing the security issues included in a project consists, to a substantial degree, in the preparation and ongoing development of a 'Threat and Risk Assessment,' or 'TARA.' A TARA is a project-specific document that is used to assess and minimize security vulnerabilities for a particular property or project." R887a. Thus, the mere preparation of a TARA, with the intention of identifying and minimizing security-related risks – whatever they may be – says nothing at all about the likelihood of a terrorist attack on the property under assessment. This point is well illustrated by the fact that Mr. Venter's firm alone "has been involved in the design and implementation of security and counter-terrorism systems that are in place in hundreds of government, commercial and private-sector facilities throughout the world"; "has designed security systems and participated in risk

assessments for numerous commercial buildings"; and "has performed similar work for multi-tenant buildings with commercial, retail, parking and other occupancies." R885a-87a. Security considerations, like fire safety measures, are routinely factored into building design, development and operation for projects of all sorts – not because terrorist attacks are *reasonably likely* to occur, but because in this day and age they could *possibly* occur. Thus, Appellants are way off base in asserting that "there is no dispute as to the significant risk of a terrorist attack on the project." DDDB Br. at 27.[9]

In a futile effort to reduce the sweep of their argument, Appellants suggest that requiring an analysis of the environmental impacts of a terrorist attack on the Atlantic Yards Project would not mean that "SEQRA always mandates consideration of the environmental impacts of terrorism in the review of any action." DDDB Br. at 30. But one reasonable inference that can be drawn from Mr. Venter's affidavit is that a security risk assessment and security plan are drawn up for any kind of major real estate development, including ordinary office buildings or shopping centers. Since Appellants contend that retention of a security planning firm (such as Mr. Venter's) to prepare security

---

[9] Appellants' misconception concerning the nature and purpose of the TARA permeates their brief. Thus, its preparation did not yield "known impacts" with respect to terrorism, DDDB Br. at 27; it was not a "recognition that the risk of terrorism is significant," *id.*; and it is certainly was not intended as a "mitigation measure." *Id.* at 27, 34, 45.

planning documents is tantamount to proof of an "undisputed, substantial risk" of a terrorist attack, a decision by this Court to require the EIS to address that issue would apply equally to any kind of real estate development constructed by a prudent developer.

4. The Legal Authorities Appellants Rely Upon Are Inapplicable.

Appellants cite three decisions under the National Environmental Policy Act in support of their argument that ESDC was required to address the possibility of a terrorist attack in the EIS. Those cases concerned a nuclear facility (*San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1019-20 (9th Cir. 2006)), a biological weapons research laboratory (*Tri-Valley Cares v. U.S. Dep't of Energy*, 203 Fed.Appx.105, 106 (9th Cir. 2006)), and the transportation of radioactive and hazardous waste (*Washington v. Bodman*, 2005 WL 1130294, *1 (E.D. Wash. 2005)). None of them addressed a mixed-use real estate development such as Atlantic Yards. Facilities and activities with the inherent dangers posed in those cases present concerns that are readily distinguishable and are irrelevant to the issue before the Court.

Appellants seek support in *Nash v. Port Auth. of New York & New Jersey*, 51 A.D.3d 337 (1st Dept 2008), which upheld a jury verdict finding the Port Authority negligent in connection with the 1993 bombing of the World Trade Center. But *Nash* is a tort case; it was not decided under the criteria that

apply to the preparation of an EIS under SEQRA. In *Nash*, this Court observed that the jury could have rationally viewed the bombing as a "real … possibility" on the record before it, *id.* at 346-47, but a jury finding that there was a real *possibility* is a far cry from Appellants' contention that ESDC lacks the discretion to determine whether an attack on a different real estate project is "reasonably likely" (*Wilder v. New York State Urban Dev. Corp.*, 154 A.D.2d at 262) for purposes of SEQRA.

5. New York State Case Law Confirms That Terrorism Need Not Be Studied in an EIS under SEQRA

Apart from Justice Madden's decision below, only one other New York State decision has addressed the issue of whether security concerns related to terrorism are to be included in an environmental review under SEQRA. In *Municipal Art Society of New York, Inc. v. New York State Convention Center Dev. Corp.*, Index No. 106245/06, 15 Misc.3d 1138(A), 2007 WL 1518932 (Sup. Ct. N.Y. Co. May 21, 2007) (Stallman, J.), petitioners challenged ESDC's finding that the expansion and renovation of the Jacob K. Javits Convention Center could be approved. Petitioners in that proceeding asserted that ESDC should have considered the security-related implications of moving a truck marshalling and screening facility to a location above the Lincoln Tunnel. The court rejected this claim, ruling that:

> Nothing in 6 NYCRR 617.9 indicates that SEQRA requires an analysis of security concerns. Indeed, 6 NYCRR 617.9 pertains to impacts that can reasonably be anticipated.... The security concern raised by Petitioner [–] the location of a truck facility – does not involve the use, production, or management of any inherently dangerous material that might otherwise bring security within the scope of environmental considerations.

Id. at *13. Thus, the court put aside any speculation regarding terrorism and focused its attention on the project before it, finding it not to be of an inherently dangerous nature. For this reason, the court concluded that security concerns were not a "reasonably anticipated" impact that needs to be addressed under SEQRA.

Appellants seek to distinguish *Municipal Art Society* by asserting "there is no indication that any party had already found the security risks significant enough to warrant substantial analysis and mitigation measures, as FCRC has done with respect to the Project." DDDB Br. at 38-39. Not only does this assertion mischaracterize FCRC's security planning effort, as discussed above; it also misstates the facts before the court in *Municipal Art Society*. Extensive affidavits were submitted to the court in that proceeding, describing in detail the security planning efforts that had been conducted with respect to the truck marshalling and screening facility. *See* Affidavits of David Kaplan and Michael Petralia (filed Oct. 24, 2006 in Index No. 106245/06 and available in the Office of the County Clerk). The decision in *Municipal Art*

Society is directly on point, both on the law and the facts (as Appellants here raise concerns about truck marshalling and screening with respect to the Arena).

6. It Would Be Unreasonable And Ill-Advised To Include In An EIS The Analysis Appellants Are Demanding; ESDC Rationally Addressed The Issue Of Security To The Extent It Deemed Reasonable And Its Disclosure Was At The Same Level Of Generality As EISs For Other New York City Projects.

In making its determination as to how far it should go in discussing the issue of anti-terrorist planning, ESDC was mindful of the role the public plays in the environmental review process, and in particular, that: (i) pursuant to ECL § 8-0109(4), it would be posting the DEIS on a "publicly-available internet website"; and (ii) any analyses or studies that are included in a DEIS would be subject to widespread public review. One only has to consider the sort of analysis Appellants are seeking to understand how ill-advised it would be to post on the internet a DEIS with the information they would have it contain.

In his affidavit in support of Appellants' claim, Dr. Groner suggests that the EIS should have contained "risk and vulnerability assessments," and an analysis of "alternative locations, configurations and mitigation strategies for the arena, residential towers or critical infrastructure," as well as a "blast analysis that includes different scenarios for blast resistant window treatments" and an analysis of threats posed by "forced entry, covert

entry, ballistics, explosions, and chemical, biological and radiological weapons." R241a-42a. While it may be Dr. Groner's view that such matters should have been included in a widely circulated document, ESDC believed that to do so would be to spoon-feed potential terrorists with the information they need to plan their crimes, and would not be in the public interest. Nothing in SEQRA requires such a wrong-headed course of action.[10]

Appellants themselves seem now to apprehend the folly of the papers they submitted to Justice Madden, and seek to temper their earlier demand by contending that "SEQRA requires disclosure and discussion of ... information" that "identif[ies] and analyze[s] the terrorism risk" and discusses "specific mitigation measures," but only "within the limitations imposed by reasonable security concerns." DDDB Br. at 45. But that watered-down claim must also fail, because it was ESDC's reasoned judgment that such "reasonable security concerns" weighed against the publication of the specific information of the sort Appellants are seeking.

---

[10] Appellants are correct in stating that one purpose of the environmental review process is to "solicit comments from the public" and that the "public comment purpose of SEQRA is best served by broad disclosure." DDDB Br. at 29-30. These principles apply with respect to "reasonably related" environmental impacts, and not to planning for the remote, albeit possible, contingency of a terrorist attack. "Broad disclosure" of information related to the identification and assessment of potential risks associated with terrorism might serve the purposes of those who would like to plot such attacks, but would do nothing to advance the purposes of SEQRA.

The FEIS discloses that that ESDC did take security issues and community safety into careful account in the course of conducting its environmental review of the Project. Thus, one of the criteria used in evaluating the Project site's appropriateness for use as an arena was that "[t]he site shape and size should be adequate to provide security and access control around and beneath the arena and related development." R10574. The Arena will comply with the NBA recommendations that there not be any parking or loading area beneath the arena bowl for security reasons. R10587. A specific site security plan is to be implemented, including "additional security personnel at arena events, screening of office tenants and visitors, and private security for the residential and open space components of the proposed project." R10620.

Appellants insist that the discussion of such matters in the EIS does not go far enough, and contend that EISs for other projects "have addressed terrorism risks and mitigation measures in sufficient detail to permit public participation and comment without publishing blueprints for terror." DDDB Br. at 41. Appellants made virtually the same assertion below, and in response ESDC submitted to Justice Madden the relevant sections from the four EISs they had cited in their papers. R22864-927.

With the documents themselves before her, Justice Madden found that "[a] review of the EISs prepared for these projects reveals that they

basically provide a generalized overview of what was considered for safety and security purposes." R55a. Appellants ignore this specific finding in their appeal, and simply repeat their assertions below. DDDB Br. at 42-44. In response, ESDC directs the Court's attention to the relevant passages of these documents in the record below. *See* R22868-909. Upon its review of these documents, the Court will find, as Justice Madden did, that "none has 'attempted to describe, even qualitatively, the consequences of a terrorist attack.'" R55a (citation omitted).

The World Trade Center Memorial and Redevelopment Plan FGEIS (R22878-86) explains that safety and security are important objectives of the project and that it will meet or exceed the criteria in building codes and safety regulations. R22880. While the EIS indicates that the "threat likelihood" for each building would be considered in the design of security and safety systems, there is no detailed discussion of terrorism. R22883-84. In fact, in response to a comment about the lack of provisions for anti-terrorism attacks, the EIS states that "the need to maintain the confidentiality of such design elements limits their public disclosure." R22886. The Fulton Street Transit Center FEIS (R22888-95) discusses safety issues, and indicates that a "Threat and Risk Assessment Study" was underway. R22894. While it generally identifies some areas to be addressed in the study, it does not provide specifics

with respect to those particular matters. The Permanent WTC PATH Terminal FEIS (R22897-901) touches briefly on matters related to security, but offers no detail with respect to anti-terrorist planning. R22899. Finally, the Environmental Assessment prepared for a component of the East Side Access Project (R22903-09) describes a "safety program" but is devoid of any detail regarding the analysis of potential terrorist activities or the impacts of a terrorist attack.

7. Appellants' Claims Regarding The Potential Effect Of Security Measures On Other Areas Of Environmental Concern Are Baseless.

Appellants fault the EIS for failing to anticipate future changes to the Project associated with security measures not yet factored into the design, or not yet incorporated into existing operational protocols. DDDB Br. at 36-37. For example, they speculate – without offering any basis for their assertions – that "security enhancements … will likely impact the character of the glass-enclosed … Arena and adjacent 'Urban Room.'" *Id.* at 36. What Appellants neglect to mention is that FCRC's security expert has explained that his company had worked over a period of months with the Project's structural engineer to:

> [perform] an extensive analysis of potential design specifications and materials of the arena, the other building on the Arena Block, and the connections between the Arena Block and public transportation. On

> the basis of these analyses … the structural design of the Arena Block and the buildings to be build on the block, and the specifications for building materials and glazing that are to be used were refined and upgraded to enhance the buildings' security to a very high standard.

R890a.

Thus, the current design of the Project already incorporates the "security enhancements" that are the subject of Appellants' purported concern. Moreover, any change to that design, whether related to security or not, would have to conform to the detailed Design Guidelines that were the basis for the Project as studied in the EIS. R20059, R20099-207. Although no such change is anticipated, any material modification to the Design Guidelines would be permitted only upon completion of an appropriate environmental review under SEQRA and the approval of a modification to the GPP.

Appellants also speculate, without citation to anything in the record, that "costs associated with anticipated security enhancements and protocols will impact the Project's overall financial burden on the City and State, may crowd out other Project features and/or mitigation measures, and may severely impact neighboring residential and commercial risk insurance rates." DDDB Br. at 36-37. To the extent this claim relates to financial matters like public finance and insurance rates, it has nothing to do with the environmental concerns that are covered by SEQRA. *See Tudor City Ass'n v.*

City of New York, 225 A.D.2d 367, 368 (1st Dep't 1996); *Coalition Against Lincoln West, Inc. v. City of New York*, 208 A.D.2d 472, 473 (1st Dep't 1994), *aff'd* 86 N.Y.2d 123 (1995). The specter of mitigation measures being eliminated by the need for security enhancements is without any basis in the record. In any event, any such Project modification could be allowed only upon the completion of additional environmental review in compliance with the requirements of SEQRA.

Appellants make the same argument as it relates to traffic, hypothesizing that "[a]lthough the EIS includes an analysis of the project's impacts on vehicular traffic, it says nothing about how the security-enhancing 'operational protocols' for the project may affect traffic." DDDB Br. at 37. However, they add a flourish to the argument here, noting that the City of Newark has "determined that the recently built Prudential Arena was sited so close to the streets of downtown Newark as to create a security risk, requiring implementation of a procedure to close the streets adjacent to the arena during events as a precaution against truck bombs." *Id.* They then hypothesize that the City of New York will do the same with respect to the Project Arena – but in doing so ignore the fact that security planning for the Project was conducted in close consultation with the "NYPD Counterterrorism Bureau" and that the materials used to construct the Project have been "refined and upgraded to

enhance the buildings' security to a very high standard." R890a-92a. In any event, as with the design components discussed above, any substantial modification to the roadway network or traffic operations implemented to address some security concern would have to be preceded by an appropriate environmental review under SEQRA.

B. ESDC's Selection of a 2016 Build Year to Conduct Certain of the Technical Analyses Presented in the FEIS Was Not Arbitrary or Capricious or an Abuse of Discretion.

Before the lower court, Appellants argued that the EIS was flawed in that the build years utilized for purposes of certain of the impacts analyses were incorrect. In particular, Appellants argued that it is "extremely unlikely" the Project will be completed by the 2016 build year, and that it will "almost certainly" require from five to ten years beyond that date to be completed. Judge Madden rejected this claim as being backed up only by "vague generalities and isolated statements made outside of the environmental review process." R60a. In addition, the lower court found that Appellants "failed to submit legal support suggesting that an agency's SEQRA findings, under the circumstances herein, can be called into question on the basis of the build year … selected by the agency in analyzing the environmental impacts of a proposed project." *Id.*

On appeal, Appellants distort Justice Madden's decision, characterizing it as a ruling that "the choice of the build years were immaterial to the accuracy of the analyses contained in the EIS." DDDB Br. at 46. They then add a few bells and whistles to their unsuccessful argument below, without addressing the fundamental deficiencies identified by Justice Madden. Thus, Appellants now assert that "[t]he evidence is clear that when ESDC issued the FEIS, it knew or certainly should have known that the build dates were not 'certain' as required by SEQRA." DDDB Br. at 53. The primary basis for this argument remains the "vague generalities" and "isolated statements" discounted by Justice Madden. In addition, Appellants make the irrelevant observation that the start date for the construction schedule that formed the basis for ESDC's selection of the build year had slipped by a few months.

As explained below, ESDC had a rational basis for its selection of the build year (Point III.B.1, *infra*) and did not abuse its discretion in making this selection (Point III.B.2, *infra*).

1. ESDC Had A Rational Basis For Its Selection Of The Build Year.

The build year of 2016 for the Project was confirmed by a detailed quarter-by-quarter schedule prepared by Turner Construction Company, one of the largest construction contractors in the United States, which laid out the expected sequence and timing of all major activities required for completion of

the project. *See* R11566, R13102-13149. This detailed construction schedule addressed not only the construction sequence, but also equipment and labor requirements, deliveries, and locations of equipment and work activity on the project site. *Id.* ESDC scrutinized the construction schedule, reviewing it in detail with the assistance of its consultants. R10. The FEIS notes that "[m]eetings . . . have been underway during the preparation of the DEIS and are continuing, to make sure that the DEIS and FEIS reflect the latest understandings of the likely construction methods, durations, timeframes and mitigation methods." R12338-39.

Thus, ESDC took particular care in selecting the build years to be analyzed in the EIS, and had sound reasons for making the selection it did. There is no basis for any contention that ESDC did not take the requisite "hard look" at this issue.

Appellants proffer no credible evidence to indicate that the schedule prepared by Turner Construction and carefully reviewed by ESDC and its consultants was faulty in any material way. They provide no affidavits from persons knowledgeable in project scheduling, construction, or project management, and "do not identify any specific inaccuracies in the construction schedule." R60a. As Judge Madden correctly ruled, a SEQRA challenge must

rest on something more than "vague generalities and isolated statements made outside the environmental review process." *Id.*

In their attempt to discredit the 2016 build year, Appellants point to Charles Ratner's comment that the project may last fifteen years. What they fail to mention, however, is that Mr. Ratner explained that his 15-year period referred "to the total time, from the idea or conception of the development to completion of the final building" and that he further stated that "[t]he actual construction of Atlantic Yards will take 10 years." R580a. Mr. Ratner's statement fully comports with the 2016 Build Year.

Appellants also call attention to Laurie Olin's comments concerning the construction period. While Mr. Olin said that he believed the project "probably" would take longer than planned, this was an off-the-cuff opinion of a landscape architect with no apparent expertise in the scheduling of major construction projects. *Id.*

Appellants note that certain preparatory work slated to begin in November 2006 did not commence until February 2007 and declare that the "construction schedule [on which ESDC based its build year selection] was already demonstrably inaccurate at the time the FEIS was issued." DDDB Br. at 52. They then blow this asserted slippage of a few months out of all proportion and announce that "[t]he evidence is clear that when ESDC issued

the FEIS, it knew or certainly should have known that the build dates were not 'certain' as required by SEQRA," and – worse yet – that "it was unlikely that the Project would be completed before 2021 or 2026." DDDB Br. at 53. Appellants make no attempt to explain how a *de minimis* three month deferral in preparatory activities would result in a delay of the Project for five to ten years. Appellants' assertions are rank speculation without any logical or record basis.

2. The Selection of the "Build Year" Calls for the Exercise of Discretion by the Lead Agency; ESDC Did Not Abuse Its Discretion.

In addition to being rationally based on the detailed schedule from Turner Construction Company, the build year of 2016 that ESDC established for the FEIS analysis was a reasonable exercise of its discretion under the circumstances. The FEIS explains why a "build year" is needed for the EIS analysis:

> An EIS analyzes the effects of a proposed project on its environmental setting. Since typically a proposed project, if approved, would take place in the future, the action's environmental setting is not the current environment but the environment as it would exist at project completion, in the future. Therefore, future conditions must be projected. This prediction is made for a particular year, generally known as the "analysis year" or the "build year," which is the year when the proposed project would be substantially operational.

R10630–31.

For example, traffic is a principal concern raised by Appellants. The amount of traffic generated by the Project upon its completion is a function of the size of the buildings and their uses; the traffic generated by the Project is *not* a function of the assumed build year. R12616. Nevertheless, in conducting the required analysis of traffic impacts, it is necessary to overlay the Project-generated traffic on top of the traffic patterns and volumes that are assumed to be in place in the "build year." It is Appellants' contention that a later build year would have increased the assumed "background traffic" and, as a result, would have affected the FEIS analysis of the *cumulative* effect of "background traffic" and Project-generated traffic.

Once the role of the build year is understood, it is clear that Appellants' purported "build year"-related traffic concern is that the "background traffic" assumed in the FEIS was too low. The record establishes, however, that ESDC used many conservative assumptions in estimating background traffic to ensure that it was not underestimated. In addition to assuming a general background growth factor of 0.5 percent per year for travel demand during the 2006 through 2016 period (equivalent to the travel demand generated by 9 million square feet of new office space in Downtown Brooklyn, *see* R12602), ESDC added the travel demand from discrete projects consisting of 6,254 dwelling units, 5.2 million square feet of office space, 1.2 million

square feet of retail space and 2.4 million square of other space. R12198, R12608. This resulted in a very high estimate of background growth, which, when combined with Project-generated traffic, resulted in the disclosure of many significant adverse traffic impacts and a host of traffic mitigation measures. R11263-64, R11708-62.

Although Appellants claim that a later build year should have been used, the build year is merely one component of a series of professional judgments that ESDC made to establish a reasonable estimate of background growth. Appellants point to nothing that would suggest that the complex and conservative methodology applied by ESDC (including, as one of many factors, the 2016 Build Year) resulted in an underestimate of that facet of the traffic analysis.

Appellants' "build year" contention with respect to construction is somewhat different. With respect to this issue, Appellants assert that a longer construction period would reduce the intensity of construction (less construction per year) but increase its duration. Again, however, the build year assumption used for the analysis of construction impacts required considerable professional judgment by ESDC: had the analysis been conducted as Appellants suggest with a stretched-out construction schedule, there would be less construction-related traffic – and thus less construction-related diesel emissions and noise –

in any single time period. Use of such an extended construction schedule would reduce the potential that the analysis would result in the disclosure of significant adverse construction impacts that triggered the mitigation ESDC imposed on the Project's construction. R12352 ("The schedule and analyses concentrate construction activities at the site and assures that the reasonable worst-case construction condition is analyzed.").

As the foregoing examples illustrate, the build year is but one of many judgments made by the lead agency in presenting an EIS that fairly discloses environmental impacts. In *Fisher v. Giuliani*, 280 A.D.2d 13 (1st Dep't 2001), this Court upheld the City Planning Commission's "hard look" under SEQRA with respect to the likely development induced by zoning amendments affecting the Manhattan Theater District. The petitioners in that case noted that CPC had looked only at buildings projected to be built within 10 years of the zoning enactment, and claimed that CPC should have tried to look further into the future and based its analysis on a later build year. This Court held that "[t]o adopt a ten-year time frame was hardly an irrational examination of the long-term foreseeable future." 280 A.D.2d at 21. This Court's decision recognizes that the selection of a build year is a judgment-call by the lead agency calling for the exercise of the agency's discretion. The Court also

recognized that there are limits to the ability of an agency to foresee environmental conditions far into the future.

Having vetted the build year and having exercised diligence in establishing the other parameters of the analytical framework for the EIS, ESDC, with the help of its consultants, produced an EIS that included an in-depth analysis of each of the relevant areas of environmental concern. R10471-14007. The 93-page, single-spaced SEQRA Findings issued at the conclusion of the process brought into sharp relief the numerous impacts disclosed in the EIS. Among the issues highlighted and thoroughly discussed was the fact that the Project's construction will result in "traffic and noise … beyond the relevant criteria." R25.66. The SEQRA Findings Statement concluded with the observation that "even after mitigation, when the Project is fully built, 35 intersections will experience significant impacts in one or more through or turning movements during one or more of the seven analyzed peak time periods." *Id.* The SEQRA Findings Statement also concluded that, as a result of Project's construction, the "local neighborhood character will be impaired over a prolonged period of time." *Id.*

These were the facts Justice Madden had before her when she found no legal support for the contention that "an agency's SEQRA findings, under the circumstances herein, can be called into question" on the basis of the

agency's selection of a build year. Appellants attempt to twist this ruling into a finding that build years are "immaterial" to a SEQRA analysis. DDDB Br. at 46. But Justice Madden's decision was based on the "circumstances herein," which included ESDC's careful consideration of a detailed construction schedule, a thorough FEIS disclosing environmental impacts and a SEQRA Findings Statement that carefully weighed the impacts and imposed a comprehensive set of mitigation measures.

Appellants would have the Court set aside the years of painstaking work ESDC devoted to the environmental review of the Project because of its purported failure to "correctly estimate" the build years with the "accuracy" and certainty they say SEQRA demands. DDDB Br. at 46. But the courts have consistently refused to entertain such claims. "Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess an agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence." *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417; *see also Aldrich v. Pattison*, 107 A.D.2d at 267 (SEQRA "leaves room for a responsible exercise of discretion and does not require a particular substantive result in particular problematic instances."); *Schiff v. Bd. of Estimate of City of New York*, 122 A.D.2d 57, 59 (2nd Dep't

1986) ("[T]he Legislature has left the agencies considerable latitude in evaluating environmental effects.").

Thus, the question under the law is not whether ESDC "correctly" or "accurately" identified the build years for the Project, but whether the agency had given "reasoned consideration" to the issue. *See Jackson v. New York State Urban Dev. Corp.*, *supra*. It is undisputed here that ESDC based its build year selection on its review, with the assistance of qualified consulting firms, of an extraordinarily detailed construction schedule prepared by a well-respected construction company. While Appellants may quibble with the outcome of ESDC's review, there can also be no question under the circumstances that the issue of when the Project would be substantially operational was duly considered by the agency.

No case has overturned agency findings on the basis of the build year selected for analysis. In the leading case where the issue was addressed, this Court characterized the build year concept as a "non statutory baseline" used "as a device to provide assumptions derived from relevant environmental studies." *Committee to Preserve Brighton Beach v. Council of the City of New York*, 214 A.D.2d 335, 337 (1st Dep't 1995) ("*Brighton Beach*"). Notably, this Court rejected the suggestion "that the data utilized in the environmental impact statement is invalidated because of the reliance on a particular build year." *Id.*

Appellants attempt to distinguish *Brighton Beach*, noting that "the build year complained of was only three years after the environmental review, and there is no indication that the appellants alleged how the build year might have affected the EIS data." DDDB Br. at 55. But given the fact that the Court explicitly rejected a challenge to the "data utilized" in the EIS due to the agency's reliance on a purportedly inaccurate build year, there is every indication that the appellants in *Brighton Beach* alleged – as Appellants do in this case – that an inaccuracy in the build year caused the analysis to be flawed. Moreover, Appellants make no effort to explain why the distinction they seek to draw with respect to the time frames for the build years might make any difference to the applicability of the ruling in *Brighton Beach* to this case.

Appellants also make passing reference to the fact that the Project involves property acquisition through "eminent domain, a process that would involve significant litigation" and assert that such litigation would "keep the project from commencing." DDDB Br. at 53. This assertion is belied by the fact that in April 2007 Appellants sought a preliminary injunction to stop work on the project and submitted affidavits stating that construction had commenced. R568a, R580a, R22760. Moreover, litigation-related delays in project completion do not invalidate a SEQRA review and do not require it to be updated, even if its conclusions were based on older data. *See Jackson v.*

New York State Urban Dev. Corp., 67 N.Y.2d at 425 ("The EIS process necessarily ages data. A requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives."); *Wilder v. New York State Urban Dev. Corp.*, 154 A.D.2d at 262 ("[I]t would be most inappropriate to permit an unsuccessful challenge to a public benefit project to nevertheless thwart its completion.... Such a result renders a baseless challenge as effective as a meritorious one in defeating public development projects and cannot be tolerated."). These cases confirm that a pinpoint build year is not a prerequisite to a proper SEQRA review, particularly when the build year is the product of a well documented and reasonable analysis.

Finally, Appellants argue that ESDC has acted in a manner that is inconsistent with the guidance set forth in the *CEQR Technical Manual* with respect to the selection of a build year. DDDB Br. at 54.[11] Justice Madden's opinion cites the specific language of this guidance, as follows:

> "It may be that the build year of a given action is uncertain. *This could be the case for some generic actions or for small rezonings*, where the buildout

---

[11] Appellants refer inaccurately to the *CEQR Technical Manual* as containing "directives regarding the selection of a completion date." DDDB Br. at 55. While it generally follows the *Manual* as a guideline, ESDC, as a state agency taking the lead in the environmental review of the project, is not subject to city directives. On the contrary, it is obligated under SEQRA to exercise its own judgment in conducting the review.

> depends on market conditions or other variables. In this case, it is prudent to select, from the range of reasonable timing scenarios, the one that represents the worst case environmentally."

R60a-R61a (quoting *CEQR Technical Manual*) (emphasis added).

The italicized language indicates that this guidance is directed at environmental reviews for "generic actions" and "rezonings" where prediction of a build year is particularly difficult. The guidance has no applicability here, where there is a specific, well-scrutinized construction schedule for a specific development by a specific sponsor on a specific time schedule that is referenced in the GPP.[12]

Thus, Appellants' contentions do nothing to shake the reasonable foundation on which ESDC's build year selection was based. Accordingly, their claim with respect to this issue must fail.

---

[12] Appellants improperly cite a "Funding Agreement" between FCRC and ESDC dated September 12, 2007. DDDB Br. at 51 n.14. The document is not in the administrative (or judicial) record because it did not exist at the time the public approvals challenged in this proceeding were issued. The Court should ignore Appellants' contentions with respect to the Funding Agreement altogether. But the Court should be aware that Appellants have grossly mischaracterized the Funding Agreement by stating that it "afforded FCRC twelve years ... to build Phase I alone, and an indeterminate amount of time to build Phase 2." *Id.* The Funding Agreement (at p. 27) specifically states that the "Project Documentation" (more detailed agreements that are still being negotiated) "will contain provisions requiring the use of commercially reasonable efforts to achieve construction of the Arena and the other buildings in accordance with the project schedule set forth in the GPP." www.empire.state.ny.us/pdf/AtlanticYards/Funding_Agreement/Document_part5.pdf. The Funding Agreement includes certain contractual remedies ESDC could pursue if FCRC falls years behind schedule, but these remedies are not stated to be exclusive.

C. ESDC's Rejection of the "Reduced Density–No Arena Alternative" and "No Action Alternative" Was Not Arbitrary or Capricious or an Abuse of Discretion.

Appellants assert that ESDC "irrationally rejected" two of the alternatives studied in the FEIS: the Reduced Density–No Arena Alternative and the No Action Alternative. These two alternatives are the focal point of Appellants' contentions because neither involved development on Blocks 1127 and 1129 and the western ⅓ of Block 1128. DDDB Br. at 57. But ESDC's decision-making on this point was eminently rational, even though it made a choice that Appellants oppose.

Appellants ground their claim in a mischaracterization of the reasons that ESDC chose the Atlantic Yards Project over these two alternatives. Having created this strawman, they then seek to knock it down by once again attempting to convince this Court that the 2⅓ blocks mentioned above were "thriving" rather than blighted.

1. The Lead Agency Has Wide Discretion in Choosing Among Alternatives.

A lead agency under SEQRA has "considerable latitude in evaluating environmental effects and choosing among alternatives." *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417. "[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives." *Id.* at 416; *C/S 12th Ave. LLC v. City of New York*, 32 A.D.3d at 6–7. The choice

among alternatives is to be documented in the SEQRA Findings Statement, which is required to "provide a rationale for the agency's decision." 6 N.Y.C.R.R. § 617.11(d)(3).

2. ESDC Provided a Rational Explanation for Its Decision to Approve the Project Rather Than the Alternatives.

The SEQRA Findings Statement explains in detail the reasons why ESDC selected the Project in lieu of the No Action Alternative and the Reduced Density–No Arena Alternative. For example, ESDC's findings included a detailed comparison of the environmental impacts of the Project to those of the No Action Alternative. R25.49-25.50. The discussion also included a careful comparison of the social, environmental, civic and economic benefits of the Project to the benefits of "No Action." R25.50, R19-R21. Accordingly, ESDC was well aware that the Project would result in significant unmitigated environmental impacts as well as significant benefits, while "No Action" would result in far fewer and less severe environmental impacts but far fewer benefits as well. R25.50. Thus, ESDC's deliberations involved a balancing of a wide array of Project benefits against its well-defined impacts. R25.65-R25.69. The Findings Statement summarized the Project's benefits as follows:

> The Project will have many significant social, environmental, civic and economic benefits. It will eliminate long-standing blight at the project site. It will create 8 acres of publicly accessible open space, which will be designed, landscaped and configured to be

inviting to the public. Since the Project will include a network of wide pedestrian walkways and a bicycle path into the open space, it will create visual and physical links between neighborhoods that are currently divided by an open rail yard and blighted conditions. It will add a new subway entrance on the southeast corner of Atlantic and Flatbush Avenues to the 10-line Atlantic Avenue/Pacific Street subway station complex and provide a new and improved LIRR rail yard with the capacity to accommodate 10-car trains and improved train access to the LIRR Atlantic Terminal.

The Project will create an architecturally distinctive development that will invigorate the Atlantic Terminal area of Brooklyn. It will create 17 new "green" buildings that will be, at a minimum, LEED certified, which is the recognized standard for measuring environmental sustainability of new buildings. It will create a new arena that will bring a major professional sports team to Brooklyn, which has lacked such a team for decades, and will provide a venue for many other entertainment, collegiate, community and other events. The arena will be surrounded by other buildings and retail uses that create street-level activity even when there is no event at the arena, avoiding what might otherwise be a poor pedestrian experience characteristic of some other arenas.

The Project will create thousands of new housing units, including a large number of affordable units, to accommodate the demand that will exist, with or without the Project, for housing in Brooklyn and New York City more generally. It will allow for efficient regional growth by locating a significant new development at a major transit hub and thereby encouraging the use of mass transit. It will create a new 400-bicycle indoor facility adjacent to the transit hub for use by the community. It will stimulate the New York City and New York State economies by providing thousands of jobs, significant annual tax revenues, and billions of dollars in economic activity.

R25.65-25.66. On the other side of the scale, the Findings included a well-documented, detailed summary of the adverse environmental impacts of the Project, a number of which were identified as significant. R25.62-25.64. After weighing this array of benefits and impacts of the Project against "No Action," ESDC concluded that it should go forward with the Project, and explained why in detail. R25.66, R25.49-R25.50.

ESDC followed the same deliberative process in comparing the benefits and impacts of the Project to the benefits and impacts of the Reduced Density–No Arena Alternative. R25.54-R25.58, R25.66-R25.67. ESDC's detailed reasoning, as reflected in the SEQRA Findings Statement, is eminently reasonable and meets all SEQRA requirements.

Appellants, however, seek to reduce this entire, complex analysis to one consideration. According to Appellants, the reason ESDC rejected the two alternatives was the "false assumption" that "without the Project" the Non-ATURA Blocks "would remain blighted and continue to permit low-density industrial uses." DDDB Br. at 58. Appellants' statement is inaccurate for many reasons.

First, the issue as to whether the Non-ATURA Blocks would remain blighted in the future without the Project was only one of many considerations that informed ESDC's decision-making, as established by the

detailed discussion of ESDC's reasoning in the SEQRA Findings Statement. R25.50, R25.57-R25.58, R25.66. For example, neither of the two alternatives under discussion include the civic elements of the Atlantic Yards Project – the Arena, the new subway station entrance, the new LIRR yard, or the 8-acres of publicly accessible open space. R25.50, R25.57-R25.58. These were key reasons why ESDC did not select these alternatives. *Id.* The Project also offers more economic, housing and other social benefits than the alternatives ESDC rejected. *Id.*

Second, ESDC never made a "false assumption" about what would occur on the 2⅓ blocks Appellants cite if the No Action or Reduced Density–No Arena Alternative were selected. Contrary to the premise of Appellants' argument, ESDC never assumed that the Non-ATURA Blocks would forever remain in their current condition without the Project. Rather, ESDC concluded that without the Project, "individual parcels on the project site … could be redeveloped subject to present zoning." R25.49. ESDC also concluded that without the Project "individual parcels on the project site … could be redeveloped subject to … separate discretionary actions [*e.g.*, a City rezoning or zoning variance] and environmental reviews [of those separate discretionary actions]." *Id.* Although ESDC acknowledged that redevelopment of individual parcels was possible, it determined that "significant new development" would

be "unlikely" due to the "blighting influence of the rail yard" and the "predominance of low-density manufacturing zoning on the site." *Id.* Appellants' abbreviated statement that ESDC assumed that the "area would remain blighted" (DDDB Br. at 67) glosses over ESDC's acknowledgement that individual parcels on the project site could be redeveloped over time in the absence of the Project.

ESDC's conclusions were rational. First, the blighting influence of the rail yard is well established by the record. R217, R219, R228-31, R233-34. Second, the blighted conditions on the project site have been created over many decades and are long-standing. R233. Third, the zoning on the site is predominantly low density and would not permit significant development. R10662-63, R10666. Fourth, as noted above, the development of the site (and the Non-ATURA Blocks in particular, *see* R218-19) is hampered by diversity of land ownership and the presence of many small lots.

Appellants contend that Blocks 1127 and 1129 and the western ⅓ of Block 1128 were undergoing a "residential housing boom" (DDDB Br. at 64) and were "rapidly gentrifying" (DDDB Br. at 60). They mostly base these assertions on the same couple of newspaper articles they presented to Justice Madden and a few new citations to non-record and unreliable internet

"evidence." DDDB Br. at 65. The lower court soundly rejected Appellants' puffery based on the cold facts documented in the Blight Study. R74a.

Appellants accuse Justice Madden of confusing the standard for blight under eminent domain law with the SEQRA requirement that ESDC consider alternatives. DDDB Br. at 59. But Justice Madden did not cite eminent domain cases in this section of her opinion. R74a. Rather, she properly cited the *facts* documented in the Blight Study concerning the poor physical condition of the project site as being at odds with Appellants' rose-colored characterization of the project site as rapidly gentrifying. *Id.*

POINT IV

PACB IS NOT SUBJECT TO SEQRA AND WAS NOT OBLIGATED TO MAKE ENVIRONMENTAL FINDINGS

Justice Madden held that PACB was not required to make SEQRA findings before its approval of ESDC's application under PAL § 50. After an exacting review of the relevant statutory provisions and their legislative genesis, the lower court held that "[w]hile the PACB undoubtedly has certain discretion, that discretion is confined to reviewing the financial feasibility and impact of proposed debt-incurring projects, which bears no relationship to the environmental concerns that may be raised in an EIS." R30a. In accordance with the principles laid down in *Village of Atlantic Beach v. Gavalas*, 81

N.Y.2d 322 (1993), the lower court properly determined that PACB's approval of ESDC's participation in the Project was not an "action" under SEQRA.

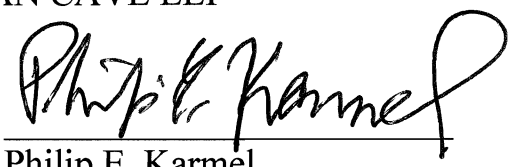
Justice Madden's ruling was correct for the reasons set forth in PACB's Brief, which ESDC adopts on this point. Appellants' contentions improperly rely on a "mechanical distinction" between discretionary and ministerial actions proscribed by *Gavalas* and the political statements of the Assembly Speaker in an entirely separate matter. As explained in the PACB's Brief, the views of one member of the Board cannot expand or diminish the powers of the PACB as granted by the legislature, and do not reflect either proceedings before the Board or the action it took in this case.

CONCLUSION

Respondent-defendant-respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation respectfully requests that this Court affirm the lower court's judgment dismissing this proceeding and grant such other and further relief as it may deem just and proper.

DATED: New York, New York
August 6, 2008

Respectfully submitted,
BRYAN CAVE LLP

By: 

Philip E. Karmel
J. Kevin Healy
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 541-2000

David Paget
Dan Chorost
SIVE, PAGET & RIESEL, P.C.
460 Park Avenue, 10th Floor
New York, New York 10022-1906

Attorneys for Respondent-Defendant-Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(iv), the foregoing brief was prepared on a computer using Microsoft Word software.

Type: Proportionally spaced

Typeface: Times New Roman

Point size: 14 (text); 12 (footnotes)

Line spacing: Double

Word Count: The total number of words in the brief exclusive of pages containing the table of contents and table of authorities and this printing specification statement is 26,319.

DATED: New York, New York
August 6, 2008

Philip E. Karmel