To be argued by:
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New York County Index No. 104597/07

Supreme Court of the State of New York
APPELLATE DIVISION – FIRST DEPARTMENT

IN THE MATTER OF DEVELOP DON'T DESTROY (BROOKLYN), INC.; 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 PLACE 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 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.

BRIEF FOR RESPONDENT-DEFENDANT-RESPONDENT FOREST CITY RATNER COMPANIES, LLC

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Preliminary Statement

Respondent-defendant-respondent Forest City Ratner Companies, LLC ("FCRC") respectfully submits this brief (1) in opposition to the appeal (A 6a-9a) by petitioners-plaintiffs-appellants, Develop Don't Destroy (Brooklyn), Inc., et al. ("petitioners"), from the decision and order (one paper) (A 13a-85a) of the Supreme Court, New York County (Joan A. Madden, J.), entered on January 17, 2008, and (2) to supplement the briefs submitted by respondents-defendants-respondents New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), and the Public Authorities Control Board (the "PACB").[1]

This appeal is another challenge to the Atlantic Yards Arena and Redevelopment Project (the "Project"), an ambitious public-private undertaking that is intended to transform central Brooklyn by redeveloping a largely derelict 22-acre swath of underutilized land. The Project has been the subject of two prior appeals to this Court (*Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *lv. to app. denied*, 8 N.Y.2d 802 (2007), and *Anderson v. New York State Urban Development Corporation*, 44

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[1] Citations in this brief to "A" refer to the Appendix, and citations to "App. Br." refer to the "Brief for Petitioners-Plaintiffs-Appellants." Although the Metropolitan Transportation Authority (the "MTA") also was named as a respondent-defendant in this litigation, in their brief petitioners do not challenge the motion court's determination insofar as it sustained the MTA's actions.

A.D.3d 437 (1st Dep't 2007)), as well as proceedings in the Second Department (*Anderson v. New York State Urban Development Corporation*, 45 A.D.3d 583 (2d Dep't 2007), *lv. to app. denied*, 10 N.Y.3d 710 (2008)) and in the federal courts (*Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, ___ U.S. ___, 128 S. Ct. 2964 (June 23, 2008)).

The Project is intended, among other things, to eliminate blight, bring to Brooklyn an arena that will end the 50-year absence of a major league sports franchise, build important new mass transit facilities, create over eight acres of publicly accessible open space, and create more than 6,400 units of much needed new housing, including 2,250 units of affordable housing. The Project was designed by Frank Gehry, one of the preeminent American architects of our time.

The Project also is intended to serve as a powerful engine of economic growth. It will create thousands of construction jobs and, eventually, thousands more permanent jobs, and will generate billions of dollars in new tax revenues for the City and the State over the next 30 years. It enjoys broad support among the general public and elected officials, including Mayor Bloomberg, New York City Comptroller Thompson, former Governors Pataki and Spitzer, Senator Schumer, Brooklyn Borough President Markowitz and numerous members of the State Legislature and the City Council.

On this appeal, petitioners contend that ESDC and the PABC failed to comply with the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law § 8-0101, *et seq.*), and that ESDC violated the Urban Development Corporation Act (the "UDC Act") (Unconsol. Laws § 6251, *et seq.*). At bottom, however, petitioners simply oppose the Project and are unhappy that it was approved after an extensive public review process in which they actively participated. The motion court thoroughly examined petitioners' contentions and correctly concluded that these agencies complied with their legal obligations, and that petitioners' assertions are completely without merit. The motion court's decision and order should be affirmed.

Questions Presented

1. Was the PACB required to make its own findings under SEQRA in connection with its approval of ESDC's financial contribution to the Project?

The motion court correctly answered this question in the negative.

2. Did SEQRA require ESDC to include in its environmental impact statement for the Project an analysis of a potential terrorist attack?

The motion court correctly answered this question in the negative.

3. Was ESDC's selection of the "build years" for the two phases of the Project reasonable as of the time that it conducted its environmental review of the Project?

The motion court correctly answered this question in the affirmative.

4. Was it proper for ESDC to consider the goal of eliminating blight in assessing alternatives to the Project?

The motion court correctly answered this question in the affirmative.

5. Was the Project properly classified as a "land use improvement project" under the UDC Act?

The motion court correctly answered this question in the affirmative.

6. Was the arena portion of the Project properly classified as a "civic project" under the UDC Act?

The motion court correctly answered this question in the affirmative.

Statement of the Case

For its statement of the case, FCRC relies on the statements in the respective briefs for ESDC and the PACB, to which the Court is respectfully referred.

Argument

I.

PACB'S DETERMINATION TO APPROVE FUNDING FOR THE PROJECT IS NOT SUBJECT TO SEQRA

The motion court held that the PACB's approval of ESDC's financial contribution to the Project was not an "action" subject to SEQRA and did not require the issuance of findings under, or other compliance with, SEQRA. This conclusion was based on the circumscribed nature of the PACB's role under the Public Authorities Law ("PAL"), which provides that ESDC may not incur a financial commitment on behalf of the State without the PACB's prior approval, and authorizes the PACB to grant such approval "only upon its determination that, with relation to any proposed project, there are commitments of funds sufficient to finance the acquisition and construction of such project." PAL § 51, subd. 3.

The motion court's holding was based on the decision by the Court of Appeals in *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993). There, the Court held that where an agency's role in decision making is circumscribed such that the contents of an environmental impact statement would not inform its determination, the agency's approval is not an "action" for the purposes of SEQRA. Petitioners' argument that the PACB was required to make findings under SEQRA before approving the funding for the Project is predicated on a mischaracterization of the motion court's decision as relying exclusively on

"SEQRA's exception for ministerial acts involving no exercise of discretion" (App. Br. at 17-18). To the contrary, the court recognized that "courts cannot rely on a mechanical distinction between ministerial and discretionary acts alone," and held that the "pivotal inquiry ... is whether the information contained in an EIS may 'form the basis for a decision whether or not to undertake or approve such action'" (A 28a, citing *Incorporated Village of Atlantic Beach*, 81 N.Y.2d at 325 (quoting *Filmways Communications v. Douglas*, 106 A.D.2d 185, 187 (4th Dep't), *aff'd*, 65 N.Y.2d 878 (1985))).

The motion court found that "PACB's authority in approving a proposed project is limited to financial considerations," including "reviewing the financial feasibility and impact of proposed debt-incurring projects" (A 30a). Reasoning that these considerations "bear no relationship to the environmental concerns that may be raised in an EIS," the court held that PACB's role in the project is not an action subject to SEQRA (*id.*).

This holding is consistent with the clear legislative purpose behind the creation of the PACB: to protect the fiscal integrity of the State from ill-advised financial commitments made by State-created public benefit corporations, including ESDC, which operate independently of other State agencies. *See* PAL § 50, subd. 1, § 51, subd. 1. *See also* 1976 N.Y. Session Laws, ch. 39, § 1 (setting forth, in creating the PACB, a legislative finding that "the amount of debt incurred

by certain public benefit corporations ... has grown dramatically ... without any effective or comprehensive monitoring by the State government"). Legislative history confirms the PACB's narrow mandate. The PACB's creation followed a Moreland Act Commission report that recommended that the PACB's jurisdiction be narrowly confined:

> One danger in any control mechanism is that those exercising control will regulate excessively and will create an elaborate bureaucratic structure. The Commission intends that authority board of directors will continue to serve as the primary, and in most cases the ultimate, decision-making bodies and that the [PACB] will review only certain selected debt issues or projects which are particularly significant in terms of their size, degree of risk, or potential impact on the State's or the authority's financial condition.

Restoring Credit and Confidence, A Reform Program for New York State and Its Public Authorities, A Report to the Governor by the New York State Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies, at 21. This report further concluded that, "in order to assure that the [PACB] will not supplant the authority boards of directors and will not unduly interfere with the day-to-day operations of authorities," the PACB's power should be limited to the review of a number of specified categories of authority action related to financing of projects and debt obligations. *Id.* at 21, 22-29.

The PAL's language, the legislative statement of purpose in the PAL and the legislative history all make clear that, whatever discretion the PACB may

have in satisfying its obligations under PAL § 51, it certainly does not have the discretion to consider the broad range of environmental issues that must be considered by an agency that is subject to SEQRA. For example, the State's regulations implementing SEQRA, 6 NYCRR Part 617, require that a statement of findings under SEQRA "must"

> (2) weigh and balance relevant environmental impacts with social, economic and other considerations ... ; and
>
> (3) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable ....

6 NYCRR § 617.11(d). A determination that the PACB is authorized to consider the factors necessary to enable it to make SEQRA findings would extend the PACB's authority beyond the limited role established by the PAL.

It is firmly established, moreover, that where the jurisdiction of an agency is so narrowly circumscribed by statute that environmental issues are outside the agency's mandate, SEQRA simply does not apply, and compliance with SEQRA is not required. *See, e.g., Incorporated Village of Atlantic Beach*, 81 N.Y.2d at 326; *CitiNeighbors Coalition of Historic Carnegie Hill v. N.Y.C. Landmarks Preservation Comm'n*, 306 A.D.2d 113 (1st Dep't 2003), *app. dsmssd.*, 2 N.Y.3d 727 (2004).

Petitioners contend that the "PACB generally considers a broad range of non-financial factors in its decision-making function" (App. Br. at 21), but the only support for this contention is a statement by Sheldon Silver, Speaker of the New York State Assembly, in the wake of the PACB's rejection of a different project, the proposed West Side stadium. In his statement, Mr. Silver expressed concern that the State should address "moral obligations" such as education, the rebuilding of Lower Manhattan and mass transit before it addresses "ambitions" to host the Olympic Games. This statement does not reflect any consideration of environmental issues, but rather Mr. Silver's views on funding priorities. Furthermore, to the extent that Mr. Silver or any other individual PACB member may express an opinion about a project that does not relate to financial considerations, it must not be viewed as an action by the PACB, which can only act by unanimous vote of its three voting members (*i.e.*, the Governor, the Speaker of the Assembly and the President of the Senate, or their respective designees), but rather as an individual act by the Governor or the leaders of the Legislature, all of whom are exempt from SEQRA pursuant to ECL § 8-0105, subd. 1, and 6 NYCRR § 617.5(c)(37). *See also, e.g., Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 415 (1991); *Settco, LLC v. N.Y.S. Urban Dev. Corp.*, 305 A.D.2d 1026, 1027 (4th Dep't), *lv. to app. denied*, 100 N.Y.2d 508 (2003); *Cerro*

v. Town of Kingsbury, 250 A.D.2d 978, 979 (3d Dep't), *lv. to app. denied*, 92 N.Y.2d 812 (1998).

The motion court's conclusion that the PACB is not, and should not be, subject to SEQRA is, thus, unassailable.

II.

ESDC WAS NOT REQUIRED TO STUDY THE THREAT OF A TERRORIST ATTACK ON THE PROJECT IN THE EIS

The motion court also was correct in holding that SEQRA did not require the ESDC to consider potential security issues and the impacts of a terrorist attack in its environmental impact statement (the "EIS") for the Project (A 56a). In the motion court, petitioners argued that 6 NYCRR § 617.9(b)(6) obligated ESDC to address and mitigate terrorism concerns in the EIS. This regulation, which the State Department of Environmental Conservation ("DEC") added to the State's existing SEQRA regulations in 1987, provides:

> ... [I]f information about reasonably foreseeable catastrophic impacts to the environment is unavailable because the cost to obtain it is exhorbitant, or the means to obtain it are unknown, or there is uncertainty about its validity, and such information is essential to an agency's SEQR findings, the EIS must ... assess the likelihood of occurrence, even if the probability of occurrence is low, and the consequences of the potential impact, using theoretical approaches or research methods generally accepted in the scientific community. This analysis 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 treatment

> facility. It does not apply in the review of such actions as shopping malls, residential subdivisions or office facilities.

As petitioners recognized, this provision contemplates consideration of only catastrophic impacts involving facilities that in and of themselves could be prone to explosions or catastrophic failure and resulting releases of hazardous substances. Nevertheless, petitioners argued that, as a result of the September 11 terrorist attacks, an agency "must consider not just the inherent instability of a facility such as an oil supertanker port; it must also consider the attractiveness of a project as a terrorist target" (*see* A 54a).

The motion court correctly rejected this argument, and refused to expand the scope of § 617.9(b)(6) beyond its express terms (A 55a).

The motion court's holding should be affirmed, because it is consistent with the obvious purpose behind the requirement that an agency consider "reasonably foreseeable catastrophic impacts to the environment" of facilities with the potential to release hazardous substances into the environment – *i.e.*, to require the agency to analyze (a) the potential impacts of such a release on the environment, and (b) how those impacts could be mitigated. In DEC's Final Generic Environmental Impact Statement on the 1987 amendments to 6 NYCRR Part 617, the intention to limit the applicability of this provision was confirmed by DEC's statement that "[t]he inclusion of this provision was necessitated by a

recognition of an increasing number of technologically sophisticated projects and projects involving hazardous substances with the potential for emissions." DEC, *Final Generic Impact Statement Including Final Regulatory Impact Statement and Final Regulatory Flexibility Analysis for Revisions to 6 NYCRR Part 617* (February 18, 1987), at 38.

Having failed to persuade the motion court to expand the application of § 617.9(b)(6) to the Project, which does not involve hazardous substances that could be released in the event of a catastrophic event such as a terrorist attack, petitioners now change their tack and rely on the more general language of SEQRA and its regulations. They thus assert in this Court that "the SEQRA statute and regulations define the range of environmental impacts to be addressed in an environmental review broadly enough to include the known impacts and mitigation measures relating to security concerns, including foreseeable terrorism" (App. Br. at 27).

There is no dispute that an EIS must study the "effect which a proposed action is likely to have on the environment." ECL § 8-0109(2). The SEQRA regulations further provide that an EIS "should identify and discuss ... reasonably related short-term and long term impacts, cumulative impacts and other associated environmental impacts ... [and] those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is

implemented ...." 6 NYCRR § 617.9(b)(5). However, this general language has never been held to require an agency to evaluate the potential impacts of a terrorist attack on a project.[2]

To the contrary, in *Municipal Art Society of New York, Inc. v. New York State Convention Ctr. Dev. Corp.*, N.Y.L.J., May 30, 2007, p. 18, col. 1 (Sup. Ct. N.Y. Co.), a case that petitioners cite but attempt to distinguish (App. Br. at 38-39), Justice Stallman rejected this very claim. In that case, the petitioners argued that the defendant had violated SEQRA by failing to consider impacts on security caused by the relocation of a "truck marshalling yard" to a site near the Lincoln Tunnel in connection with the proposed expansion of the Javits Convention Center. Citing 6 NYCRR § 617.9(b)(6), the petitioners in that case argued that "in the post-September 11 world," there would be "grave risks" posed by having a facility for

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[2] Had DEC intended to require the consideration of "catastrophic impacts" to the environment resulting from mixed-use real estate developments, or other projects that do not involve the potential release of hazardous substances, it clearly could have done so when it promulgated the 1987 amendments to the SEQRA regulations. In light of DEC's omission of this requirement from the 1987 amendments, this Court should not read it into the more general SEQRA regulations that preceded adoption of the 1987 amendments. General rules of statutory interpretation prohibit a court from reaching this result in the interpretation of a statute. *See* N.Y. Stat. Law § 74 ("a court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended"). *See also* N.Y. Stat. Law § 74, Comment ("it may be stated generally that, when from the language of an act and circumstances surrounding its enactment it appears that the Legislature has specified the cases to which it shall apply, the failure to specify a particular case indicates that the Legislature did not intend the act to cover such case"). Those rules of interpretation should guide this Court in its interpretation of the SEQRA regulations.

large trucks located directly atop critical infrastructure that the lead agency should have considered. The court rejected this argument:

> Nothing in 6 NYCRR 617.9 indicates that SEQRA requires an analysis of security concerns. Indeed, 6 NYCRR 617.9 expressly refers to considerations such as 'solid waste management,' 'groundwater protection,' and 'conservation of energy' (6 NYCRR 617.9 [a][5]). The security concern raised by petitioners – the location of the 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.

Municipal Art Society of New York, N.Y.L.J., May 30, 2007 at 15.[3]

In this case, where there is no evidence that a hypothetical terrorist attack would release hazardous substances, what petitioners really seek is a requirement that an EIS discuss the security measures that may be used to thwart or respond to a potential terrorist attack. While these security measures are important to the design, construction and operation of the Project, they are not environmental impacts within the meaning of SEQRA: they do not present "reasonably foreseeable catastrophic impacts to the environment," 6 NYCRR §

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[3] Petitioners state that this case is distinguishable because "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 this Project" (App. Br. at 38-39). To the contrary, two affidavits submitted to the motion court in that case show that security was indeed a concern in the design and plan for the Javits Convention Center renovation. *See* Affidavit of Daniel Kaplan in Support of CCDC/ESDC Motion to Dismiss, and Affidavit of Michael Petralia in Support of the CCDC/ESDC Motion to Dismiss, *Municipal Art Society of New York, Inc. v. New York State Convention Ctr. Dev. Corporation*, New York County Index No. 160245/06 (Stallman, J.).

617.9(b)(6), nor are they "reasonably related short-term and long term impacts, cumulative impacts and other associated environmental impacts" of the Project, or "adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented." *Id.* § 617.9(b)(5)(iii)(a) and (b). A discussion of security measures in the EIS would not inform the decision-making agency about environmental impacts or potential measures to mitigate those impacts. Therefore, a discussion of security measures is not required to be included in an EIS.

Furthermore, a discussion of such measures in an EIS – which is a public document that even is available on the internet – would not be highly inappropriate and imprudent, because it would provide sensitive information to those persons who might contemplate the launching of a terrorist attack.

Contrary to petitioners' contention, moreover (App. Br. at 28-29), FCRC's conduct of planning and design efforts to assess the risk of terrorism and develop security measures does not support petitioner's position. FCRC retained preeminent security consultants, Ducibella Venter & Santore, and structural engineering consultants, Thornton Tomasetti, Inc., to develop a comprehensive threat and risk assessment of the Project (*see* A 884a-93a). Working with those consultants, FCRC participated in extensive confidential reviews of the Project with the New York City Police Department's elite Counterterrorism Bureau to

discuss potential threats and risks, and generate intelligence community input and recommendations for the further development of risk assessment and to address risks in the design, materials and operation of the new arena and the surrounding buildings (R 889a-92a).[4] These efforts reflect prudent planning in the course of any large scale development project in New York City. However, they do not support the proposition that the potential for a terrorist attack is a reasonably foreseeable environmental impact that should have been analyzed in the EIS.

Based on an article in *The New York Times* about the Prudential Arena in Newark, New Jersey, which describes street closures as a precaution against truck bombs, petitioners raise a new claim – *i.e.*, they speculate that there may be "security-enhancing 'operational protocols'" that may affect traffic around the Atlantic Yards Project's Barclays Center Arena (App. Br. at 37). However, there is no evidence that the Project will entail "operational protocols" that change the Project from what was described in the EIS, or that may have potential environmental impacts that were not studied in the EIS. This is pure speculation.

Chatham Towers, Inc. v. Bloomberg, 6 Misc.3d 814 (Sup. Ct. N.Y. Co. 2004), also fails to support petitioners' position. In that case, the petitioners alleged that the New York Police Department had violated SEQRA by failing to take a "hard look" at the environmental impacts of a security plan that included

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[4] Citations to R ___ refer to the record in the motion court.

street closures in the vicinity of One Police Plaza. The court agreed, holding that the NYPD had failed to consider several significant environmental impacts of the street closures, including impeded access to the NYU Downtown Hospital and other facilities, and adverse impacts on vehicular and pedestrian traffic and parking. However, this determination involved classic environmental impacts resulting from street closures undertaken as security measures. In the present case, by contrast, there is no evidence that the Project will include street closures or other security measures that would cause significant adverse environmental impacts that have not been examined.

Three other decisions cited by petitioners (App. Br. at 40-41) are from the West Coast and involve inherently dangerous facilities or activities that are exactly the type that would require examination of reasonably foreseeable catastrophic impact under 6 NYCRR § 617.9(b)(6). *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007) (spent nuclear fuel storage facility); *Tri-Valley Cares v. Dep't of Energy*, 203 Fed.Appx. 105 (9th Cir. 2006) (biological weapons research laboratory); *State of Washington v. Bodman*, No. CV-03-5108, 2005 WL 1130294 (E.D. Wash. May 13, 2005) (shipment of radioactive and hazardous waste). None of these decisions supports petitioners' position.

Finally, petitioners argue that the environmental reviews of other projects "have addressed terrorism risks and mitigation measures in sufficient detail to permit public participation and comment without publishing blueprints for terror" (App. Br. at 41). In support of this argument, petitioners refer to the environmental review documents for four projects: a final generic EIS ("FGEIS") for the World Trade Center Memorial and Redevelopment Plan, dated April 2004; a revised environmental assessment ("EA") for the MTA Long Island Rail Road East Side Access 50th Street Facility, dated January 2006; a final EIS ("FEIS") for the Permanent WTC PATH Terminal, dated May 2005; and a FEIS for the Fulton Street Transit Center, dated October 2004 (App. Br. at 42-44).

Petitioners contend that these documents "discuss the designing and planning for terrorist attacks and the mitigation measures, and provide a basic platform for public comment and input" (App. Br. at 44). To rebut this argument in the motion court, respondent ESDC submitted each of the documents referenced by petitioners in its opposition to the petition and motion for a preliminary injunction (*see* A 22879-926). These documents reveal petitioners' argument to be false. The documents show that to the extent terrorist attacks are discussed, or alluded to, the discussion is limited to vague statements, reference to lists of applicable codes and standards, and descriptions of measures yet to be determined that "may" be incorporated into each project.

The World Trade Center FGEIS explains that safety and security measures are important objectives of that project and, further, that the project will meet or exceed building code and safety regulation criteria (FGEIS at 1-34). Petitioners contend that the FGEIS "identifies specific security threats, and describes specific measures intended protect against those threats and to mitigate the impacts, at a level of detail sufficient to allow members of the public to comment on them" (App. Br. at 42), but this is completely inaccurate. The entire discussion in the FGEIS regarding specific security threats and protective measures is as follows:

> Security threats to be considered in the design and execution of the Proposed Action would include, but not be limited to:
>
> · Explosive event threats delivered by vehicles and/or persons;
> · Unauthorized use of firearms;
> · Conventional crimes against persons and property;
> · Airborne contaminants threats;
> · Threat of sabotage to equipment;
> · Water contamination threat; and
> · Arson.
>
> Vehicular screening and access would be designed to achieve secure protection from an explosive event threats by stressing visible security at sensitive locations. Persons entering secure areas and locations within the Project Site would be subjected to screening for explosives, flammables or firearms at visible security checkpoints at sensitive positions. Airborne contaminant monitoring and detection would allow emergency response to noxious threats as well as providing a

> positive identification of safe conditions. Local point-of-use water filters would also be suggested.

(A 22884). Beyond these most conclusory statements, the FGEIS includes only a description of various codes and standards that would be complied with in the design and construction of the building, and various safety strategies yet to be developed (*see, e.g.,* A 22882 ("the design of security and safety systems would consider the unique configurations, level of needed protection and threat likelihood for each building, structure or public space," "the design of all structures on the Project Site is expected to incorporate life safety provisions that would be guided by or exceed the relevant current building code requirements," "[a] fire strategy would be developed for the Project Site through a combination of prescriptive requirements and performance based engineering")). There is no detailed discussion of terrorist events, specific security measures, or mitigation of any environmental impacts that might occur in the event of a terrorist attack.

The revised EA for the MTA Long Island Rail Road East Side Access 50th Street Facility states that a threat, risk and vulnerability assessment was conducted for the proposed facility, but that "the specific details from the assessment ... must be kept confidential to ensure that they remain effective" (A 22905). The document also states that the design criteria for the facility "specify that security shall be incorporated into facility design" by such basic measures as providing sufficient space for electronic security systems, providing backup

electrical power for security systems, and protecting utilities by locating transformers within security-controlled areas (A 22905). Additional similarly mundane measures are listed to control access, such as close circuit television monitors, alarm systems, and an electronic access control system (*id.*). The EA also describes an emergency ventilation system to purge smoke from the transit tunnel system (A 22908), which appears to be a typical measure associated with transit tunnel facilities. In a response to a comment that the proposed facility is a "security risk" and "a significant target," the EA does not reveal any specific security measures to minimize that risk or mitigate impacts of a terrorist attack. Rather, the EA states generally that "specially designed security measures would be incorporated into the 50th Street facility's design to permit the entire building to function as a security-controlled area. These security measures are being developed in coordination with the MTA Division of Security" (A 22921).

The Permanent WTC Path Terminal FEIS generally describes safety and security considerations that "would be embodied in the [project's] civil designs" (A 22900). According to the FEIS, "mechanical, electrical, and fire protection systems shall be provided to achieve an enhanced level of fault tolerance in excess of code requirements," and "electronic security countermeasures ... are envisioned to be included as part of each stakeholder occupancy" (A 22900).

The Fulton Street Transit Center FEIS states only that "a Threat and Risk Assessment Study would be completed by NYCT to determine the appropriate design guidelines and criteria to afford protection of the FSTC under threats. The threats to be addressed include, but are not limited to, explosions, arson, and biological, chemical or radiological attacks" (A 22894).

These documents clearly do not support petitioners' claim that the environmental reviews of these projects contain detailed information regarding "the designing and planning for terrorist attacks and the mitigation measures" (App. Br. at 44). Therefore, they do not support petitioners' contention that SEQRA required ESDC to include an analysis of terrorism risks in the EIS for the Project.

III.

THE BUILD YEARS USED FOR ANALYSIS OF THE PROJECT IN THE EIS ARE REASONABLE

The motion court correctly rejected petitioners' claim that ESDC intentionally or mistakenly mischaracterized the "build years" of the Project, and held that petitioners' disagreement with the construction schedule for the Project from which the "build years" were derived was no basis to invalidate the EIS (A 62a). Petitioners contend that this holding was an error, and argue that "the failure of the ESDC to disclose accurate completion, or build, dates, prevented disclosure of the true environmental impacts of the project, minimized the obligation to

propose effective mitigation measures," and "made it impossible for the ESDC or any other agency to properly consider the adverse negative impacts of the Atlantic Yards project compared to the no-build or the proposed alternatives in order to properly determine which proposal resulted in the least adverse environmental impacts" (App. Br. at 48-49). Petitioners further assert that a delay in the build year would "significantly increas[e] the disruption to the surrounding areas caused by construction related traffic, noise, and dust," "adversely impacts the analysis of traffic and transportation impacts," and postpone the public benefits of the Project that "purport to alleviate the environmental harm of the Project" (App. Br. at 48-50). Petitioners do not bother to address the possibility that a delay in a build year would diminish other environmental impacts.

The motion court properly found that the record does not support petitioners' claim that the timetable on which the EIS was premised was unreasonable, and concluded that petitioners were relying only "on vague generalities and isolated statements made outside the environmental review process" to support their claim (A 60a).

In an EIS, the project for which approval is sought is analyzed in the context of the environment as it would exist when the project has been completed. This analysis requires a projection of future conditions in the "build year" – *i.e.*, the predicted year as of which the project would be substantially complete, and its

environmental impacts would begin to be evident. Here, ESDC selected two build years for predicted completion of the Project in two phases – 2010 and 2016 – for its analysis of the Project's environmental impacts in the EIS. These build years were selected on the basis of a quarter-by-quarter construction schedule prepared by Turner Construction Company ("Turner"), one of the country's largest and most reputable construction companies. That schedule laid out the sequence and timing for all major activities involved in construction of the Project (*see* R 11566 and R 13101-13207). ESDC and its own environmental consultants, including ESDC's own construction consultant, reviewed Turner's construction schedule and determined that it provided a sufficient basis upon which to estimate the build years for the environmental analysis in the EIS. In addition, as part of the environmental review process, other public agencies with jurisdiction over various aspects of the Project also reviewed the schedule, including the Mayor's Office of Transportation Coordination regarding traffic, the New York City Department of Environment Protection regarding sewer and water mains and other infrastructure, and the Long Island Railroad with regard to transit yard improvements (R 11970). In a response to a public comment about the schedule of the Project's first phase, the final EIS specifically stated that the estimates of completion are "based on a detailed scheduling program for construction, and years of experience in the construction of sports complexes and residential/office buildings," and it also

stated that extensive coordination was undertaken with utility and transportation agencies before the preparation of the draft EIS to "ensure that the analyses reflect the likely timelines for reconstruction/utility replacement" (R 12352).

Based on these efforts and the expertise of the various participants in the review process, it was entirely reasonable for ESDC to select 2010 and 2016 as the build years for analysis in the EIS.

Petitioners point out that, when ESDC issued the final EIS on November 27, 2006, certain work that the schedule had predicted to commence on November 1, 2006 (as described in the "Construction Impacts" chapter of the EIS), had not started. However, a delay of a few weeks in the commencement of this work did not obligate ESDC to seriously question the validity of the 2010 and 2016 build year dates, or commission new studies of the impacts of the Project that reasonably could be anticipated, when it approved the Project on December 8, 2006. Contrary to petitioners' contention, this slight delay by no means suggested that "it was unlikely that the Project would be completed before 2021 or 2026" (App. Br. at 53). Petitioners argue that they offered "substantial support" for their claim that "ESDC knew when it issued the FEIS that the projected build-out date of 2016 was extremely unlikely, and that [the] Project would almost certainly require five to ten years beyond 2016 to be completed" (App. Br. at 51). However, the "substantial support" that petitioners ostensibly have offered consists only of

two oral statements reported in newspaper accounts *several months after* ESDC had issued the final EIS and approved the Project.[5]

Given the rule of reason that governs judicial review of the substance of an agency's examination of a project's potential environmental impacts, these statements do not establish that ESDC's reliance on the build years in the EIS was unreasonable. *See, e.g., Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 396 (1995) (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"); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) ("Nothing in [SEQRA] 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"); *Aldrich v. Pattison*, 107 A.D.2d 258, 267 (2d Dep't 1985) ("the court may only annul a determination as to the sufficiency of an environmental impact statement and the environmental consequences of the proposed project 'if it is not rational – if it is arbitrary and capricious or unsupported by substantial evidence'").

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[5] One of those statements, made by the Chief Executive Officer of FCRC's parent company at an investors' meeting in March 2007, was mistaken and corrected immediately and, as the motion court recognized, is not persuasive evidence that the build years were unreasonable as of ESDC's approval of the Project in December 2006 (A 62a). Similarly unpersuasive is the off-the-cuff statement of Laurie Olin, a landscape architect. Mr. Olin has no apparent expertise in scheduling major construction projects, had a limited role in designing the public open space and streetscapes, and had not been privy to the developer's detailed construction schedules (A 580a, n.4).

Petitioners' general claim that the build years analyzed in the FEIS now appear to be wrong would be an improper basis upon which to invalidate ESDC's compliance with SEQRA. As the motion court recognized, nothing in the record supports the claim that the timetable for completing the Project was unreasonable as of December 2006 (A 60a). Indeed, the same claim was rejected by this Court in *Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Council of the City of New York*, 214 A.D.2d 335 (1st Dep't 1995). There, the petitioner challenged the environmental review of a large residential development on a 15-acre waterfront parcel in Brighton Beach, based on an allegation that the build year was "spurious." This Court held:

> We find no basis to conclude that the use of 1995 as a "build year" was spurious. We are persuaded by the reasoning of the IAS Court that this is only a nonstatutory baseline used by the CEQR agencies as a device to provide assumptions derived from relevant environmental studies, and we find no reason to adopt petitioners' theory that the data utilized in the environmental impact statement are invalidated because of the reliance on a particular build year.

214 A.D.2d at 337. Here, petitioners attempt to distinguish *Brighton Beach* by claiming that "there is no indication that the petitioners [in that case] alleged how the build year might have affected the EIS data" (App. Br. at 55). However, the briefs submitted to this Court by the petitioners in *Brighton Beach* show that that is precisely what the petitioners claimed – *i.e.*, that the purportedly unrealistic build

year caused an understatement of the adverse impacts on community resources and services, infrastructure, and open space, and caused the project's benefits to be overstated. *See* Brief for Petitioners-Appellants (pp. 58-66); Reply Brief for Petitioners-Appellants (pp. 15-17).[6]

Furthermore, even if this Court's decision in *Brighton Beach* somehow was inapplicable here, other prior decisions by this Court would compel the rejection of petitioners' claim. Specifically, this Court has held that it would be improper to invalidate an environmental review based on delays in a project's completion. In *Wilder v. New York State Urban Dev. Corp.*, 154 A.D.2d 261 (1st Dep't 1989), this Court refused to require ESDC to prepare a new EIS when the 42nd Street Redevelopment Project was changed to allow "the phased acquisition and construction of building sites rather than simultaneous acquisition and construction," 154 A.D.2d at 261, due to the changes that had occurred in the market during delays resulting from litigation challenging the project. *Id.* at 262-63. This Court held that it would be inappropriate to require ESDC to "review the project de novo because of circumstances resulting from delay attendant on the litigation." *Id.* at 263. It based this conclusion in part on the reasoning of the Court of Appeals in *Jackson*, a seminal SEQRA case in which the Court held that

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[6] Copies of the relevant pages from the briefs submitted to this Court by the petitioners in *Brighton Beach* are annexed hereto as an appendix.

"[t]he 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." 67 N.Y.2d at 425.

In this case, unlike the 42nd Street Redevelopment Project at issue before this Court in *Wilder*, ESDC has not even approved changes to the Project since it approved the Project in December 2006, let alone a change that would result in the delay of construction beyond the build years. Therefore, there is no reason to require ESDC to reopen its environmental review.

Petitioners also contend that, when ESDC approved the Project, it "knew that it had to acquire various properties for Phase I through eminent domain" and that the eminent domain process "would involve significant litigation that would keep the project from commencing" (App. Br. at 53). This contention is outrageous. No court ever has held that a public agency conducting a SEQRA review is required to incorporate potential litigation into the construction schedule for a project for purposes of establishing a build year for environmental analysis, just as an agency is not required to begin an environmental review anew if litigation delays the project. *See, e.g., Wilder,* 154 A.D.2d at 263. Moreover, to incorporate potential litigation into an environmental review would be wholly speculative, because it is never clear whether or not litigation will actually occur or, if it does occur, whether it will actually impede a project. Therefore, the

establishment of a build year based on speculative litigation risk would contravene the fundamental rule that SEQRA does not require an examination of speculative impacts. *See, e.g., Indus. Liaison Comm. of 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).[7]

Because Petitioners have not established that ESDC's selection of the build years for analysis in the EIS was unreasonable as of the time that ESDC approved the Project, there is no basis upon which to invalidate ESDC's compliance with SEQRA.

IV.

ESDC COMPLIED WITH SEQRA IN ITS CONSIDERATION OF ALTERNATIVES

The motion court held that ESDC complied with SEQRA in its consideration of alternatives to the Project in the EIS, including the "no-action" alternative and the alternative proposed by Extell Development Corporation ("Extell") (A 73a). The court found rational ESDC's reasons for rejecting these alternatives, and disagreed with petitioners' assertion that ESDC relied on the

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[7] The proceedings in the motion court establish that work at the Project site commenced in February 2007. In a decision rendered on April 20, 2007 the motion court denied applications by petitioners for a temporary restraining order and a preliminary injunction to halt the scheduled demolition of approximately 15 vacant buildings on the Project site. Having tried without success to halt work on the Project in the motion court, it ill behooves petitioners to complain in this Court that the work is not progressing with sufficient rapidity.

"false assumption" that, without the Project, "significant new development is considered unlikely given the blighting influence of the rail yard and the predominance of low-density manufacturing zoning on the project site" (A 74a). The motion court based its decision on the overwhelming evidence in the record of blighted conditions in the Project site (*see id.*).

SEQRA requires that an EIS set forth alternatives to the proposed action, including alternative sites if appropriate, and to "act and choose alternatives, which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." ECL §§ 8-0109(1), 8-0109(2)(d). An agency has "considerable latitude" in choosing among alternatives identified in the FEIS, and the courts are not permitted to second-guess that choice. *Jackson*, 67 N.Y.2d at 417 ("It is not the role of the courts to weigh the desirability of any action or choose among alternatives"). SEQRA's requirement to analyze alternatives is substantive in nature and judicial review is based on a rule of reason. *See, e.g.*, *Town of Dryden v. Tompkins Bd. of Representatives*, 78 N.Y.2d 331, 334 (1991); *Jackson*, 67 N.Y.2d at 417.

The SEQRA regulations require the agency to provide "a description and evaluation of the range of reasonable alternatives to the action that are feasible, *considering the objectives and capabilities of the project sponsor.*" 6 NYCRR §

617.9(b)(5)(v) (emphasis added). An agency is not required to choose an alternative that would not meet the objectives of the proposed project.

Here, "the overarching goal of the proposed project is to transform a blighted area into a vibrant mixed-use community" (R 10564). The Project's other goals include, among others, the creation of necessary affordable and market-rate housing, publicly accessible open space, a new arena, a new subway entrance and an improved rail yard (R 10564-66). Petitioners claim that the motion court erred because ESDC's conclusion that the Project site was blighted has no application in determining whether ESDC considered reasonable alternatives as required by SEQRA (*see* App. Br. at 59). Petitioners offer no authority for this claim, which is insupportable.[8] There is no basis to disturb ESDC's determination, which was premised on a thorough review of each alternative in the EIS. Given that the elimination of blight was a stated objective of the Project, it was entirely reasonable for ESDC to consider the blighted nature of the Project site as a factor in its evaluation of alternatives.

ESDC considered a range of alternatives sites, and conducted an extensive analysis of the "no action" alternative, as required by SEQRA, and the Extell alternative (R 11793-11804, 11809-47). ESDC extensively analyzed these

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[8] Petitioners seem to cite *Town of Dryden v. Tompkins Bd. of Representatives*, 78 N.Y.2d 331 (1991), to support this claim (App. Br. at 59). However, that case has no application here. In *Dryden*, the Court held that the agency acted reasonably in not exercising its power of eminent domain in order to gain access to and test alternatives to the proposed action.

alternatives' potential impacts on a broad range of environmental issues, including land use, zoning and public policy, socioeconomic conditions, community facilities, open space and recreational facilities, cultural resources, urban design and visual resources, shadows, hazardous materials, infrastructure, traffic and parking, transit and pedestrians, air quality, noise, neighborhood character, construction impacts and pubic health (*see id.*). This analysis supported the conclusion that the "no action" and Extell alternatives were not feasible or would not to meet the Project's goals and objectives.

ESDC found that the "no action" alternative would "forgo the opportunity to enhance the vitality of the Atlantic Terminal area and realize substantial benefits to the local community, the borough of Brooklyn, and the City and State" (R 11804). Furthermore, "by failing to introduce new jobs, new residents, and major new attractions in this area, the No Action Alternative would maintain the blighted conditions of the project site in the heart of Brooklyn" (*id.*). The EIS acknowledged that individual parcels could be redeveloped in the "no action" alternative, but concluded that future as-of-right development would be limited by the predominance of low-density manufacturing zoning, which does not permit residential use, and by the blighting influence of the existing rail yard (R 11794).

Similarly, ESDC concluded that the Extell (or "reduced density-no arena") alternative would result in fewer benefits to the local community and the City. Petitioners object to ESDC's rejection of this alternative insofar as it was based on the conclusion that the area beyond the existing rail yard "would remain blighted and continue to permit low-density industrial uses" (App. Br. at 58). Although ESDC's conclusion on this point was rational, supported by the evidence and in and of itself sufficient to justify ESDC's rejection of the Extell alternative, in fact ESDC had several other reasons for rejecting the Extell alternative, including the fact that this alternative would: (1) not meet the LIRR's requirements for the rail yard and would actually reduce rather than enhance LIRR operations; (2) "result in far fewer employees, residents and visitors on the project site" and thus result in reduced economic benefits; (4) not include an on-site detention/retention system for stormwater management; (5) not provide for a new subway entrance; (6) not increase pedestrian linkages through the Project site; (7) not provide the benefits of an arena, (8) not provide a substantial number of affordable housing units; and (9) not provide eight acres of street-level publicly accessible open space (R 11847).

Petitioners claim that "ESDC may not reject alternatives based on an unsupported, conclusory assumption that is directly contradicted by the known facts," by which petitioner refer to ESDC's blight determination (App. Br. at 60).

To the contrary, however, as discussed in Point V, *infra,* ESDC's blight determination was based on a 381 page comprehensive study that systematically surveyed each parcel in the Project site and reported in detail on the condition of each parcel.

Furthermore, the "known facts" to which petitioners refer are conclusory statements by individual project opponents, not professionals, about residential development in the area surrounding the Project site (*see* App. Br. at 61-67). The motion court found that "that fact alone was insufficient to outweigh the ample evidence of blighted conditions documented in the Blight Study" (A 74a). Furthermore, petitioners' position is based largely on isolated examples of prior conversions of industrial buildings into residential developments, most of which are not within the Project site. For example, the recent residential development on Block 1128 to which petitioners refer (*see* App. Br. at 63-66) is situated on the portion of the block that is not within the Project footprint and was excluded for the very reason that it was not blighted. Of the few buildings that are within the Project site, one of them is owned by an entity that was a plaintiff in *Goldstein v. Pataki*, the federal court lawsuit that unsuccessfully challenged the use of eminent domain in furtherance of the Project on grounds that included assertions that this portion of the Project site is not blighted. In light of the extensive record evidence of blight, these assertions simply are not enough to demonstrate that ESDC's

conclusions about alternatives were unreasonable or irrational. The motion court correctly held that ESDC's consideration of alternatives complied with its obligations under SEQRA.

V.

ESDC PROPERLY DESIGNATED THE NON-ATURA BLOCKS AS PART OF A "LAND USE IMPROVEMENT PROJECT" UNDER THE UDC ACT

The motion court correctly held that there is no basis to disturb ESDC's determination that the Project site is blighted (A 48a). Petitioners do not dispute that 63% of the Project site, which is within the Atlantic Terminal Urban Renewal Area ("ATURA"), is blighted and has repeatedly been designated as blighted by the City of New York over a period of four decades (A 46a). Instead, petitioners claim that the portion of the Project site that is not within ATURA but immediately adjoins ATURA, consisting of two city blocks (Blocks 1127 and 1129) and about one-third of another block (Block 1128), are not "substandard or insanitary" within the meaning of the UDC Act (App. Br. at 69). Petitioners assert that it was irrational for ESDC to include these non-ATURA blocks in its blight designation because they are distinct from the rail yards, and thus the ATURA and non-ATURA portions of the site should not have been analyzed as a "single, homogenous whole" (App. Br. at 72). Petitioners' assertion is unavailing, because

the extensive record demonstrates, and the case law establishes, that ESDC's determination to include these blocks in the Project site was rational and proper.

The Court of Appeals has held that the term "blight" has a "liberal rather than literal definition." *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478, 483 (1975). It is well established that (1) blight may be addressed on an area-wide basis rather than a lot-by-lot basis, so that non-blighted properties within an area that suffers from blight may be condemned to allow redevelopment of the area as a whole to ensure that the solution to blighted conditions is permanent, and (2) the courts will not second-guess the condemnor's judgment about where to draw the boundary between properties that are to be condemned and those that are not. *See, e.g., Berman v. Parker*, 348 U.S. 26, 35 (1954); *Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, (1986); *Kaskel v. Impellitteri*, 306 N.Y. 73 (1953); *Spadanuta v. Incorporated Village of Rockville Centre*, 16 A.D.2d 966 (2d Dep't 1962), *aff'd*, 12 N.Y.2d 895 (1963); *Cannata v. City of New York*, 24 Misc.2d 694 (Sup. Ct. Kings Co. 1960), *aff'd*, 14 A.D.2d 813 (2d Dep't 1961), *mod'd*, 11 N.Y.2d 210 (1962).

In fact, the United States Court of Appeals for the Second Circuit already has upheld ESDC's conclusion that the entire Project area, including the non-ATURA section, may properly be viewed as blighted and therefore condemned. *Goldstein v. Pataki*, 516 F.3d 50, 59 (2d Cir. 2008), *cert. denied*, ___

U.S. ___, 128 S. Ct. 2964 (June 23, 2008).[9] The Court affirmed the District Court's decision that the "Project is . . . permissible even if [some properties] are not blighted, because 'property may of course be taken for redevelopment which, standing by itself is innocuous and unoffending' if the redevelopment is intended to cure and prevent reversion of blight in some larger area that includes the property." *Goldstein v. Pataki*, 488 F.Supp.2d 254, 287 (E.D.N.Y. 2007), quoting *Berman*, 348 U.S. at 35. Therefore, the motion court clearly was correct in holding that, because it is undisputed that a majority of the properties in the Project site are blighted, any unblighted portions of the Project area could properly be included in the Project as part of the overall plan to eliminate blight in the area (A 49a). Petitioners' assertion that individual lots are not blighted (App. Br. at 80-81) is, thus, completely irrelevant.

Moreover, as to the blocks at issue, the record shows that ESDC made its blight determination on the basis of a comprehensive study that systematically surveyed each parcel in the Project's footprint and reported in detail on the condition of each parcel. This blight study documents at length the condition of

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[9] In *Goldstein v. Pataki*, the plaintiffs – who included the leader and principal spokesman for the lead petitioner in this case, Develop Don't Destroy (Brooklyn), Inc. – challenged the ESDC's determination to use eminent domain for the Project on the ground that the condemnation would not serve a public purpose under the Fifth Amendment. The Second Circuit upheld ESDC's determination to use eminent domain on the basis that, among other things, the Project would eliminate blight, and that the elimination of blight is a public purpose. 516 F.3d at 59).

each of the properties in the Project's footprint and compiles ample evidence to support a determination by ESDC that there is significant blight within these non-ATURA blocks.

The blight study thus reported, for example, that on Block 1127, not only were four vacant buildings in such an extreme state of disrepair that they were unsafe and exposed to the elements for many years, and therefore were demolished with ESDC approval (R 244, 331-38), but ten lots were underutilized and/or had building code violations (R 311, 322, 329, 339, 342, 347, 354, 365, 373), and one lot was entirely vacant prior to its acquisition by an FCRC affiliate (R 375). In the portion of Block 1128 within the Project's footprint, the mid-block area was "overgrown with weeds, enclosed by a chain-link fence, and occupied by several parked cars, many of which appear to be abandoned" (R 244), while two lots were vacant (R 389), and three were underutilized and/or had building code violations (R 396, 398, 400).

Finally, as to Block 1129, two lots were vacant (R 407), a third had broken-down cars and auto parts and was littered with debris (R 410-12), and two others were used for open-air parking (R 413). The warehouse on another lot on Block 1129 had windows that "have been sealed with cinder blocks or glass block," while "scaffolding covers the majority of the building's ground-floor ... , contributing to the abandoned appearance of the building," which also displayed

graffiti, large cracks in the façade, and an interior that was in poor condition (R 244, 421-431). The three small buildings on another lot were so "severely dilapidated" that FCRC's structural engineer recommended their prompt demolition (R 245, 445-55), while the warehouse on another lot was so unsafe that it was demolished with ESDC's approval on an emergency basis (R 244, 479-483). Another lot was "in a state of extreme disrepair," being "overgrown with weeds and littered with trash and surrounded by a chain link fence ... topped with barbed wire," while "[g]raffiti covers many of the surfaces on the lot, including the facades of the five-story warehouse, two dilapidated structures adjacent to the main building, and the wall of the building on [the] adjacent lot," with "[a]ll of the windows on the warehouse building having been permanently sealed" (R 245, 467-74). Another lot contained a half-empty residential building with an interior that was in disrepair (R 456-62).

Petitioners claim that there is no evidence that these three blocks were blighted before the Project was announced and FCRC began acquiring property (App. Br. at 77). This claim is belied not only by the blight study, but also by this Court's determination of a prior litigation. Under the regulations implementing SEQRA, *see* 6 NYCRR § 617.3(a)), the applicant for approvals that are subject to SEQRA is precluded from changing the affected property while the application is pending – subject, however, to an exception for emergencies (§ 617.5(c)(33)).

Buildings on five of the parcels on these very blocks were in such poor condition when they were acquired by FCRC that structural engineers concluded that the buildings were at risk of immediate collapse, posed a danger to the public safety, and should promptly be demolished.[10] On that basis, notwithstanding that the Project was then in the midst of an ongoing environmental review, ESDC authorized FCRC to demolish these five buildings immediately on an emergency basis. The Project's opponents, including the lead petitioner in this case and six other petitioners in this case, commenced a proceeding to challenge ESDC's emergency determination and enjoin the buildings' demolition. Both the motion court and this Court sustained ESDC's determination and allowed the buildings to be demolished. *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *lv. to app. denied*, 8 N.Y.3d 802 (2007).[11]

Petitioners' assertions that, when the Project was announced, these three blocks were undergoing a "residential real estate boom" (App. Br. at 72) that

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[10] The report of FCRC's structural engineer on these three buildings is part of the blight study (R 506-44).

[11] Under New York law, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984). *See also, e.g., Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999). Seven of the petitioners in the present proceeding, including the lead petitioner, were named petitioners in the prior proceeding and thus are barred from contesting the blighted condition of these parcels – *i.e.*, Develop Don't Destroy (Brooklyn), Inc., Atlantic Avenue Betterment Association, Inc., Boerum Hill Association, Inc., Dean Street Block Association, Inc., Fort Greene Association, Inc., Prospect Heights Action Coalition and Society for Clinton Hill, Inc.

should have been allowed to continue is merely an effort to impermissibly ask the courts to substitute their judgment for that of ESDC on the basis of allegations that are entirely conclusory. Such allegations are wholly insufficient to annul an agency's determination. *See, e.g., Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400, 426 (1986); *West 41st Street Realty LLC v. N.Y.S. Urban Dev. Corp.*, 298 A.D.2d 1 (1st Dep't 2002), *app. dsmssd.*, 98 N.Y.2d 727 (2002), *cert. denied*, 537 U.S. 1191, 123 S.Ct. 1271 (2003). In *West 41st Street Realty*, project opponents challenged ESDC's determination of blight in connection with the 42nd Street Redevelopment Project. Like petitioners here, the petitioners in that case claimed that blight had been virtually eliminated in the area, and that it was the anticipation of condemnation in support of the project that precluded new development. 298 A.D.2d at 5. This Court held that these allegations were conclusory and unsupported by the record, and it sustained ESDC's determination. 298 A.D.2d at 7. In addition, in *Jackson*, also in connection with the redevelopment of Times Square, the Court of Appeals held that isolated facts asserted by petitioners to show that the area might be improving without condemnation was outside the scope of proper judicial inquiry. According to the Court, the proper question was whether substantial evidence existed in the record to support ESDC's determination of blight. 67 N.Y.2d at 426. Here, similarly, there is no legal basis for overturning ESDC's determination on the basis of petitioners' assertion that

ESDC should have examined market conditions that supposedly showed that the area surrounding the Project site was improving (App. Br. 73, 78). As discussed above, the blight study contained ample evidence to support ESDC's determination that these blocks are blighted.

Finally, petitioners' claim that ESDC improperly used underutilization as a basis for its blight determination (App. Br. at 82-87) also is belied by the case law. *See, e.g., Yonkers Cmty. Dev. Agency*, 37 N.Y.2d at 481 ("economic underdevelopment" is a factor in considering whether an area is "substandard and insanitary"); *Haberman v. City of Long Beach*, 307 A.D.2d 313, 313 (2d Dep't 2003) (upholding blight determination based on the existence of vacant and underutilized properties); *West 41st Street Realty LLC*, 298 A.D.2d at 4 (recognizing that ESDC's authority to designate land use improvement projects was created in part to address urban areas that have become underutilized); *Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 218 (1st Dep't), *aff'd*, 76 N.Y.2d 962 (1990) (recognizing that the existence of unutilized development rights can support a blight determination); *G & A Books, Inc. v. M.J.M. Exhibitors*, 770 F.2d 288, 292-94 (2d Cir. 1985) ("severe underuse" is evidence of blight).[12]

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[12] Contrary to petitioners' contention (App. Br. at 83-84), the motion court was correct in refusing to follow the decision of the New Jersey Supreme Court in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 191 N.J. 344, 924 A.2d 201 (2007). The case involved the condemnation of a mostly vacant 63-acre parcel of wetlands and turned on the issue of whether a local law allowing municipalities to condemn property "in need of redevelopment," 191 N.J. at 357-58, was consistent with a New Jersey statute and a provision of New Jersey's constitution.

The motion court therefore was correct in holding that ESDC acted properly in determining that these two-and-a-fraction blocks should be condemned to eliminate blight even if not all of the properties on those blocks are blighted.[13]

VI.

ESDC'S DETERMINATION THAT THE PROJECT IS A "CIVIC PROJECT" UNDER THE UDC ACT WAS PROPER

The motion court correctly upheld ESDC's determination the arena portion of the Project qualifies as a "civic project" under the UDC Act (A 452). Petitioners argue that the motion court erred in relying on the definition of "recreational" in concluding that "an arena whose primary purpose is to provide a home for a professional basketball team" is a "civic project" (App. Br. at 89-90). Petitioners are wrong, because their contention ignores the plain language of the UDC Act as well as the numerous decisions holding that sports arenas serve public purposes even if they are operated by private entities.

The case has no application here, where New York courts have repeatedly recognized underutilization as evidence of blight, particularly where, as here, there is ample other evidence of blight.

[13] The blight study also found that the diverse ownership of the numerous parcels contributed to the blight by preventing the site assemblage necessary for comprehensive redevelopment (R 219). Diversity of ownership has been recognized as a factor that can indicate blight. *See Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44 (2d Cir. 1985) ("Nothing in the Constitution prevents a state from deciding that in a particular area diversity of land ownership stands in the way of full economic development, and that assembling a major site to be developed as a piece is the best way to serve the public purposes"). The blight study also found evidence that the incidence of crime was higher in the project area than in surrounding areas (R 214-18).

The UDC Act empowers ESDC to sponsor a "civic project," which the statute defines as a project that is "designed and intended for the purpose of providing facilities for *educational, cultural, recreational, community, municipal, public service or other civic purposes*." Unconsol. Laws § 6253(6)(d) (emphasis added). The statute also authorizes ESDC to sell or lease such a project to "any" entity that "is carrying out a community, municipal, public or other civic purpose." *Id.* at § 6259(1). The definition of a "civic project" in the UDC Act plainly is broad enough to encompass a sports arena. In fact, in the past, ESDC has sponsored the construction of numerous sports stadiums and arenas throughout the State and then leased them to private operators under similar arrangements. No court ever has ruled that such a facility is not a "civic project" within the meaning of the UDC Act, and for a court to do so now would be just plain wrong.

Here, ESDC or a subsidiary will own the arena and lease it to an FCRC affiliate. As the motion court recognized, the lease to and operation of the arena by a profit-making entity is consistent with the UDC Act's purpose to maximize private participation in its projects (A 44a). The UDC Act explicitly requires ESDC to "encourage maximum participation by the private sector of the economy, including the sale or lease of the corporation's interest in projects at the earliest time deemed feasible, and through participation in such programs ... to

acquire, construct, reconstruct, rehabilitate or improve ... commercial, educational, recreational and cultural facilities." Unconsol. Laws § 6252.

Petitioners assert that the motion court incorrectly determined that the arena is a "civic project" by relying on the word "recreational" and ignoring the term "civic" (App. Br. at 90). However, the plain language of the UDC Act shows that a recreational purpose *is* a civic purpose. Unconsol Laws § 6253 (6)(d) (a civic project is a facility designed for "recreational ... or *other* civic purposes" (emphasis added)). The motion court correctly held that the arena is a facility "designed an intended for recreational purposes," and as such constitutes a "civic project" within the meaning of the UDC Act (A 42a).[14]

Furthermore, even without reliance on the presence of the word "recreational" in the statutory definition of a "civic project," the arena clearly is a "civic project."[15] In other contexts, the Legislature has found that arenas and stadiums are facilities for educational, cultural, recreational *and* community purposes. For example, in enacting a law authorizing the leasing of New York

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[14] Petitioners' attempt to distinguish *Diamond v. Springfield Metropolitan Exposition Auditorium Auth.*, 44 F.3d 599 (7th Cir. 1995), and *Frazier v. Norfolk*, 234 Va. 388 (1987) (App. Br. at 91), is unavailing. In both cases, the courts found that facilities used for diversion and entertainment by offering opportunities for either participating in or observing activities were "recreational" facilities. By this reasoning, the arena clearly is a recreational facility.

[15] Although the motion court dismissed it as a *de minimis* point, the arena also will "provide a venue for other entertainment and cultural events including cultural gatherings, collegiate competitions, and graduations" (R 19951). It also will be made available to local community groups pursuant to the Community Benefits Agreement (R 625a-697a).

City parkland for the construction of the new Yankee Stadium, the Legislature made the following findings:

> It is hereby found and declared that the development, financing, operation and maintenance of a new stadium for professional baseball and associated facilities, including parking facilities, in the borough of the Bronx in the city of New York, will provide, for the benefit of the people of the city of New York, *recreational use and activities including entertainment, amusement, education, enlightenment, cultural development and betterment* and improvement of trade and commerce, including professional sports and athletic events, tourism, meetings and assemblages, and other events of a civic, community and general public interest ... and are hereby declared to be public purposes.

N.Y. Session Laws 2005, ch. 238, § 1 (emphasis added). Similarly, in authorizing a tax exemption for Madison Square Garden, the Legislature found that "professional major league sports teams" "are an invaluable recreational resource of the state and promote civic pride and community cohesiveness." N.Y. Session Laws 1982, ch. 459, § 1.

Here, the new arena is intended to enhance civic pride in Brooklyn. The arena will enable the New Jersey Nets professional basketball team to relocate to Brooklyn, bringing a major league sports franchise to the Borough for the first time since the Dodgers baseball team left fifty years ago – a traumatic event for many Brooklynites. The Nets' presence is intended to both symbolize and stimulate Brooklyn's continuing resurgence as a major urban center for the arts,

culture and recreation, as well as a Borough with a diverse and proud population. With a population of over 2.4 million people, if Brooklyn were an independent municipality, it would be the fourth most populous city in the United States.

In addition, recently, in its 2006 session, the New York State Legislature – in appropriating $100 million to ESDC to support the Project (Budget Bill S. 8470, A. 12044), and in authorizing ESDC to sell $100 million in bonds to be backed by the State's appropriation (c. 109, Pt. J-1, § 4) – specified that the funds were for "economic development projects, ... *public recreation projects and arts and cultural facility improvement projects*" that specifically included the "Atlantic Yards Railway Redevelopment [and] Nets Project" (emphasis added). This enactment in and of itself plainly demonstrates that the Legislature understands the arena to be a "civic project" within the scope of the UDC Act.

Petitioners rely upon a session law from 1993 to argue that the Legislature did not intend to include sports facilities within the meaning of the term "civic project" in the UDC Act (App. Br. at 97-98). However, that session law did not limit any of the provisions of the UDC Act. Rather, by this law, the Legislature authorized ESDC to administer a state funding program for the construction of sports arenas, and found that the development of sports facilities to retain and attract professional sports teams, and for recreational purposes, is in the

interest of the people of the State of New York. *See* 1993 N.Y. Session Laws, ch. 258, § 1. The Legislature also declared that the financing of sports facilities "must involve a partnership of public and private interests." *Id.*

Furthermore, courts have consistently upheld legislative findings that arenas or stadiums serve a public purpose even if operated by a private entity and reap private profits. *See, e.g., Murphy v. Erie County*, 28 N.Y.2d 80 (1971); *County of Erie v. Kerr*, 49 A.D.2d 174 (4th Dep't 1975); *Dubbs v. Board of Assessment Review of the County of Nassau*, 81 Misc.2d 591 (Sup. Ct. Nassau Cty. 1975). These cases did not, as petitioners contend, turn on whether there was a "specific legislative authorization" for the sports facility at issue (App. Br. at 95-96), but rather on whether the use of the facility served a public purpose.

In *Murphy*, the Court of Appeals upheld a contract between Erie County and a private entity whereby the county would issue bonds to finance the construction of Rich County Stadium and the private entity would lease the stadium from the county and operate it. The contract was authorized by state legislation empowering the county to enter into contracts in connection with building the stadium. The plaintiffs argued that giving control of the stadium to a private entity converted the stadium to a private use and was, therefore, not warranted by the legislation. The Court of Appeals concluded that this private control was irrelevant, stating that "it is evident that the county's residents will be

obtaining the full benefit for which the stadium is intended, the ability to view sporting events and cultural activities, regardless of the identity of the party operating the stadium." 28 N.Y.2d at 87.

In *Kerr*, the Appellate Division held that Rich County Stadium served a public purpose even though it would be leased and operated by the Buffalo Bills professional football team, and that it therefore was tax exempt. There, the lease even provided that use of the stadium by the county for "county events" was subject to the approval of the lessee. The court stated:

> Rich County 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.* The existence of a private profit motive by the lessee does not preclude the operation of a stadium from being a public purpose.

49 A.D.2d at 180 (emphasis added). *See also Dubbs*, 81 Misc.2d at 600-01 (holding that Nassau Coliseum is for public use and, therefore, is tax-exempt despite the fact that public is charged admission and private entities make profit from it).

Similarly, it recently was observed that, consistent with the public use clause of the Fifth Amendment to the federal constitution (which requires that an exercise of the power of eminent domain must be in furtherance of a public use or purpose), it is a "relatively straightforward and uncontroversial" proposition that

"the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use – such as with ... a stadium." *Kelo v. City of New London*, 545 U.S. 469, 497-98, 125 S.Ct. 2655, 2673 (2005) (O'Connor, J., dissenting). *See also Southeast Land Dev. Assocs., L.P. v. District of Columbia*, No. Civ. A 05-1413 RWR, 2005 WL 3211458 (D.D.C. Nov. 1, 2005) (taking property for the construction of a baseball stadium is consistent with the public use clause); *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1995) (a baseball stadium parking lot is a public use).

Given these principles, petitioners' assertion that the arena does not constitute a "civic project" is untenable.

Conclusion

For the foregoing reasons, the motion court's Decision and Order dismissing the petition should be affirmed in its entirety.

Dated: New York, New York
August 4, 2008

Respectfully submitted,

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APPELLATE DIVISION – FIRST DEPARTMENT
PRINTING SPECIFICATIONS STATEMENT

The foregoing brief was prepared on a computer and meets the following printing specifications.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, cases, etc., is 12,522.

Dated: New York, New York
August 5, 2008

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APPENDIX

54484

To be Argued by:
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New York County Clerk's Index No. 100688/93

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of COMMITTEE TO PRESERVE BRIGHTON BEACH AND MANHATTAN BEACH, INC., JUDITH BARON, MARTIN BARON, JEAN KREILING, JANICE LIEBOWITZ, DONNA NICOLARDI, SARAH SEIDNER, and THE PARKS COUNCIL,

Petitioners-Appellants,

For Judgment Pursuant to CPLR Article 78

—against—

THE COUNCIL OF THE CITY OF NEW YORK, THE PLANNING COMMISSION OF THE CITY OF NEW YORK, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK, THE DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents-Respondents,

—and—

ALEXANDER MUSS & SONS,

Intervenor-Respondent-Respondent.

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The heart of SEQRA is the EIS process. ECL § 8-109; Jackson, 67 N.Y.2d at 415, 503 N.Y.S.2d at 304. The EIS discloses to the public the environmental impacts of a proposed action and provides a basis for informed decisions by the responsible agencies. When an EIS is required, it must accurately and thoroughly describe the short-term, long-term, cumulative, and other associated impacts of a proposed action, as well as of the alternatives to that action. ECL § 8-109(2)(a); 6 N.Y.C.R.R. § 617.14(f)(3) and (5); CEQR § 6-09. To this end, an EIS must allow a decision maker to (1) identify the relevant areas of environmental concern, (2) take a "hard look" at each of those areas, and (3) provide a "reasoned elaboration" of the basis for its decision. Jackson, 67 N.Y.2d at 417, 503 N.Y.S.2d at 305. Akpan v. Koch, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16, 20 (1990). When the content of an EIS is inadequate, the "hard look" standard is not met and the agency action is null and void. Chinese Staff, 68 N.Y.2d at 368-69, 509 N.Y.S.2d at 504-5; Town of Red Hook v. Dutchess County Resource Recovery Agency, 146 Misc. 2d 723, 729, 552 N.Y.S.2d 191, 194-95 (Sup. Ct. Dutchess Cty. 1990).

B. The FSEIS Build Year was Known to be Erroneous at the Time the FSEIS was Adopted.

The environmental impacts of any development project are experienced over a long period, starting at or before the beginning of construction, and continuing until such time, if ever, when the development no longer exists. Although a project's impacts may exist for many decades, an EIS typically

chooses a single time to assess the impacts of a project. That time is known as the "build year," the year when the project is reasonably expected to be both fully constructed and fully occupied. See App. at 743; R. at 710.

Selection of a realistic build year is thus critical to a "hard look" at the environmental impacts of a proposed project. If an unrealistic build year is chosen, most, if not all, of a project's impacts are likely to be skewed. Negative impacts may be understated if, for example, the project will in fact add residents to the service area for a local hospital several years later than predicted, when the hospital is substantially more crowded. Similarly, positive impacts may be overstated if the tax revenues from the project will not begin to flow until several years later than predicted.

In the instant case, Respondents used a blatantly unrealistic build year. Rather than developing a realistic projection of when the Project was likely to be completed and occupied, they chose a build year that might have been realistic when the development was first proposed and simply continued to use it, unchanged, more than five years later. From March 1987, when a preliminary DEIS was submitted for the first Brighton By the Sea proposal, through completion of the environmental review of the Project in July 1992, the build year remained a constant "1995." While in 1987 almost nine years were expected to elapse before the development would be built and occupied, that estimate

was ultimately reduced, at least for FSEIS purposes, to just over three years in 1992.

It is not difficult to understand why Respondents chose to retain the same build year even as it became grossly unrealistic. Changing the build year for an environmental analysis that has already been prepared is costly, since the analysis must be redone to account for changing background conditions. Changing the build year for an environmental analysis that has already been done also introduces new risks for a developer, since the new analysis may reveal different or more severe impacts than those shown earlier. Respondents avoided these consequences by using the same build year over and over again, despite their knowledge that it was no longer valid. They did so, however, at the expense of the accurate disclosure of environmental impacts required by SEQRA.

For example, the study area's population is expected to increase over time. The FSEIS assumes a population increase of 0.45% per year. App. at 1125; R. at 1582. A later build year, therefore, would show greater strains on community resources and infrastructure as a result of the Project. The FSEIS recognized an existing acute shortage of active open space in the Brighton Beach area near the Project, which, according to the FSEIS, would be exacerbated in 1995 due to the general increase in population and the approximately 4,400 new residents added by the Project. App. at 1130, 1310, 1319; R. at 1587, 1767, 1776. Since the actual build year will be many years later than 1995, the active

open space shortage will be even more acute when the Project is completed. For example, if the actual build year were 2005, the active open space shortage in the community would, under the FSEIS methodology, have to be revised to reflect a greater background population. Similarly, with a later build year, the increase in population in the area would likely result in greater strains on schools, hospitals, fire and police protection, public transportation and public parking. There are complex procedures in the FSEIS for making each of these assessments, and it is simply not possible to expect the public -- or the decisionmakers -- to guess at what the actual impacts of the Project will be on these open space resources and community services when the Project is actually completed sometime after the year 2000.

Nor does anything in the record justify continuing use of 1995 as the Project's build year. Indeed, Respondents themselves recognized that 1995 was an unrealistic build year. In October 1991 the Director of the Environmental Assessment and Review Division of DCP wrote to the consultant drafting the DSEIS to say: "The 3 1/2 year phasing plan is inconsistent with the 1995 build year since the project approval date is not likely to be earlier than the spring of 1992. Please rewrite and justify." App. at 91. Despite this request, the DSEIS was not rewritten; nor was the continued use of the 1995 build year ever justified, even as the spring of 1992 passed without Project approval.

Moreover, the Developer itself made clear that the use of 1995 as a build year was a sham. Two months before the FSEIS

was completed, the New York Times quoted Stephen Muss, president of the Developer, as stating that the final plans for the Project would not be ready before the summer of 1993 and that the Developer would not construct the entire Project initially, but would instead market only one tower and would then decide how quickly to try to build and sell the remaining units. App. at 89-90. Thus, according to the Developer's own estimate, the 1995 build year assumes that no more than two and a half years would be available for constructing the Project's first high-rise tower, a 1,701 car underground parking facility, the health club, and all the accessory facilities and infrastructure, then marketing first one building and, thereafter, building and selling the remainder of the Project's 1,499 residential units.[14]

The lower court defended the use of the 1995 build year, citing cases in which the courts rejected claims that further environmental review was required due to delays after the initial environmental review was conducted. Decision at 7; App. at 12. The lower court also argued, in essence, that respondents examined the build year issue and satisfied themselves as to the validity of 1995 and that they also satisfied themselves that

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[14]The developer's statements to the press are consistent with its statements to members of the community. On February 24, 1992, during a meeting of the Board of Directors of the Shorefront YM-YWHA of Brighton Beach and Manhattan Beach regarding the proposed Project, a vice president of the developer stated that initially only one tower would be constructed and that the Project would not be completed by 1995, but rather would take at least ten years. See Baron Aff. ¶ 5; App. at 75-76.

even if 1995 was invalid, certain negative project impacts would be no greater if the build year had been 1998.

The lower court's approach is fallacious, for several reasons. First, the cases cited by the lower court are inapposite. Petitioner's claim is not that delay following completion of the environmental review requires an updated environmental analysis, which is the issue discussed in the cases cited by the court. See, e.g., Jackson, 67 N.Y.2d at 426, 503 N.Y.S.2d at 310-11 (delay in construction of project did not require supplemental EIS); Wilder v. New York State Urban Dev. Corp., 154 A.D.2d 261, 546 N.Y.S.2d 95, 96 (1st Dep't 1989) (amendments to proposed development did not require new EIS), appeal denied, 75 N.Y.2d 709, 555 N.Y.S.2d 692 (1990); Lazard Realty v. New York State Urban Dev. Corp., 142 Misc. 2d 463, 472-73, 537 N.Y.S.2d 950, 957 (Sup. Ct. N.Y. Cty. 1989) (same). Rather, Petitioners' claim is that at the time of this Project's environmental review, 1995 was clearly an unrealistic build year. Respondents' choice of that known-to-be-impossible build year therefore deprived the decisionmakers and the public -- of the "hard look" at the Project impacts that was required by SEQRA.

Second, the mere fact that Respondents examined an issue does not satisfy the requirements of SEQRA if the conclusion they reached was arbitrary or capricious. The FSEIS makes it clear that construction alone was expected to take at least three and a half years. App. at 1029; R. at 1487. At the time the FSEIS was completed, it was therefore plain from

Respondents' own documents that, even allowing no time for the remainder of the review and approval process, construction of the Project could not be completed until 1996 at the earliest. Moreover, marketing and occupancy of what was then expected to be 1,600 units (later reduced to 1,499) obviously would take a substantial additional period (even without reference to the developer's stated intention to defer constructing the remaining towers), making 1995 obviously wrong as the Project's "build year."

In the court below Appellants cited, among other evidence in the record, the City's own recognition, as early as October 1991, that the build year was unrealistic. The Director of DCP's Environmental Assessment and Review Division wrote to the Developer's EIS consultant to say: "The 3 1/2 year phasing plan is inconsistent with the 1995 build year since the project approval date is not likely to be earlier than the spring of 1992. Please rewrite and justify." App. at 91. According to the lower court, "Petitioners omit the consultant's response to that request, (Exhibit C to Answer [App. at 232-33]) and the conclusion stated in the FSEIS that the reasonableness of the 1995 build year for analysis was confirmed as a result of discussion among various City agencies and the Developer." Decision at 9; App. at 14.

However, the consultant's response, referenced by the lower court, makes it all the clearer that 1995 was an improper build year. The consultant stated: "The build year and phasing

plan are contingent upon receiving approvals prior to the Spring of 1992." App. at 232. Obviously, when the FSEIS was completed in July 1992, prior to the conclusion of the review process, the use of 1995 as a build year was then no longer valid. Moreover, we have been unable to locate in the FSEIS any statement that the reasonableness of the 1995 build year for analysis was confirmed as a result of discussion among various City agencies and the Developer. Even if there were such a statement, of course, it would not justify use of 1995 as a build year when, at the time the FSEIS was completed, the minimum number of years expected for construction alone would preclude the use of 1995 for that purpose.

C. **As a Consequence, the FSEIS Underestimates the Project's Adverse Impacts and Overstates its Benefits**

In its decision, the lower court claimed that certain of the Project's negative impacts would remain the same even if the build year were 1998. That claim, however, was a wholly inadequate cure for Respondents' failure to comply with SEQRA. First, nothing in the record supports the reasonableness of even a 1998 build year. Indeed, given the Developer's own admission and the depressed real estate market in the Brighton Beach area at the time the FSEIS was certified, building, marketing and selling 1,499 units was likely to take a decade. Second, the City cannot knowingly use an unrealistic build year and then assert that the numbers are sufficiently conservative to reflect 1998 impacts, without -- at the very least -- making that judgment and the information on which it is based a part of the

FSEIS. One of the principal purposes of preparing an EIS is to permit the public and other agencies to comment on it. See Jackson, 67 N.Y.2d at 414-15, 302 N.Y.S.2d at 303-4 (1986); Bardon v. Town of North Dansville, 134 Misc. 2d 927, 934, 513 N.Y.S.2d 584, 588-89 (Sup. Ct. Livingston Cty. 1987). That purpose is defeated if the preparers of the EIS rely on a rationale that is neither disclosed nor subject to public scrutiny in the manner contemplated by the statute.

Finally, beyond distorting and minimizing the negative impacts of the Project, the assumption of a 1995 build year also misled the decisionmakers about the positive benefits of the Project, including jobs, new business for local stores, and additions to the tax base, which will be realized, if at all, at a far later date than projected in the FSEIS. All of these "benefits" of the Project were cited in the Planning Commission report granting the approvals for the Project. See App. at 1583; R. at 2505. By using a wholly unreasonable build year, the FSEIS failed to take a "hard look" at the positive, as well as the negative, impacts of the Project and thus prevented the informed balancing of costs and benefits that is the very purpose of SEQRA.

54484 *To be Argued by:* STEPHEN L. KASS

New York County Clerk's Index No. 100688/93

New York Supreme Court

Appellate Division—First Department

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—against—

THE COUNCIL OF THE CITY OF NEW YORK, THE PLANNING COMMISSION OF THE CITY OF NEW YORK, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK, THE DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

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—and—

ALEXANDER MUSS & SONS,

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case here, where the FSEIS found that the Project would cause a "significant" and "irreparable" effect on light and air in the area (App. at 1108). Because there was no evidence to support the finding required by § 78-313(d), and indeed clear evidence to the contrary, the City had no discretion to grant the special permit. The City's purported exercise of discretion here was an illusion, and it is not entitled to any deference in this Court.

POINT III

THE FSEIS FAILED TO TAKE A "HARD LOOK" AT THE PROJECT'S ENVIRONMENTAL IMPACTS

Appellants agree with the City that the "build year" under SEQRA and CEQR is a "common-sense concept" that allows a "common set of assumptions to be used for all prediction categories" (City Brief at 21). Thus, as Respondents concede, an improbable build year could make the analysis based on that build year "worthless" (City Brief at 22). That is precisely what happened here, at least for certain categories of the Project's impacts.

The Developer's decision to use a 1995 "build year" for its 1986-87 DEIS may not have seemed unreasonable at the time. However, after withdrawal of the original proposal, the Developer persuaded the City to permit it to use the same build year for the revised Project's 1989 DEIS

and FEIS and, yet again, for the 1992 DSEIS and FSEIS. By that date, the City clearly knew that 1995 was not a reasonable build year and that the analysis results would be skewed accordingly. As a result, the Respondents must now rely on the claim that, for some purposes at least, the City determined that 1995 data would also be suitable for 1998. However, 1998 is hardly a more realistic build year than 1995. If, as the Developer's officers have stated (App. at 75-76), the Project would actually take at least 10 years to build (and assuming construction actually began in 1995), it might not be completed until 10 years after the build year used in the FSEIS and seven years after the build year that Respondents now claim is equivalent to the original build year.

This case is thus very different from Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986), in which the mere passage of time was held not to invalidate an EIS that was based on data that was reasonable at the time the EIS was prepared. In Jackson, the court noted that the lead agency had "continued to review conditions affecting the area" and its Final EIS relied on data that had been updated after the completion of the Draft EIS. Id. at 426, 503 N.Y.S.2d at 310. Here, by contrast, by continuing to use an outdated build year through a series of EIS's, the City avoided precisely the

type of updating that, under Jackson, can reasonably be expected of a lead agency under SEQRA. Moreover, there was no good reason for the City to fail to require the Developer to update its analysis to a reasonable build year. Had it done so, neither the public nor this Court would be in the position of guessing what the Project's open space and community facility impacts, or its financial benefits, might be in 2005 when the Project may actually be completed.

Where, as here, all of the assumptions underlying the Project's environmental review were based on an unreasonable build year, neither the City nor the public could not take the requisite "hard look" at the environmental impacts of the Project. The court below erred in not setting aside the City's approvals for the Project until that requirement has been satisfied.