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PRELIMINARY STATEMENT

Appellants-Petitioners-Plaintiffs (hereinafter "Appellants") respectfully submit this brief in support of their appeal the January 11, 2008 Decision and Order by Justice Madden in the Court below (R 14a, *et seq.*) which dismissed the Appellants' petition challenging various approvals granted to the Atlantic Yards Arena and Redevelopment Project (the "Project") in Brooklyn. The petition challenged, among other things, actions by respondent Urban Development Corporation d/b/a Empire State Development Corp. ("ESDC") in approving the project and respondent Public Authorities Control Board ("PACB") in approving ESDC funding and undertaking the project.

The Project represents the largest single-developer project in New York City history. While the Project was originated and has been promoted as a concept by Forrest City Ratner Companies ("FCRC") and ESDC worked with FCRC on the Project for many years, the actual period of public review was highly truncated and the ESDC paid only lip-service to the numerous comments and complaints regarding the project, particularly the fundamental question of designating the thriving southern portion of the Project area as blighted. This Project was rushed to approval to meet the

waning days of the Pataki administration and Appellants seek judicial review to provide the objective consideration of their complaints instead of the arbitrary and capricious determinations made by ESDC and other agencies.

While Appellants' petition contained numerous causes of action, all of which had merits, for the purposes of this appeal only limited issues are being pursued, however, those go to the heart of the deficiencies in the project. Appellants contend that (i) PACB violated the New York State Environmental Quality Review Act ("SEQRA"), New York Environmental Conservation Law ("ECL") § 8-0101, *et seq*., by failing to make environmental findings when it approved the Project; (ii) ESDC violated SEQRA by refusing to address the known impacts relating to the risk of terrorism in the environmental impact statement ("EIS") for the Project; (iii) the EIS was fatally flawed because ESDC relied on incorrect construction completion dates for the Project; (iv) ESDC violated SEQRA by failing to reasonably consider that the privately owned portions were already developing without the Project, and thereby failing to reasonably consider Project alternatives; (v) ESDC violated the New York State Urban Development Corporation Act ("UDCA"), New York Unconsolidated Laws

§ 6251, *et seq*., by improperly designating three thriving, privately owned blocks in the rapidly gentrifying Prospect Heights neighborhood as part of a "land use improvement project"; and (vi) ESDC's violated the UDCA by improperly designating a privately operated, professional sports arena as a "civic project".

QUESTIONS PRESENTED

1. Was PACB required to make its own findings under SEQRA prior to approving the funding of the Project?

Answer: Yes. The Court below erroneously determined that PACB's approval of the Project was ministerial rather than discretionary, and, therefore, incorrectly held that PACB was not required to make its own environmental findings did not directly answer this question. In fact, PACB has substantial discretion in determining whether to approve a project, and therefore was required to make its own environmental findings under SEQRA.

2. Given the significant risk that the Project might be the target of a terrorist attack, and the substantial information already obtained by the developer with respect to the analysis and mitigation of the impacts of

terrorism, did SEQRA require ESDC to address the environmental impacts associated with the risk of terrorism in the EIS for the Project?

Answer: Yes. The Court below recognized the public significance of potential terrorist attacks, but incorrectly held that SEQRA did not require ESDC to consider environmental impacts associated with potential terrorist attacks on the Project in the EIS.

3. Did ESDC violate SEQRA by using 2016 as the Project completion year despite clear evidence that the Project would not be completed until at least five to ten years later?

Answer: Yes. The Court below erroneously held that ESDC's choice of project completion date in the EIS was reasonable even though principals of FCRC had stated that the project completion would likely take at least an additional 10 years.

4. Given the significant, private redevelopment of the privately-owned blocks within the Project area already, did ESDC reasonably consider and reject alternatives to the Project on the ground that significant new residential development on those blocks was unlikely?

Answer: No. The Court below failed to answer this question, because it incorrectly applied a an eminent domain "blight" analysis to determine whether ESDC reasonably considered Project alternatives under SEQRA.

5. Did ESDC irrationally and arbitrarily designate the Project as a land use improvement project under the UDCA?

Answer: Yes. ESDC unreasonably appended a thriving, privately owned residential neighborhood to the decrepit rail yards owned by the Metropolitan Transit Authority ("MTA") in order to designate the entire area as "blighted" for purposes of the UDCA. The Court below erroneously determined that permitted ESDC to designate the entire area as a land use improvement project.

6. Did ESDC properly designate the portion of the Project consisting of the privately operated, professional basketball arena to be known as the "Barclays Center Arena" portion of the Project as a "Civic Project" under the UDCA?

Answer: No. The Court below erred in determining that the Barclays Center Arena qualified as a "Civic Project" under the UDCA because it was designed and intended for the "recreational" purpose of paying to watch a

professional, for-profit sports franchise, even though the Court found that the non-professional "civic" uses of the arena would be *de minimus*.

STATEMENT OF FACTS

This Project, the multi-agency approvals of which form the basis for this appeal, is the largest single-developer project in New York City history. (R. 15a) Despite this designation, the public has been was given very little opportunity to review the Project proposal, let alone time to informatively and intelligently comment on the Project. The history of the Project includes: a pre-determined public bidding process; governmental acquisition of homes and businesses with boundaries drawn not based upon an objective study to determine a blighted area, but rather drawn precisely to meet the desires of a private developer-Forest City Rather; and a State Environmental Quality Review Act ("SEQRA") process which turned a blind eye to the thoughts and concerns of the public contrary to the requirements of SEQRA and the UDCA.

As currently proposed, the Project includes a professional basketball arena intended to house the New Jersey Nets, which will be known as the Barclays Center Arena pursuant to a reported $400 million naming-rights agreement between FCRC and Barclays Bank, and 16 high-rise buildings

ranging from 184 feet to 620 feet. The Project is expected to include up to 6,430 residential apartments, 180 hotel rooms, 583,000 square feet of retail and commercial space, and 3,670 parking spaces. (R. 88a; R 259a)

A. The Project Area and ESDC's "Blight" Designation

The Project site covers approximately 22 acres in the Prospect Heights neighborhood of Brooklyn, and includes the Vanderbilt Yards, an 8-acre parcel owned by MTA and used as a rail yard for the Long Island Rail Road. (R. 88a) The Project would require construction of a platform over the rail yard on which part of the Project would be built, and relocation of some of the rail yard functions.

Of the eight City blocks that comprise the Project's planned footprint, five are within the Atlantic Terminal Urban Renewal Area ("ATURA"), which was created by New York City in 1968 in order to facilitate redevelopment of what was determined to be a blighted area. A variety of redevelopment projects have been undertaken within ATURA since 1968, and the Vanderbilt Yards are the primary portion of ATURA that remains un-redeveloped.

The other three blocks that make up the Project area – designated

Blocks 1127, 1128,[1] and 1129, and comprising just under 40 percent of the Project footprint – are not included within ATURA, and have never been designated blighted by any governmental entity. These three privately owned, contiguous blocks (referred to herein as the Non-ATURA Blocks") are located on the south side of Pacific Street, directly across the street from the Vanderbilt Yards, and are part of a rapidly redeveloping area of Prospect Heights characterized by private conversions of former warehouse and factory buildings into residential apartments, and rapidly increasing property values. (R. 550a-553a) FCRC has purchased portions of these blocks, and ESDC intends to take the remaining privately owned portions under the State's power of eminent domain.

Although since 1968 there have been 10 revisions to the original plan for redevelopment of ATURA, including one expansion of ATURA's boundaries to include an adjacent area that was deemed blighted, the City has never proposed including Blocks 1127, 1128, and 1129 in ATURA or otherwise designated the Non-ATURA Blocks as blighted. The most recent amendment to the ATURA plan was in 2004, after the Project was proposed.

The Project's developer, FCRC, identified the blocks to be included in

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1 Block 1128 is only partially included in the Project area. (R. 46a)

the Project area before the Project was publicly announced (R. 584a), and ESDC did not state that the Project was intended to cure "blight" in the Non-ATURA Blocks until after it entered into the February 2005 Memorandum of Understanding ("MOU") with FCRC and the City. Although the MOU established the parameters of the Project, it did not state how the Project might be authorized under the UDCA.[2]

ESDC ultimately supported its designation of the Non-ATURA Blocks as blighted with a "Blight Study" prepared by ESDC's environmental consultant, AKRF, Inc. ("AKRF"), which was published with the General Project Plan ("GPP") dated July 18, 2006. (R. 216, *et seq.*) During the public comment period following ESDC's publication of the Draft Environmental Impact Statement ("DEIS") in July 2006, ESDC received hundreds of pages of comments from residents of Prospect Heights and other members of the public questioning the conclusions of the Blight Study with regard to the Non-ATURA Blocks. (*See, e.g.*, R. 14035-43, 14178-81, 14185-87, 15494-97, 15502-06) ESDC dismissed those

2 The Petition herein alleges at ¶144 that the MOU made no reference to "blight" and did not indicate that the purpose of the Project was to alleviate blighted or substandard conditions. ESDC answered that allegation as follows: "Denied. The MOU stated that, if ESDC were to proceed with the Project, it would 'make the project findings and take such others [sic] actions and proceedings under the …UDC Act …as may be necessary or convenient to establish the Project as one or more 'projects ' under the UDC Act." (R.. 1739a)

comments by asserting that the Blight Study was attached to the General Project Plan and, therefore, was "not a part of the EIS." (R. 20280)

B. The Genesis of the Project

The Project was conceived and initiated by FCRC, the Project's private developer, who proposed to City and State officials the construction of a professional sports venue and mixed-use development that would be built partly within the remaining un-redeveloped portion of ATURA. As proposed by FCRC, the Project would rely on public subsidies and the use of eminent domain to acquire property for the Project. Eventually, the Project was brought under the auspices of ESDC, with the intent that ESDC would exercise its statutory power to override the New York City Zoning Resolution and land use approval process, thus allowing the construction of a Project that greatly exceeds the size that would otherwise be allowed under New York City laws.

Other than a short-lived effort in the 1970s, there had never been any initiative by the City, State or MTA to redevelop the Vanderbilt Yards. Although there has been a general desire to return a major league sports franchise to Brooklyn ever since the departure of the former Brooklyn Dodgers baseball team in 1957, most of the planning efforts for a sports

facility have focused on the Coney Island section of Brooklyn. The City commissioned a preliminary study in 1974 which considered a variety of locations in Brooklyn, including Coney Island and Prospect Heights, but did not draw any conclusion as to the preferred site. A more detailed study conducted in 1984 concluded that Coney Island was the preferred site for a major sports venue in Brooklyn. Finally, in 1994 a detailed development study was prepared devoted solely to a proposal to build a sports venue in Coney Island. Despite the existence of these studies concluding Coney Island to be the preferred site for a major sports facility, Prospect Heights was chosen as the preferred venue by private developer FCRC.

The Project was formally announced in December 2003, with great fanfare at a press conference attended by New York City Mayor Michael Bloomberg and Brooklyn Borough President Marty Markowitz. The essence of the proposed Project was that FCRC's principal, Bruce Ratner, would buy the New Jersey Nets basketball team and move it to Brooklyn, in conjunction with State's assistance through ESDC to build the massive mixed-use development which Mr. Ratner envisioned, unhindered by the need to comply with New York City zoning and land use laws. At the time of the Project announcement, there was no claim made that the Project was

allegedly to cure blight in Prospect Heights, even though part of the Project was located in ATURA.

C. The Public Review Process

A little over a year later, in February 2005, the City, ESDC and FCRC entered into the MOU, which established the terms and parameters of the project. (R. 20296, *et seq.*) Concurrently with that MOU, FCRC and MTA entered into a written agreement for FCRC o gain the right to develop over MTA's Vanderbilt Yards. (R. 20303)

It appears that sometime in the spring of 2005, MTA recognized that it could not lawfully dispose of the publicly owned Vanderbilt Yards to FCRC without some form of a public bidding process. Therefore, in May 2005, MTA issued a Request for Proposals ("RFP") with very detailed response requirements to assess the interest in building a platform over and developing the Vanderbilt Yards. Although FCRC had been developing its Project proposal for nearly two years, the RFP permitted other interested applicants only 45 days to develop and submit their proposals.

Despite the difficulty of complying with MTA's RFP requirements, another private developer, Extell Corp. ("Extell"), submitted a competing proposal. Unlike FCRC, Extell proposed construction of a mixed-income

housing development limited to the Vanderbilt Yards, would not have required the acquisition of private homes and businesses through eminent domain, and would have complied with City land use procedures. In addition, Extell offered MTA $100 million more than FCRC had offered for the right to develop the Vanderbilt Yards area. Nevertheless, MTA's Board of Directors rejected Extell's bid and proposal and announced that it would continue to negotiate exclusively with FCRC to develop the Project. FCRC eventually increased its bid by $50 million, and on September 14, 2005, the MTA's Board of Directors adopted a resolution accepting FCR's bid for the Yards.

Two days later, on September 16, 2005, ESDC designated itself as the lead agency for the Project under SEQRA, issued a "positive declaration" under SEQRA for the Project, and commenced the scoping process required under SEQRA for the environmental review. ESDC commenced the SEQRA environmental review process about 21 months after the Project was formally announced, and about six months after the ESDC and the City had signed the MOU with FCRC. Although the comment period for the draft scoping document under SEQRA ended on October 28, 2005, ESDC did not release the final scoping document until the end of March, 2006.

On July 24, 2006, ESDC released the DEIS and GPP, which together comprised more than 3,000 pages. The release included ESDC's notice of the requisite public hearing to be held on August 23, 2006, which was the earliest date after the release of the DEIS that ESDC could schedule the hearing pursuant to SEQRA, and that ESDC would accept written comments from the public until September 23, 2006, which was the minimum 30-day period permitted under the UDCA for ESDC to accept written comments after a public hearing. The public hearing was chaotic, and hundreds of people were denied entrance to the hearing due to overcrowding. Although the hearing continued three hours past its scheduled ending time, many persons were denied the opportunity to speak. ESDC also scheduled two "community forums" on September 12 and September 18, 2006, which were identical in form, substance and location to the public hearing, but declined requests from the community that it recognize that the "community forums" were public hearings. (R. 1764a)

Despite the brevity of the written comment submission period, ESDC and AKRF quickly completed ESDC's final environmental impact statement ("FEIS"), which ESDC's Board of Directors accepted on November 16, 2006. Shortly thereafter, ESDC and/or AKRF staff realized that in their

haste to complete the FEIS they had omitted many of the written comments received from members of the public, all of which ESDC were required to address in the FEIS. A revised FEIS was hurriedly completed over the Thanksgiving weekend and accepted by the ESDC Board on November 27, 2006 – the Monday following Thanksgiving.

D. The Final Decision

SEQRA required ESDC to wait a minimum of ten days following its release of the revised FEIS before it could issue its decision on the project, in order to allow the public to provide comments on the FEIS. On December 8, 2006, AKRF provided ESDC with a 27-page written memorandum addressing the written comments received on the FEIS, including comments from several of the Appellants herein. With virtually no discussion and without considering the substantive comments and objections, ESDC's Board approved its SEQRA Findings and the GPP on December 8, 2006.

On December 13, 2006, MTA's Board of Directors approved a "summary" of the SEQRA findings for the project, and on December 20, 2006, the New York Public Authorities Control Board ("PACB") approved the Project, admittedly without complying with SEQRA, thereby barely

completing the public and governmental review processes for the Project before the end of then-Governor George Pataki's last term of office.[3]

E. Process to Date

On April 5, 2007, Appellants commenced this Article 78 proceeding and action for declaratory judgment, by Order to Show Cause seeking a temporary and preliminary injunction of FCRC's demolition and construction of the project pending determination of the Petition. By Decision and Order dated April 20, 2007, the Court below denied the temporary restraining order.

On May 3, 2007, the Court below heard oral argument on the motion for a preliminary injunction and the merits of the petition. By Decision and Order dated January 11, 2008, the Court below denied the petition in its entirety. (R. 13a, *et seq.*)

LEGAL ARGUMENT

POINT I: SEQRA REQUIRED PACB TO MAKE ITS OWN WRITTEN ENVIRONMENTAL FINDINGS FOR THE PROJECT

Appellants submit that the Court below erred in finding that the Public

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[3] The estimated costs for the Barclays Center Arena have increased by nearly 50 percent. In December of 2006 when the Project was approved, the estimated cost was $637.2 million and in March of 2008, the estimated cost had increased to $950 million.

Authorities Control Board (PACB) did not violate the procedural requirements of SEQRA by failing to make written environmental findings when it approved the Project. SEQRA requires every state agency that approves an "action" that has been the subject of an EIS to consider the environmental impacts of the action and to make its own written environmental findings. ECL § 8-0109(8). This requirement includes PACB's approval of the Project at issue herein.

SEQRA defines the term "action" broadly, but excludes "official acts of a ministerial nature, involving no exercise of discretion". ECL § 8-105(5)(ii). Thus, every agency with discretion to approve an action subject to SEQRA has an independent obligation to analyze the areas of environmental concern. *See Golten Marine Co., Inc., v. New York State Dep't of Environmental Conservation*, 193 A.D.2d 742, 743 (2d Dep't 1993). This obligation furthers the basic purpose of SEQRA, which is to incorporate environmental considerations into the decision making process and ensure that "all agencies conduct their affairs with an awareness that they are stewards of the environment." ECL § 8-0103(8); 6 NYCRR § 617.1(c) (emphasis added).

The Court below held that PACB is not required to make its own

environmental findings when it approves an action, relying on SEQRA's exception for ministerial acts involving no exercise of discretion. (R. 27a-30a) In so doing, the Court read PACB's enabling statute, the New York Public Authorities Law ("PAL"), too narrowly, and incorrectly concluded that PACB's discretion "is confined to reviewing the financial feasibility and impact of proposed debt-incurring projects, which bear no relationship to the environmental concerns that may be raised in an EIS." (R. 30a) That was error because, as discussed below, the PAL does not limit PACB's discretion to financial criteria, and PACB in fact exercises substantial discretionary authority encompassing many of the same environmental impacts encompassed under SEQRA.

A. PACB Is an "Involved Agency" Required to Make Environmental Findings Under SEQRA

Under SEQRA, "no involved agency may make a final decision to undertake, fund, approve or disapprove an action that has been the subject of a final EIS . . . [unless] the agency has made a written findings statement." 6 N.Y.C.R.R. § 617.11(c). Any agency that has jurisdiction to make a discretionary decision to fund, approve, or undertake an action, is an "involved agency" under SEQRA. *See* 6 N.Y.C.R.R. § 617.2 (s).

As a threshold issue, PACB is an "agency" under SEQRA, which

defines "agency" as "any state or local agency," and "state agency" as "any state department, agency, board, public benefit corporation, public authority or commission." ECL § 8-0105(1) and (3). The "Public Authorities Control Board" is, by definition, a "board" created by the state, and, therefore, plainly falls under SEQRA's definition of "agency". *See* Gerard, Ruzow & Weinberg, Environmental Impact Review in New York §2.02, at 2-67 (2007) ("With very few exceptions, all state and local agencies are subject to SEQRA.")

Further, the SEQRA regulations define "involved agency" as one "that has jurisdiction by law to fund, approve, or directly undertake an action." 6 NYCRR §617.2(s) The New York Public Authorities Law provides that the PACB "shall have the power <u>and it shall be its duty</u> to receive applications for approval of the financing and construction of any project proposed by [ESDC]." PAL § 51(1)(e) (emphasis supplied). Thus, PACB plainly is an "involved agency" under SEQRA.

SEQRA mandates that an involved agency make explicit written environmental findings when it approves an action subject to an EIS. Specifically, the findings statement must:

(1) consider the relevant environmental impacts, facts and

> conclusions disclosed in the final EIS;
>
> (2) weigh and balance relevant environmental impacts with social, economic and other considerations;
>
> (3) provide a rationale for the agency's decision;
>
> (4) certify that the requirements of [SEQRA] have been met; and
>
> (5) 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, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

6 N.Y.C.R.R. § 617.11 (d). *See* ECL §8-0109(8).

PACB issued its resolution dated December 20, 2006 approving the Project, without making any environmental findings. (R. 1606a – 1614a) The only reference in the resolution to SEQRA or environmental findings generally was an acknowledgment that ESDC accepted a FEIS and an Amended FEIS for the Project.

B. The Court Below Misconstrued the Scope of PACB's Discretionary Authority

As noted above, SEQRA generally requires any agency with discretionary authority over an action already subject to an EIS to make its

own environmental findings, but exempts those actions deemed ministerial and non-discretionary. *See* ECL § 8-105(5)(ii). "In determining whether an agency decision falls within SEQRA's purview, . . . 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." *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 325 (1993). The Court below interpreted PACB's statutory decision-making authority too narrowly, and thereby erroneously concluded that PACB's discretion is confined to financial criteria. In fact, PACB generally considers a broad range of non-financial factors in its decision-making function and its decisions are highly discretionary.

PACB has the "duty to receive applications for approval of the financing and construction of any project proposed by" ESDC. PAL § 51(1). In reviewing an application, PACB may require "such information as it deems necessary". PAL § 51(2). PACB uses that information to make its determination, but is not mandated to reach any predetermined or formulaic conclusion:

> The board <u>may</u> approve applications 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(3) (emphasis added).

The operative word in the foregoing is "may" – not "shall" or "must". While PACB may only approve if its members are confident of the financial assurances, even if the financial assurances are evident, that does not mandate PACB's approval of the project – which is why approval of the project requires the unanimous vote of the three voting members of the Board. Had the Legislature deemed the scope of PACB's review to be limited strictly to financial assurance, it could have limited PACB's ability to approve a project to a specified set of financial criteria. But, the Legislature vested discretion in PACB. Indeed, ESDC itself recognized in the FEIS that the approval of the project by PACB was a discretionary approval, by including PACB approval among the discretionary approvals the Project was required to obtain. (R 762-763)

The PACB itself has demonstrated that it exercises broad discretion and considers environmental impacts in deciding whether or not to approve large-scale projects. For example, on June 5, 2005, the PACB refused to approve the construction of a football stadium for the New York Jets on the West Side of Manhattan. Assembly Speaker Sheldon Silver, who directed his representative on the PACB to deny project approval, explained the

reason for his rejection of that project, in part, as follows:

> Developing the West Side and ignoring Lower Manhattan: this is what the PACB vote is really about. . . . The question is not whether New York City should host the Olympics. The question is not whether New York City should host a Super Bowl or eight Jet home games every season. The question, is, what do we address first, our moral obligations or our ambitions? Considering our constitutional obligation to provide each and every child with a sound, basic education, our moral obligation to rebuild and revitalize Lower Manhattan, and our public obligation to provide a safe, affordable and efficient mass transit system, I cannot in good conscience cast my vote in support of the proposal before us today.

(R. 22861- 22862)

Mr. Silver's decision plainly was not confined to financial criteria; to the contrary, he based his decision on much of the same types of environmental concerns normally address in an EIS.[4] It simply is not true that, as erroneously stated in the decision appealed from herein, "PACB's

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4 Under SEQRA, "'Environment' means the physical conditions that will be affected by a proposed action, including land, air, water, mineral, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character." ECL §8-0105(6). *See also* 6 NYCRR §617.2(l) (adding "human health" to the list).

authority in approving a proposed project is limited to financial considerations." (R. 30a)

Where an agency has discretion to approve or deny an action even after the action meets a set of mandatory criteria, the action generally is subject to SEQRA. For example in *Gavalas*, *supra*, the Court of Appeals found that the issuance of a building permit was not subject to SEQRA, because the responsible agency had no discretion to deny a permit if the necessary regulatory standards were met. *See* 81 N.Y.2d at 323. In contrast, in *Pius v. Bletsch*, 70 N.Y.2d 920, 922 (1987) the Court of Appeals found that the issuance of a building permit was sufficiently discretionary to be deemed an unexempted "action" under SEQRA, because the issuing official had "specifically delegated site plan approval powers coupled with authority to make certain case-by-case judgments on site plan design and construction materials issues". *Id.* at 922.

As Mr. Silver has demonstrated, PACB's discretion to approve or reject a proposed project exceeds the authority granted to the official who issued building permits in *Bletsch*, and includes the authority to deny a proposed project even if it meets the requisite financial criteria, unlike the agency in *Gavalas*. PACB's authority is plainly discretionary under

SEQRA, and, therefore, PACB, as an "involved agency", was required to make its own written environmental findings when it approved the Project.

C. PACB's Failure to Make Environmental Findings Requires Annulment of Its Approval of the Project

New York Courts require strict compliance with the procedural review mandates of the SEQRA statute and regulations. *See New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 (2003). Indeed, "SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act." *East End Prop. Co. # 1, LLC v. Kessel*, 46 A.D.3d 817, 820 (2d Dep't 2007).

This is because

> [s]trict compliance with SEQRA . . . insure[s] that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance . . . offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 348 (1996).

Strict compliance with SEQRA is particularly crucial in connection with this Project – the largest single-developer project in the history of New York City, in which ESDC has exercised its power to override local land use

laws. *See* UDCA § 16(3). One of the few checks on ESDC's extraordinary (and controversial) exercise of power in favor of a particular developer is the statutory obligation of PACB to conduct its own independent review of the Project. PACB's failure to do so violated SEQRA's mandate that all agencies undertake an independent analysis of the impacts of the projects in which they are involved, and compels annulment of PACB's approval of the Project herein. *See, e.g., Glen Head-Glenwood Landing Civic Council, Inc., v. Town of Oyster Bay*, 88 A.D.2d 484 (2d Dep't 1982) ("the town board's failure to make the necessary 'explicit' SEQRA findings in rezoning the property was fatal"); *Nash Metalware Co., v. Council of the City of New York*, 14 Misc. 3d 1211 (S. Ct. N.Y. Co. 2006) (Council's zoning resolutions rendered ineffective because of failure to make environmental findings under SEQRA).

While the PACB has consistently ignored its SEQRA obligations, that does not condone continued flouting of the law. If the Legislature wanted to exempt the PACB from SEQRA, it could have, but chose not to. It is not for the courts to create an exemption where none exists.

POINT II: ESDC VIOLATED SEQRA BY FAILING TO DISCLOSE THE SIGNIFICANT, KNOWN ENVIRONMENTAL IMPACTS ASSOCIATED WITH THE RISK OF TERRORISM

The Court below recognized the public significance of the terrorism concerns raised by Petitioners, but nevertheless declined to find that SEQRA required ESDC to consider the environmental impacts of a potential terrorist attack in the EIS, citing to the lack of precedent and the absence of an explicit reference to terrorism in the SEQRA regulations. (R. 43) Appellants assert that the court below interpreted SEQRA too narrowly, because 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.

It does not appear that any court has addressed the terrorism issue in circumstances analogous to this case. Relevant case law, however, supports the conclusion that where, as here, there is no dispute as to the significant risk of a terrorist attack on the project at issue,[5] and substantial efforts have

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5 As planned, the Project would include the 18,000-seat, glass-walled Barclays Center Arena and a dense concentration of high-rise residential and office buildings, all to be built atop and/or adjacent to a major underground transportation hub consisting of the Atlantic Avenue/Pacific Street subway station, the Flatbush Avenue LIRR Terminal, and the LIRR's Vanderbilt Rail Yards. The Atlantic Avenue station has already been the

already been undertaken to identify the risks, analyze the impacts, and implement mitigation measures, SEQRA requires that they be addressed in the environmental review of the project.

This is not a case in which the environmental impacts of a potential terrorist attack are merely speculative. The Project's developer, FCRC, plainly recognized that the risk of terrorism is significant, and retained two different security firms to perform security-related work for the Project. (R. 889a) One of those firms, Ducibella Venter & Santore ("DVS"), prepared a Threat and Risk Assessment ("TARA") for Phase I of the Project, which includes the Barclays Center Arena, and is expected to prepare another TARA for the second phase. A TARA is used "to assess and minimize security vulnerabilities for a particular property or project . . . in accordance with geopolitical events deemed pertinent to the project." (R. 887a) DVS discussed the TARA with the NYPD's Counterterrorism Bureau, which "provides comments on the design-based threats and security implications of the designs and operational arrangements for significant projects in New York City." (R. 890a) FCRC also engaged a structural engineering design and consulting firm, Thornton Tomasetti, Inc., to analyze the design and

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intended target of a terrorist attack thwarted by the New York City Police Department ("NYPD") in 1997. (AR 15293-96)

materials for the Barclays Center Arena and other elements of the Project. (R. 890a) As a result of these efforts, changes to the structural designs and materials for the Project, and operation protocols, were implemented in order to enhance security. (R. 891a)

Although members of the public raised the need to address and to mitigate terrorism concerns throughout the environmental review process, including as comments on the Draft Scoping Document and on the DEIS, ESDC refused to disclose or to discuss any efforts to address their concerns. Instead, ESDC asserted that the impacts of a terrorism event "are not considered a reasonable worst-case scenario and are therefore outside the scope of the DEIS" (R. 12437), and that "[i]t is not anticipated that the proposed project would have to implement emergency security measures." (R. 12441) Petitioners were not even made aware of the TARA or any security analysis or related mitigating measures at all, until FCRC decided to disclose that information in answer to the petition in the Court below.[6]

One of the primary purposes of the environmental review process is to solicit comments from the public and from other agencies which will assist

[6] The TARA and related security analyses were disclosed to Appellants for the first time in the affidavits supplied by FCRC in this case, and are not referenced anywhere in ESDC's Administrative Record. ESDC has not alleged or otherwise asserted in this case that FCRC disclosed any of its security analyses to ESDC.

the agency involved in the decision making process, *see Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 422 (1986); ECL § 8-0109(4), and "the public comment purpose of SEQRA is best served by broad disclosure". *Indus. Liaison Comm. v. Williams*, 72 N.Y.2d 137, 146 (1988). ESDC's refusal to address the environmental impacts of a potential terrorist attack in its environmental review of the Project and improperly precluded public participation and comment on a significant environmental issue, contrary to both the intent and, as discussed below, the plain language of SEQRA.

This Court need not determine that SEQRA always mandates consideration of the environmental impacts of terrorism in the review of any action. This Court should determine, however, that in this case, given the undisputed, substantial risk of a terrorist attack on the Project and the significant efforts already undertaken by the Project's developer to analyze and identify the risks and to mitigate them, SEQRA requires ESDC to address those risks and mitigation measures in its environmental review of the Project.

A. ESDC's Interpretation of SEQRA Is Subject to *De Novo* Review by the Court

As a threshold issue, ESDC's determination that SEQRA does not

require consideration of the environmental impacts of a potential terrorist attack in the EIS for the Project is subject to a *de novo* standard of review, and is not entitled to the more deferential review generally afforded to an agency on issues involving factual evaluations and operation practices. Statutory interpretation requires a determination of legislative intent, which is the province of the Courts, and does not involve any area of special competence or expertise on the part of an agency. *See LaCroix v. Syracuse Exec. Air Serv., Inc.*, 8 N.Y.3d 348, 352-53 (2007); *cf. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1028 (9th Cir. 2006) (same, interpreting NEPA).

Similarly, while an agency's interpretation of its own regulations may be entitled to deference unless unreasonable or irrational, *see Rodriguez v. Perales*, 86 N.Y.2d 361, 366 (1995), an agency is not entitled to deference with regard to interpretation of regulations promulgated by another agency. *See Weingarten v. Board of Trustees of the New York City Teachers Retirement System*, 98 N.Y.2d 575, 579-580 (2002). Therefore, ESDC's interpretation of the SEQRA regulations issued by the New York State Department of Environmental Conservation ("DEC"), as well as its interpretation of the statute itself, requires *de novo* review by the Court.

B. SEQRA Encompasses Environmental Impacts Relating to the Foreseeable Risk of Terrorism

"[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. . . . [I]t is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). When "an issue of regulatory construction is presented, in the first instance we must consider the text's 'plain meaning'". *East Acupuncture, P.C. v. Allstate Ins. Co.*, 15 Misc. 3d 104, 107 (2d Dep't 2007). Further, "[i]t is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other." *People v Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979). *See Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007) (quoting same).

SEQRA requires that an EIS address, among other things, the following:

(b) the environmental impact of the proposed action

> including short-term and long-term effects; . . .
>
> (f) mitigation measures proposed to minimize the environmental impact; . . . [and]
>
> (j) such other information consistent with the purposes this article which may be prescribed in guidelines issued by the commissioner pursuant to section 8-0113 of this chapter.

ECL § 8-0109(2). The implementing regulations, which are promulgated by DEC, "shall be no less protective of environmental values" than the procedures provided in the statue, although they may be more protective. ECL § 8-0113(3)(a); *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 364 (1986).

SEQRA regulations state that a draft EIS "must include", among other things, "a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the likelihood of their occurrence." 6 NYCRR § 617.9(b)(5). In addition,

> [t]he draft EIS should identify and discuss the following [among other things] only where applicable and significant:
>
> (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts; [and]
>
> (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented[.]

6 NYCRR § 617.9(b)(5)(iii)(a), (b). An EIS must also include "a description of the mitigation measures" to be undertaken with respect to the Project. 6 NYCRR § 617.9(b)(5)(iv).

The plain language of section (b)(5)(iii) is broad, and does not distinguish between the significant environmental impacts of conditions or events that are certain to exist, and significant environmental impacts from reasonably foreseeable events that may not be certain to occur. Indeed, it is well established that "SEQRA review to some extent must take into account unknowns, which are circumscribed by a rule of reason; only environmental effects that can reasonably be anticipated must be considered." *Neville v. Koch*, 79 N.Y.2d 416, 427 (1992). Here, not only have the significant environmental impacts of a potential terrorist attack on the Project been anticipated, substantial efforts have been undertaken to identify, analyze, and mitigate them.

The Decision of the Court below does not refer to section (b)(5)(iii) of the SEQRA regulations, but, rather, relies entirely on section (b)(6), which provides as follows:

> In addition to the analysis of significant environmental impacts required in subparagraph (b)(5)(iii) of this section, if information about reasonably foreseeable catastrophic impacts on the environment is unavailable because the cost

to obtain it is exorbitant, or the means to obtain it is unknown, or there is uncertainty about its validity, and such information is essential to an agency's SEQR findings, the EIS must:

> (i) identify the nature and relevance of unavailable or uncertain information;
>
> (ii) provide a summary of existing credible scientific evidence, if available; and
>
> (iii) 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.

6 NYCRR § 617.9(b)(6) (emphasis added).

The Court below erroneously concluded that because section (b)(6), read alone, does not appear intended to address terrorism, the Court could not "rewrite" or "expand" it to include the environmental impacts of terrorism. (R. 55a) In so doing, the Court failed to construe SEQRA as a whole, as it was required to do, and disregarded the fact that section (b)(6) is explicitly intended to add to – not to limit – the requirements of the preceding section (b)(5)(iii). By its express language, section (b)(6) applies

only to "reasonably foreseeable catastrophic impacts on the environment" with respect to which information is unavailable, and cannot reasonably be construed to preclude an EIS from addressing the impacts of reasonably foreseeable catastrophic events with respect to which information not only is readily available, but has already been obtained. The latter is encompassed by section (b)(5)(iii).

Further, the Court below overlooked the fact that terrorism is not an isolated environmental issue, but directly affects other environmental impacts that must be addressed under SEQRA. For example, security enhancements of the structural designs and building materials on the Arena Block will likely impact the character of the glass-enclosed Barclays Center Arena and adjacent "Urban Room", features emphasized in the EIS's discussion of the Project's impact on the surrounding communities and promoted as "public benefits" which would mitigate adverse impacts.[7] In addition, the costs associated with anticipated security enhancements and protocols will impact the Project's overall financial burden on the City and

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7 For example, efforts to re-design the base of the planned Freedom Tower at the World Trade Center site created a highly-criticized, fortress-like design which led to further re-designs in order to preserve the intended character of that project. *See* David Dunlap and Glenn Collins, "Freedom Tower Sheds the Look of Bulky Armor", NEW YORK TIMES (Jun. 29, 2006), available online at http://www.nytimes.com/2006/06/29/nyregion/29freedom.html.

State, may crowd out other Project features and/or mitigation measures, and may severely impact neighboring residential and commercial risk insurance rates. Furthermore, the risks and mitigation costs relating to security and terrorism should have been addressed in consideration of alternative proposals for the Vanderbilt Yards ATURA area, and alternative sites that had been previously studied for the Barclays Center Arena.

Although the EIS includes an analysis of the Project's impacts on vehicular traffic, it says nothing about how the security-enhancing "operation protocols" for the Project may affect traffic. We note that subsequent to the hearing of this proceeding by the Court below, the City of Newark, New Jersey, determined that the recently built Prudential Arena was sited so close to the streets of downtown Newark as to create a security risk, requiring implementation of a procedure to close the streets adjacent to that arena during events as a precaution against truck bombs.[8] The Barclays Center Arena will, at its closest point, be set back only 20 feet from both Atlantic and Flatbush Avenues, which is the same distance which the City of Newark determined warrants street closings during arena events. Although

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8 *See* Andy Newman, "A Brooklyn Arena and the Street: What's the Right Distance?", NEW YORK TIMES (Nov. 24, 2007), available online at http://www.nytimes.com/2007/11/24/nyregion/24yards.html.

the EIS discusses the impact of the Project on street traffic, ESDC refused to allow any consideration of how arena security protocols might affect its findings and determinations regarding the Project's impact on local traffic, which falls squarely within the range of environmental impacts covered by SEQRA. *See, e.g.*, *Chatham Towers Inc. v. Bloomberg*, 6 Misc. 3d 814 (Sup. Ct. N.Y. Co. 2004), *modified on different grounds*, 18 A.D.3d 395 (1st Dep't 2005) (ordering City to conduct environmental review under SEQRA of post-9/11 security plan to close streets and install traffic checkpoints around One Police Plaza).

While *Chatham Towers* addressed an action that was itself a terrorism mitigation measure, appellants are aware of only one case in which a New York State court has addressed whether SEQRA requires consideration of the impacts of a terrorist attack on the project itself. In *Municipal Art Society of New York v. New York State Urban Dev. Corp.*, 2007 N.Y. Misc. LEXIS 2701, 237 N.Y.L.J. 103 (Sup. Ct. N.Y. Co. May 21, 2007) (Stallman, J.), the court held that SEQRA regulations did not require ESDC to address security concerns pertaining to the proposed location of a truck yard directly atop the Lincoln Tunnel. That case is distinguishable in that 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. To the extent the court construed SEQRA to exclude security-related environmental impacts *per se*, however, its interpretation of SEQRA was erroneous for the same reasons stated herein.[9]

C. Federal Court Precedent Under NEPA Supports Inclusion of Terrorism-Related Impacts in the EIS in This Case

Some federal courts have held that an environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*., must address a significant risk of a terrorist attack on the project under review. Although the Court below appears to have discounted the relevance of those cases to SEQRA, New York State courts routinely look to cases decided under NEPA for guidance in construing SEQRA. *See Chinese Staff Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 365 n.6 (1986) (comparison of SEQRA with NEPA "is instructive"); *H.O.M.E.S. v. New*

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[9] Other SEQRA cases in which terrorism-related issues have been raised were resolved without addressing those issues. *See Herald Square South Civic Assn. v. Consolidated Edison*, 2003 N.Y. Misc. LEXIS 1994, *3 (Sup. Ct. N.Y. Co. Mar. 24, 2003), *aff'd*, 307 A.D.2d 213, (1st Dep't 2003) (finding private corporation's construction of electrical substation not subject to SEQRA, without reaching plaintiffs' concern about the possibility of a terrorist attack); *Brighton Residents Against Violence to Children, Inc. v. M.W. Properties, LLC*, 304 A.D.2d 53 (4th Dep't 2003) (where Town approved installation of barrier to protect neighbors from threatened bombing of abortion clinic, anti-abortion group lacked standing to challenge negative declaration under SEQRA).

York State Urban Dev. Corp, 69 A.D.2d 222, 231 (4th Dep't 1979) ("for construction of the State law we look to the cases which have construed [NEPA]").[10]

In *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 1124, 166 L. Ed. 2d 891 (2007), the Ninth Circuit Court of Appeals held that "[i]f the risk of a terrorist attack is not insignificant, then NEPA obligates the NRC to take a "hard look" at the environmental consequences of that risk." *Id.* at 1035 (environmental review under NEPA of nuclear facility must consider environmental effects of a terrorist attack). *See also Tri-Valley Cares v. Dep't of Energy*, 2006 U.S. App. LEXIS 25724, *5, 2006 WL 2971651 (9th Cir. 2006) (finding environmental review of proposed biological weapons laboratory sufficient "[w]ith the exception of the lack of analysis concerning the possibility of a terrorist attack"); *Washington v. Bodman*, 2005 WL 1130294, *32 (E.D. Wash. May 13, 2005) (recognizing that earlier 2003 decision enjoining shipment of hazardous

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[10] NEPA is "the paradigm for SEQRA", *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 54 (1st Dep't 2001), although SEQRA "imposes far more 'action-forcing' or 'substantive' requirements on state and local decision makers than NEPA imposes on their federal counterparts." *In re Metro. Museum Historic Dist. Coalition v. De Montebello*, 20 A.D.3d 28, 34 (1st Dep't 2005).

waste was based in part upon agency's insufficient analysis of transportation risk, including terrorism risk, under NEPA).

While *San Luis Obispo Mothers for Peace* concerned a nuclear facility, the Ninth Circuit focused on the facility's attractiveness as a terrorist target, rather than any hazard intrinsic to that facility, and did not limit its holding to the circumstances of that case or to any category of project. The court simply held that NEPA requires a "hard look" at a "significant" risk of a terrorist attack. Similarly, SEQRA requires the lead agency to take a "hard look" at "significant" environmental impacts (6 NYCRR § 617.9(b)(5)(iii)), and FCRC has already determined that the risk of terrorism to the Project is significant. The Ninth Circuit's reasoning under NEPA is equally valid under SEQRA.

D. Previous Environmental Reviews Have Addressed Terrorism Issues in Sufficient Detail to Permit Public Participation and Input

While ESDC has asserted that public disclosure of security matters in the EIS at issue herein would compromise public safety, EISs for other projects have addressed terrorism risks and mitigation measures in sufficient detail to permit public participation and comment without publishing blueprints for terror. Indeed, FCRC has already disclosed far more

information regarding security matters as part of its defense herein than ESDC deigned to disclose to the public in the EIS.

Significantly, ESDC's environmental consultant for the EIS for the Project, AKRF, was also the environmental consultant for the Generic Environmental Impact Statement ("GEIS") for the Word Trade Center Memorial and Redevelopment Plan, prepared under both NEPA and SEQRA. (R. 22878, *et seq.*) The GEIS, dated April 2004, contains five pages of security analysis, identifies specific security threats, and describes specific measures intended to 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. Among other things, the GEIS discusses specific measures to strengthen building structures; enhance emergency communications pursuant to recommendations of the National Fire Protection Association, including an internal antenna system for communications with emergency responders; improve emergency staircases to facilitate emergency evacuations; and smoke control systems. (R. 22882-83) The GEIS also discusses implementation of security screening of vehicles and persons, addresses "airborne monitoring and detection" and the use of "local point-of-use water filters", and discusses incorporation of the

findings of the National Institute of Standards and Technology regarding the events of September 11. (R. 22884) Further, the GEIS includes responses to public comments concerning "provisions for anti-terrorism and anti-bacteriological attack", methods to screen vehicles and search for weapons at entry points, and emergency evacuation procedures, in sufficient detail to inform the public of the steps being taken to address the concerns raised in the comments. (R. 22886)

The MTA Long Island Rail Road East Side Access 50th Street Facility Revised Environmental Assessment dated January 2006, prepared with AKRF pursuant to NEPA and the CEQR Technical Manual, contains six pages of analysis discussing, among other things, MTA's risk assessment methodology and the incorporation of security into the facility design, and separately addresses "Safety and Security During Normal Operations" and "During Emergencies", as well as six pages of public comments and detailed responses pertaining largely to terrorism concerns and other potential catastrophic events. (R. 22903, *et seq.*)

The Permanent WTC PATH Terminal Final Environmental Impact Statement dated May 2005, also prepared with AKRF, specifically notes the heightened security concerns following September 11, and includes more

than two pages addressing the incorporation of safety and security elements and protections into the project's architectural and civil designs, structural elements, and mechanical, electrical, and fire protection systems, and various surveillance and security measures and countermeasures, among other things, in sufficient detail to apprise the public. (R. 22897, *et seq.*)

The Fulton Street Transit Center Final Environmental Impact Statement dated October 2004, for which AKRF was not the environmental consultant, includes a six-page Safety and Security section which, among other things, discusses a planned Threat and Risk Assessment Study, identifies various threats to be addressed, discusses compliance with multiple security-related programs and codes, and analyzes alternatives in light of security concerns. (R. 22888, *et seq.*)

While none of those EISs discloses confidential security information, they all discuss the designing and planning for terrorist attacks and the mitigation measures, and provide a basic platform for public comment and input. In contrast, discussion of security issues in the FEIS at issue herein is limited mainly to a single paragraph captioned "Public Safety" and a few broad references to a future "site security plan", security screenings, and coordination with the local police and fire departments to be developed.

(AR 10525-26, 10533, 10537-38; R. 53a-54a)

There is no question that the risk of adverse environmental impacts from a terrorist attack on the Project is significant, as evidenced by the substantial efforts to identify, analyze, and mitigate that risk already undertaken by FCRC. As this Court recently held in *Nash v. The Port Authority of New York and New Jersey*, 51 A.D.3d 337 (1st Dep't 2008):

> Where the seriousness of the injuries potentially arising from an identified risk is immense and the burden of the risk's minimization is relatively small, there can be no reasonable requirement that the risk's realization appear more probable than not before the landlord's duty to address it is triggered; in such circumstances prudent risk management dictates that the risk be minimized if it presents as a real, as opposed to a purely hypothetical, possibility.

Id. (upholding jury's determination that Port Authority was substantially liable under tort law for 1993 World Trade Center bombing). Given that FCRC has already identified and analyzed the terrorism risk and developed specific mitigation measures, SEQRA required disclosure and discussion of that information, within the limitations imposed by reasonable security concerns, in the EIS.

POINT III: ESDC'S FAILURE TO CORRECTLY ESTIMATE THE BUILD YEARS OF THE PROJECT WAS FATAL TO ITS ABILITY TO TAKE A "HARD LOOK" AT THE PROJECT'S ENVIRONMENTAL IMPACTS

To determine many of the environmental impacts of a project, it is necessary for the lead agency to establish the year in which the project will be completed, generally referred to as "the build year". In the case of a large project, the build years of each phase of the project must be determined. The agency is then required to assess the extent and nature of the negative impacts utilizing the build years. *See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415 (1986). Particularly when considering traffic impacts and the demands on community services, the build year is critically important to assess the background growth that will occur between project consideration and completion to which the project impacts can then be added. *See* New York City CEQR Manual, at 2-4.

In their challenge to the EIS, Appellants argued that ESDC had intentionally or mistakenly mischaracterized the build years of the Project. The Court below disagreed, erroneously ruling that the choice of the build years were immaterial to the accuracy of analyses contained in the EIS.

"The heart of SEQRA is the Environmental Impact Statement (EIS)

process." *Jackson.*, 67 N.Y.2d 400, 415 (1986).[11] The EIS must be "sufficient to allow a hard look and reasoned elaboration for the Board's determination of whether the projects would have a significant environmental effect." *Save the Pine Bush, Inc. v. Albany*, 141 A.D.2d 949, 952 (3d Dep't 1988). Moreover, the EIS must propose mitigation measures which, to the extent possible, minimize the negative environmental impact of the proposed project. *See* ECL § 8-0109(2)(f); 6 NYCRR § 617.14(f)(7). Finally, SEQRA requires the reviewing agencies 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).

Appellants respectfully submit 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

[11] "[A] primary purpose of a DEIS is to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action – a purpose arguably best served by broad disclosure." *Id.* at 422, citing 6 N.Y.C.R.R. § 617.14(b), (c); 21 § N.Y.C.R.R. 4200.10(a); ECL § 8-0109(4).

in order to properly determine which proposal resulted in the least adverse environmental impacts.,.

As set forth more fully above in the Statement of Facts, the developer proposes to build the Project in two phases. According to the General Project Plan, Phase I consists of construction of the Barclays Center arena and the other buildings located on Blocks 1118, 1119 and 1127, and includes retail, residential, office and possible hotel space. (R. 69-74) Additionally, during Phase I, all of the buildings in the entire Project area would be razed, leaving the area designated for Phase II as oversized parking lots for construction workers, staging areas for Phase I construction, or vacant lots. (R.73-74) Phase II comprises the balance of the project, including the construction of a platform over the Vanderbilt Yards and most of the residential skyscrapers. (R.74-75) For purposes of the EIS, ESDC projected that Phase I would be completed in 2010, and Phase II in 2016 – 10 years after the 2006 baseline study year for the EIS. (R. 65, 2074-2075)

A. Prolonged Construction Impacts Traffic, Noise, and Air Quality

It is difficult to fathom any reasonable argument that the inaccuracy of the Project build dates does not impact multiple levels of the SEQRA analysis. Certainly, a substantially longer construction period significantly

increases the disruption to the surrounding areas caused by construction-related traffic, noise, and dust. Equally significant, the substantial delay in the completion of Phase I causes the significant delay in the commencement of Phase II, necessarily resulting in a substantial portion of an entire Brooklyn neighborhood being utilized as a long term construction staging area and an oversized parking lot for 1600 cars and trucks belonging to FCR's construction workers. (R. 1456)

Undoubtedly, a delayed completion date also adversely impacts the analysis of traffic and transportation impacts. Traffic and transit demand analysis is first based upon the project demand that is added to anticipated background traffic and transit growth without the project.[12] Therefore, if the project is not completed for a significant period of time beyond what is considered in the EIS, then the background growth will be that much greater , changing the projections of the impacts in the FEIS.

B. Postponement of Claimed Public Benefits

In addition, as Appellants argued before the Court below, significant delays in project construction also substantially postpone the supposed

12 The FEIS used a 0.5% annual background traffic growth rate.

"public benefits" and delivery of the alleged mitigation measures that purport to alleviate the environmental harm of the Project. Just by way of a single example, the appellants pointed out to the Court below that ESDC relies on the provision of additional open space and recreational facilities as mitigation for loss of such amenities that will be destroyed to make way for the Project. However, nearly all of the open space proposed for the Project is not planned until Phase II. (R.1010) Clearly, a substantial change in the completion date of Phase I would have significantly effected, and indeed has, the proposed mitigations of the negative impacts, and should have been anticipated and considered by the relevant agencies before a final determination on the Project was reached.

C. The Court Below Erred When It Relied Upon ESDC's Claim That the Build years in the EIS Were Certain

As the appellants pointed out to the Court below, many of the public's comments to the DEIS noted that the projected completion year of 2016 was unrealistic, given the Project's size and complexity, and based on past experience of large projects in the City. In particular, comments noted the many variables and contingencies that exist in this Project and nothing in the SEQRA Findings or GPP adopted by ESDC mandate that FCRC complete the project in any time frame, let alone by 2016. (R. 597-599)

Through affidavits, news articles, and public comments made by the ESDC and FCRCemployees submitted to the Court below, the appellants offered substantial support for their contention that the ESDC knew when it issued the FEIS that the projected build-out date of 2016 was extremely unlikely, and that Project would almost certainly require five to ten years beyond 2016 to be completed.

For example, on March 6, 2007, in a presentation to investors, Forest City Enterprises (parent company of FCRC) Chief Executive Officer Chuck Ratner informed investors that full build-out of the project would take 15 years, pushing the completion date to 2021, at the earliest. "Return expectations have not changed since we started. That is – this is going to be a 15-year buildout, so obviously, we believe over time that we'll be able to make up for this, as we have." [13] (R. 498a). A few weeks earlier, one of the Project's two designers, landscape architect Laurie Olin, made clear that "[t]he time calendar we are talking about is probably 20 years." [14] (R. 511a)

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13 Chuck Ratner's comment is quoted from an FCRC webcast, available online at http://ir.forestcity.net/phoenix.zhtml?c=88464&p=irol-eventdetails&EventId=1492668. The relevant portion begins at around 1:21:35.

14 Significantly, in or about September, 2007, after the proceeding below was fully briefed, but long before the lower court rendered its decision, the ESDC apparently signed a funding agreement with FCRC which afforded FCRC twelve years, or at least until 2019, to build Phase 1 alone, and an indeterminate amount of time to build Phase 2. (http://www.nytimes.com/2008/06/13/nyregion/13stadium.html), further evidencing ESDC's knowledge that the build years designated in the FEIS were completely inaccurate.

As pointed out to the Court below (R. 60a-62a), neither ESDC nor FCRC had disclosed any intervening event subsequent to the issuance of the FEIS and prior to either of these announcements that would have resulted in the Project's projected completion date being pushed back by five to 10 years.

In response, ESDC simply reiterated, without analysis, that its projections were accurate; in other words, it found that the build years supplied by FCRC were 'certain', and claimed that its methodology was consistent with the CEQR Manual. (R. 2091) ESDC's response was simply false in the first assertion, and therefore wrong in the latter.

In their arguments in the Court below, both FCRC and ESDC contend they properly relied on a construction schedule provided by FCR's paid consultant for their stated 2010 and 2016 completion years, for Phase I and Phase II respectively, on which ESDC relied to analyze adverse environmental impacts from the Project. (R. 1616a, 1617a, 1628a, 1647a, 1648a) But, that construction schedule was already demonstrably inaccurate at the time the FEIS was issued.

For example, the construction timeline which ESDC included in the FEIS chapter on "Construction Impacts" plainly relies on the following work

commencing on November 1, 2006: on the "Arena Block," demolition of existing buildings, "mass excavation," and utility and environmental work, lasting from eight to 12 months; closure of the Carlton Avenue bridge (which crosses over the rail yards); demolition of various buildings on Blocks 1120, 1128, and 1129. lasting eight months; and "LIRR Construction Staging" on Blocks 1121 and 1129. (R.11566) When ESDC issued the FEIS on November 27, 2006, none of this work was even close to being commenced. Indeed, as was argued before the lower court on the appellants' requests for a stay of demolition, none of the preparatory work for the planned demolitions commenced until late February 2007. Moreover, ESDC knew that it had to acquire various properties for Phase I through eminent domain, a process that would involve significant litigation that would keep the project from commencing. ESDC's contention that it had a right to rely on a construction schedule that they already knew was inaccurate is spurious. The evidence is clear that when ESDC issued the FEIS, it knew or certainly should have known that the build dates were not "certain" as required by SEQRA, it was unlikely that the Project would be completed before 2021 or 2026, and it therefore should have utilized a much longer build-out timeframe as the reasonable worst-case scenario for

purposes of its analysis.

Originally, in its argument before the lower court, the ESDC cavalierly claimed in the FEIS that its methodology was consistent with the CEQR Manual (R. 2091), even though the CEQR Manual instructs that where a build year is uncertain, the agency should chose "from the range of reasonable timing scenarios, the one that represents the worst case environmentally." CEQR Manual at 2-4. 15

However, the ESDC then apparently changed its position, arguing that the Project completion dates are irrelevant to a proper environmental review, based on a single case, *Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Council of the City of New York*, 214 A.D.2d 335, 626 N.Y.S.2d 134 (1st Dep't 1995), in which the court declined to invalidate the data relied upon in an EIS because of an allegedly suspect "build year."

Unfortunately, in reaching its decision, the Court below adopted the ESDC's belated argument and relied on the same case, ignoring all of the appellants' arguments regarding the numerous significant consequences of

[15] "It may be that the build year for a given action is uncertain. This could be the case for some generic actions or for small area rezonings, where the build-out depends on market conditions and other variables. In this case it is prudent to select, from the range of reasonable timing scenarios, the one that represents the worst case environmentally." CEQR Manual at 2-4

the selection of an erroneous completion date, and the ESDC's original acknowledgement that it should comply with the CEQR directives regarding the selection of a completion date.

However, *Committee to Preserve Brighton Beach* is easily distinguished in that the build year complained of was only three years after the environmental review, and there is no indication that the petitioners alleged how the build year might have affected the EIS data. Here, in contrast, ESDC has relied on a ten-year construction period which appellants allege should have been estimated to be at least 15 to 20 years, and ESDC cannot credibly argue that such a five to ten year discrepancy in the construction of a project of this magnitude would not significantly impact its environmental findings. (R. 139a-140a) The lower court erred in determining that *Committee to Preserve Brighton Beach* stands for the proposition that the selection of a completion date is inconsequential in determining the sufficiency of an EIS, and the lower court's decision based on that analysis cannot stand.

D. The Court below Erred in Disregarding the Evidence of the Developer's Public Estimates of the Build Years.

Although it erroneously found that an agency's SEQRA findings cannot be called into question based on the section of the build year, the

court went on to suggest that the appellants had nonetheless "not made an adequate showing as to any alleged inaccuracies" regarding the completion date, claiming that the appellants' argument was based solely on the aforementioned statements of Mr. Ratner and Mr. Olin. (R. 61a) However, as set forth more fully above, the appellants had also demonstrated that the construction schedule by Turner Construction Company relied on by the ESDC, was already flawed by the time that the FEIS was issued, in that work scheduled to be underway had not even been commenced at the time of approval of the FEIS. Moreover, certain of the work was already months behind schedule by the time that the appellants filed the lawsuit below.

Moreover, the lower court erred in giving no weight to the statements of Messrs. Ratner and Olin. This was not the wild conjecture of the appellants, but public statements of an FCRC principal and its principal landscape architect made directly on this point. As evidenced throughout the entire review process involving this Project, much information has been withheld from public scrutiny, including virtually all of the information regarding the financing of the Project. It should not come as a surprise that the appellants would not be privy to evidence other than the admissions of the developer that the Project would take substantially longer than claimed

to complete, nor should appellants be required to have additional evidence of such proprietary knowledge at this point.

Appellants submit that the words of the developer and its principal landscape architect are compelling evidence enough. At a minimum, given the admissions made, the Court should have directed a fact-finding hearing on this issue pursuant to CPLR Section 7804(h), and the lower court's decision should be modified accordingly.

POINT IV: THE COURT BELOW INCORRECTLY APPLIED A "BLIGHT" ANALYSIS TO ESDC'S CONCLUSORY ASSUMPTION THAT THE NON-ATURA BLOCKS WOULD NOT DEVELOP WITHOUT THE PROJECT

In the EIS, ESDC discussed a "Reduced Density – No Arena Alternative" to the Project, based on the proposal submitted to MTA by Extell Corp., which would limit the publicly subsidized development to the footprint of the MTA-owned Vanderbilt Yards and exclude the non-ATURA portion of the current Project footprint (the "Non-ATURA Blocks"),[16] as well as a "No Action Alternative." Petitioners asserted in the Court below that ESDC irrationally rejected both alternatives based, in substantial part,

16 The Non-ATURA Blocks include the Blocks designated 1127 and 1129, and a portion of the Block designated 1128, all of which are privately owned and lie directly across Pacific Street from the Vanderbilt Yards. (R. 46a)

on the false assumption that without the Project "significant new development" of the Non-ATURA Blocks "is considered unlikely given the blighting influence of the rail yard and the predominance of low-density manufacturing zoning on the project site" (R. 11793), and that the area "would remain blighted and continue to permit low-density industrial uses." (R. 11847)

Petitioners noted ESDC's failure to provide any support for that assumption, and cited the substantial evidence, both within and outside of the Administrative Record, that the Non-ATURA Blocks were already experiencing significant private redevelopment and rapidly increasing property values when ESDC announced the Project in late 2003, which would have continued but for the announcement of the Project. In ruling against Petitioner, the Court below appears to have conflated its analysis of whether ESDC reasonably considered alternatives to the Project under SEQRA with its analysis of whether ESDC properly designated the Project a "land use improvement project" under the UDCA. In so doing, the Court below incorrectly applied the standards for determining "blight" under New York's eminent domain law to the issue of whether ESDC's stated reason for rejecting the alternatives was reasonable, holding that

> as previously determined herein, that fact alone [of existing redevelopment] is insufficient to outweigh the ample evidence of blight conditions documented in the Blight Study, which provided a rational basis for the ESDC's conclusion that continued new development in the area was unlikely.

(R. 74a)

That was error, because, as the Court below noted, under eminent domain law "the term 'blight' is to be given a 'liberal rather than literal definition.'" *Yonkers Comm. Dev. Agency v. Morris*, 37 N.Y.2d 478, 483 (1975). (R. 47a) Although Petitioners disagree that the Non-ATURA Blocks are "blighted" even under the liberal standard stated in *Morris*, that standard has no application to determining whether ESDC engaged in the required "reasonable consideration of alternatives" under SEQRA. *Dryden v. Tompkins County Bd. of Representatives*, 78 N.Y.2d 331, 334 (1991). Under well established, controlling case law interpreting SEQRA, ESDC's unsupported, conclusory assumptions about the likelihood of development on the Non-ATURA Blocks do not provide a rational basis for its rejection of alternatives.

A. Under SEQRA, ESDC Must Make Reasoned Consideration of the Alternatives

Under eminent domain law, an area may be deemed "blighted"

despite the presence of non-blighted parcels "if the redevelopment is intended to cure and prevent reversion to blight in some larger area that includes the property." *Berman v. Parker*, 348 U.S. 26, 35 (1956). The Court below upheld ESDC's designation of the entire Project footprint as a "land use improvement project" under that standard. (R. 48a) While Petitioners contend that *Berman* does not permit ESDC to append a distinct, rapidly gentrifying neighborhood to a publicly owned, undeveloped urban renewal area under the pretense that the entire area is "blighted" for purposes of the UDCA, regardless of how this Court decides that issue, that will not determine whether ESDC reasonably considered alternatives to the Project. The latter issue hinges not on whether the Project is intended to cure blight, but, rather, on whether ESDC made a rational "choice among alternatives . . . based on an awareness of all reasonable options". *Dryden*, 78 N.Y.2d at 333-34.

While ESDC enjoys a degree of discretion in choosing among alternatives to the Project, "judicial review must be meaningful". *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). ESDC may not reject alternatives based on an unsupported, conclusory assumption that is directly contradicted by the known facts. *Cf. id.* at 573 (1990) ("Although the protected housing

study did not provide all current information on every dwelling unit in the study area, it did provide a basis for a reasoned consideration of the secondary displacement issue.”); *Horn v. County of Westchester*, 106 A.D.2d 612, 613-615 (2d Dep't 1984) (affirming rejection of alternatives where “there was a massive presentation of evidence, and a careful analysis and consideration of that evidence.”)

B. ESDC’s Unsupported Conclusions About the Non-ATURA Blocks Have No Basis in Fact

ESDC had no rational basis to assert that residential redevelopment of the Non-ATURA Blocks “is considered unlikely given the blighting influence of the rail yard and the predominance of low-density manufacturing zoning on the project site” (R. 11793), or that the area “would remain blighted and continue to permit low-density industrial uses.” (R. 11847) ESDC offered no support whatsoever for those statements, and they are directly contradicted by the fact that before the Project was announced in late 2003, the Non-ATURA Blocks were already experiencing significant private residential redevelopment, consistently with the rising property values and residential redevelopment of Prospect Heights as a whole.

For example, on Block 1127, which lies entirely within the Project

footprint, a private developer converted a former warehouse at 636 Pacific Street into the "Atlantic Art Building" which opened in 2003 with 31 luxury condominium units,[17] just a few months before the Project was announced. On the same block, the former Spalding factory, at 64 Sixth Avenue, opened in 2002 with 21 new loft condominiums.[18] Both of these recent, private housing redevelopments front on Pacific Street directly facing the Vanderbilt Yards, and both of them would be razed to make way for the Project.[19]

On Block 1129, in the fall of 2002 a private developer filed a plan with the New York City Buildings Department to convert the factory building located at 754 Pacific Street, which directly faces the Vanderbilt Yards, into a luxury residential building. (R. 22788) After the Project was announced, the developer withdrew that plan and attempted to convey his interest in 754 Pacific Street to FCRC. (R. 22788) The current owner of 754 Pacific Street has filed a plan with the Buildings Department to develop

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17 *See* Rachelle Garbarine, "Residential Real Estate: 2 Brooklyn Business Sites Converting," *The New York Times*, August 30, 2002, Section B, Col. 1, p. 6 (R. 550a – 551a); Eric Neutusch, "Here Comes the Neighborhood: Prospect Heights," *The Brooklyn Rail*, Autumn 2002, available online at http://www.thebrooklynrail.org/local/fall02/prospectheights.html (R. 552a – 553a).

18 *See id.*

19 In addition, around the same time, another private developer converted two former industrial buildings at 616-630 Dean Street, on the south side of the street opposite Block 1129, into a 21-unit luxury condominium complex known as the "Merchant House". *See id.*

a ten-storey building, including seven stories of hotel space, on that property and two adjacent lots, and intends to proceed with that development in the event ESDC does not take the properties.[20] (R. 22789)

On Block 1128, which is only partially within the Project footprint, a private developer converted a former Daily News printing plant located at 535 Dean Street and 170 Pacific Street into a 137-unit luxury condominium building known as "Newswalk"[21] which opened in 2002. Like the recent private housing redevelopments on Block 1127 and the aborted redevelopment on Block 1129, Newswalk fronts on Pacific Street directly facing the Vanderbilt Yards. A number of Newswalk residents wrote to ESDC in and around the fall of 2006 in response to the DEIS, questioning how it could have reasonably determined that the Project was needed to cure blight in their neighborhood, given that apartments in their building were selling "for $600,000 to nearly $3 million."[22] (R. 14035-43, 14178-81,

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[20] The current owner/developer, Pacific Carlton Development Corp., was a plaintiff in *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, __ U.S. __, 2008 U.S. LEXIS 5220 (Jun. 23, 2008), in which property owners and residents in the Project footprint challenged the constitutionality of ESDC's takings of their properties.

[21] *See id.*

[22] By the time ESDC issued the DEIS in 2006, FCRC had already bought out all but one of the owners in the Atlantic Art Building (*see* AR 345) and all of the owners in former Spalding factory (*see* AR 356), pursuant to agreements which prohibited the

14185-87, 15494-97, 15502-06)

FCRC carved Newswalk out of the Project footprint, because the total fair market value of the 137 luxury condominium units was so high that acquiring them, through either direct purchase or eminent domain, would have been prohibitively expensive. As a result, the Project has a shallow U-shaped footprint, surrounding Newswalk and neighboring portions of Block 1128 on three sides.

The rapid, private residential redevelopment of the area was commonly known prior to ESDC's announcement of the Project. For example, in August 2002, the New York Times reported that "[i]n the onetime manufacturing neighborhood around Dean and Pacific Streets in Prospect Heights, Brooklyn, the conversion of old warehouses and factories to housing marches on" (emphasis added).[23] Around the same time, a local Brooklyn newspaper reported that "[t]he empty industrial lots along Dean and Pacific Streets are being rejuvenated by a residential housing boom"

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former owners from speaking publicly in opposition to the Project. *See* Penelope Green, "Battling a Developer's Mammoth Plans", *The New York Times* (Feb. 27, 2005), available online at http://www.nytimes.com/2005/02/27/realestate/27habi.html?_r=1&scp=4&sq=atlantic+yards+goldstein&st=nyt&oref=slogin.

23 Garbarine, *supra* (R. 550a – 551a).

(emphasis added).[24] This private residential development was taking place before the Project was announced, and despite purported "blighting influence of the rail yard" lying directly across Pacific Street and "predominance of low-density manufacturing zoning" in the area which ESDC cited as reasons why the area would not redevelop unless it is included in the Project.

Even though ESDC's announcement of the Project in late 2003 put a stop to any further private redevelopment of the portions of the Non-ATURA, significant private redevelopment continued on the remainder of Block 1128 and property values remained high. For example, a newly constructed, three-storey, luxury condominium building known as the "DeanCarlton" recently opened at 565 Dean Street, on the corner of Carlton Street;[25] the building located at 543 Dean Street was recently redeveloped as a four-unit luxury condominium building;[26] a four-storey townhouse at 532 Carlton Avenue was sold in 2007 for $1.5 million;[27] and a three-storey

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24 Neutusch, *supra* (R. 552a – 553a).

25 According to information available on the New York City Buildings Department's web site, at http://www.nyc.gov/html/dob/html/home/home.shtml, the final Certificate of Occupancy for the DeanCarlton was issued on March 14, 2008.

26 The Buildings Department issued its final Certificate of Occupancy for the building on May 29, 2008. See http://www.nyc.gov/html/dob/html/home/home.shtml.

27 Sales information is from Property Shark, at www.propertyshark.com.

townhouse at 518 Carlton Avenue was sold in 2007 for $1.35 million and subsequently renovated as a two-family home.[28]

This continuing private residential redevelopment and sustenance of high property values on the same block as Newswalk, which is adjacent to the Vanderbilt Yards and in the precise center of the non-ATURA potion of the Project footprint, and the redevelopment project on Block 1129 which was aborted as a result of the Project, plainly demonstrate that the significant private residential development of the Non-ATURA Blocks prior to the announcement of the Project in late 2003 would have continued. Nevertheless, ESDC claimed in the FEIS that the exclusion of the Non-ATURA Blocks from the Project would be problematic, because "the existing zoning of these blocks would allow for the future development of low-density industrial uses, which would be out of context with the surrounding residential uses." (R. 11817)

ESDC blatantly ignored the fact that those blocks have been the subject of various rezoning measures by the City since the 1990s to permit

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[28] Sales information is from Property Shark, at www.propertyshark.com, and renovation information is from the NYC Buildings Department, at http://www.nyc.gov/html/dob/html/home/home.shtml.

conversion of commercial spaces to residential uses, such as Newswalk. (R. 224a) ESDC certainly must have known about the rezoning and the extensive redevelopment that had taken place, and certainly was aware of the significant, private redevelopment of the Non-ATURA Blocks and adjacent areas.

"To be meaningful, any choice among alternatives must be based on an awareness of all reasonable options". *Dryden*, 78 N.Y.2d 331, 333 (1991). Here, ESDC asserted that the alternatives addressed in the EIS that would have excluded the Non-ATURA Blocks were inferior to the Project as planned because the "area would remain blighted and continue to permit low-density industrial uses" (R. 11847), but offered no evidence or other support for that conclusion, which was directly contradicted by the actual facts.

ESDC's conclusion was unreasonable and irrational. This Court should reverse ESDC's rejection of alternatives on that basis, and order it to made a reasonable consideration of the alternatives.

POINT V: ESDC IMPROPERLY DESIGNATED THE NON-ATURA BLOCKS AS PART OF A "LAND USE IMPROVEMENT PROJECT" UNDER THE UDCA

The New York Urban Development Corporation ACT ("UDCA")

permits ESDC to undertake only specific, enumerated types of projects. ESDC designated the Project at issue herein a "land use improvement project" under UDCA § 6253(6). The sole statutory purpose of a land use improvement project is the clearance and rehabilitation of a "substandard or insanitary area", defined as

> a slum, blighted, deteriorated or deteriorating areas, or an area which has a blighting influence on the surrounding area, whether residential, non-residential, commercial, industrial, vacant or land in highways, waterways, railway and subway tracks and yards, bridge and tunnel approaches and entrances or other similar facilities.

UDCA § 6253(6).[29]

In order to sponsor a "land use improvement project" for a particular area, ESDC must determine either that the area is substandard or insanitary "or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth of the municipality." McK. Uncons. Law of NY, §6260(c)(1) (emphasis supplied).

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29 Specifically, the UDCA defines "land use improvement project" as "a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation or a combination of these and other methods, of a substandard and insanitary area, and for recreational or other facilities incidental or appurtenant thereto, pursuant to and in accordance with article eighteen of the constitution and this act. The terms 'clearance, replanning, reconstruction and rehabilitation shall include renewal, redevelopment, conservation, restoration or improvement or any combination thereof as well as the testing and reporting of methods and techniques for the arrest, prevention and elimination of slums and blight." UDCA § 6253(6)(c)

Appellants agree that the MTA allowed the portion of the Project footprint which it owns, the Vanderbilt Yards, to deteriorate into a substandard, unsanitary, and blighted condition, and do not dispute the blight designation, made decades before the Project was conceived, of the portion of the Project area that falls within ATURA. However, no rational view of the evidence supports ESDC's determination, belatedly made, that the non-ATURA portion of the Project area – Tax Blocks 1127, 1128, and 1129, which lie south of Pacific Street[30] – was "substandard or insanitary" under the UDCA.

A. ESDC's Blight Study was a Post-Hoc Rationalization of a Pre-Planned Action

Critical to this Court's review is the fact of which came first in time . Prior to and at the time of the project's announcement late in 2003 there had been no determination that the area constituting the Project footprint was blighted and required redevelopment. Rather, what came first was FCRC's vision of a mega-development and its identification of properties it coveted; this was what led to the designation of three vibrant, standard and generally sanitary City blocks as blighted.

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[30] Blocks 1127 and 1129, lie entirely within the Project area, and Block 1128 lies partially within the Project area. The three contiguous blocks are bordered by Pacific Street, Vanderbilt Avenue, Dean Street, and Flatbush Avenue.

ESDC has admitted that at even as late as February 2005 , the time it entered into the Memorandum of Understanding ("MOU") with FCRC and the City, which established the parameters of the Project, it had not identified how the Project might be authorized under the UDCA.[31] After FCRC determined the boundaries of the Project site ESDC was tasked with shoehorning the non-ATURA blocks into the blight designation that had been made years earlier for the ATURA portion, whether or not the facts supported it.

ESDC's first mention that a purpose of the project was to address blighted conditions did not come until it issued the Draft Scoping Document on September 16, 2005 (R. 405a, 407a). That represented a post hoc rationalization, specifically coming 31 months after the project was unveiled and 19 months after the MOU was signed. While the court below applied a too-deferential standard to ESDC's non-legislative blight designation, even under the most deferential of standards the designation does not pass muster.

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31 The Petition herein alleges at ¶144 that the MOU made no reference to "blight" and did not indicate that the purpose of the Project was to alleviate blighted or substandard conditions. ESDC answered that allegation as follows: "Denied. The MOU stated that, if ESDC were to proceed with the Project, it would 'make the project findings and take such others (sic) actions and proceedings under the …UDC Act …as may be necessary or convenient to establish the Project as one or more 'projects ' under the UDC Act. " (R.1739a)

B. The Non-ATURA Blocks Cannot Rationally be Included in a Blight Designation.

The court below held that it was proper to include the non-ATURA portion of the Project site in the blight designation because "any unblighted portions of the Project within the non-ATURA blocks" were "part of the overall plan to improve the blighted area." (R. 49a-50a) In so ruling the court relied on a line of cases holding that an area may be blighted even though individual parcels within the blighted area were not substandard. [32]

Appellants, however, do not argue that the blight designation is improper because not all of the individual parcels within an otherwise blighted area are substandard. Appellants argue that conditions in the three thriving Non-ATURA Blocks south of Pacific Street are not the same as, and clearly distinct from, the adjacent, MTA-owned open-pit rail yard and

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32 *See Berman v. Parker*, 348 U.S. 26 (1954) (department store within blighted area may be condemned even though not substandard; community redevelopment is by area, not building by building); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (state legislation authorizing use of eminent domain to break up and transfer large tracts of land from the owners to their tenants, is constitutional); *Kaskel v. Impellitteri*, 306 N.Y. 73 (1953), *cert. denied*, 347 U.S. 934 (1954) (rejecting notion that every building within area must be substandard); *Spadanuta v. Incorporated Village of Rockville Centre*, 16 A.D.2d 966 (2nd Dep't 1962), *aff'd*, 12 N.Y.2d 895 (1963) (individual parcel within urban renewal area can be condemned even though not substandard); *G. & A. Books, Inc. v. Stern*, 770 F.2d 288 (2nd Cir. 1985) (renewal plan for Times Square area did not unconstitutionally restrain the speech of plaintiffs' pornographic bookstores; plaintiffs' premises, though not substandard themselves, lie within substandard area); *Rosenthal v. Rosenthal, Inc. v. NYS Urban Development Corp.*, 771 F. 2d 44 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986)/.

neighboring commercial buildings, and that it was therefore irrational to analyze the two areas as if they were a single, homogenous whole.

Significantly, the three blocks at issue have always been outside the boundaries of ATURA, which was designated a blighted area in 1968 and, though later enlarged to include adjacent areas, was never expanded south across Pacific Street to include these three blocks. ESDC's blight designation, made more than two and one half years after the Project was announced in order to justify its designation as a "land use improvement project" under the UDCA (R. 214), was the first time any City or State agency had determined that any of these blocks were blighted, even through 10 amendments to ATURA by the City over 40 years.

In fact, at the time the Project was announced, these three blocks were undergoing a residential real estate boom -- the best evidence that the area was not blighted when FCRC laid its sights on it. The crime statistics contained in the Blight Study further compel the conclusion that the non-ATURA portion of the Project site is a dramatically distinct area that cannot rationally be considered blighted.

i. The Residential Redevelopment Boom and Rising Property Values, Coupled with ESDC's Lack of Market Studies, Render ESDC's Blight Finding Presumptively Irrational.

As discussed in detail in Point IV(B) hereof, *supra*, before the Project was announced in late 2003, the area of Prospect Heights lying immediately south of the Vanderbilt Yards, including the Non-ATURA Blocks at issue here, was not deteriorating and had no blighting influence on the surrounding area whatsoever, and moreover was experiencing significant residential redevelopment. The court below, however, dismissed the evidence of market conditions with the unsupported and insupportable proposition that the fact of a residential real estate boom alone "is insufficient to outweigh the ample evidence of blight conditions documented in the Blight Study." (R. 51a) This was unduly dismissive of evidence that is actually the best and most objective evidence of blight: there is no better indicator of an area's attractiveness and potential than the market. The Court below ignored the absence of any market study in ESDC's blight study. ESDC did not undertake any market study whatsoever, either for the blocks and lots designated or the adjoining lots. Thus, ESDC had no countervailing evidence to discount Appellants' evidence that the blocks south of Pacific Street were blighted or adversely affected by Vanderbilt Yards. The "ample" evidence on which the Court below relied was the Blight Study's analysis of individual lots within the non-ATURA area. This

analysis, in addition to being belied by evidence of actual market conditions, was, as shown below, deeply flawed, challenged without answer by ESDC and entitled to no weight.[33]

ii. The Dramatically Lower Crime Rates in the Non-ATURA Portion Contradict its Designation as Blighted.

The Blight Study concluded that "per capita crime rates on the project site and in surrounding blocks are higher than for the broader precincts in which the project site is located". (R. 484) This was blatantly misleading, because it failed to point out that in the non-ATURA portion of the Project area, the reported overall crime rate was measurably lower than in surrounding areas, and substantially lower than in the blighted ATURA portion of the Project area.

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33 The Court also cited to the District Court opinion in *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 256-7, fn. 11 (EDNY 2007), *aff'd*, 516 F.3d 50 (2nd Cir, 2008), *cert. denied*, ___ U.S. ___, 2008 WL 891093 (2008) as something that "must be noted." (R. 51a) That case was a challenge to the use of eminent domain for this Project. Both the District Court and the Second Circuit found that the taking of plaintiffs' non-blighted properties is constitutional. They also found that plaintiffs conceded that the majority of the eminent domain "takings area" for the Project was blighted. The plaintiffs expressly did *not* concede this. The decisions do not make clear which part of the non-ATURA area was being discussed, or specifically what the Courts believed was conceded. But petitioner-appellants have maintained all along that the non-ATURA portion of the Project site is a separate and distinct area not suffering from blight. In any event, the *Goldstein* case is not instructive here because it involves a completely different issue: the parameters of the "public use" requirement of a taking by eminent domain under the Federal Constitution.

The Blight Study was able to paint its skewed picture by aggregating crime rates in the three police precinct sectors that include the Project area and comparing them with overall precinct averages. Thus, it was able to report higher crime rates for the Project area as a whole than for the larger precinct area in 2004 and 2005.[34] An honest look at the data reveals a different picture.

At R. 487 and 19228-19232 are tables and comments summarizing the crime rate data provided in the Blight Study, distinguishing clearly between the ATURA and non-ATURA portions of the Project site. A review of those tables shows that in 2004, the crime rate in the ATURA section was approximately twice as high as in the non-ATURA section; in 2004, the crime rate in the ATURA section was more than three times as high as in the larger precinct, while the crime rates in the two non-ATURA sections of the Project area were only slightly lower or slightly higher than in the larger precincts; in 2005, the crime rate in the ATURA section of the Project area

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[34] As explained in the Blight Study, New York City Police Department ("NYPD") precincts are divided into sectors, which are the smallest geographical areas for which the NYPD publishes crime data. The entire ATURA portion of the Project area is located within Sector E of Precinct 88 (Sector 88E), while in the non-ATURA portion, Block 1127 is within Sector D of Precinct 78 (Sector 78D), and Blocks 1128 and 1129 are located within Sector A of Precinct 77 (Sector 77A). (*See* Blight Study, R. 484 and Figures 8, 9, R. 485-486).

increased, while the crime rates in the non-ATURA sections of the Project area decreased; and in 2005, the crime rate in the ATURA section was still more than three times as high as in the larger precinct., while the crime rates in the non-ATURA sections of the Project area were from 12 to 34 percent lower than in the larger precincts.

These statistics amply illustrate the fallacy of lumping the ATURA and non-ATURA areas for purposes of evaluating purported indicators of blight, and substantially undermine the determination that the non-ATURA blocks are blighted. Given the prominence which the Blight Study placed on crime statistics, the skewing of data to meet a desired outcome and the failure to analyze the ATURA and non-ATURA areas separately causes one to question the methodologies and integrity of the Blight Study overall.[35]

[35] ESDC's consultant, AKRF, which prepared the FEIS for ESDC, acknowledged comments received stating that the FEIS misrepresented the crime data in the non-ATURA sectors, but asserted in response that "(t)he DEIS and FEIS accurately describe the blighted conditions on the project site." (R. 20280) In a Memorandum to the ESDC Board of Directors, then Chairman Gargano similarly dismissed Appellants' comments regarding the crime statistics for the southern blocks with the statement "While the other two sectors have lower crime rates, because block by block statistics are unavailable, there is no support for the assertion that there is no significant crime on Blocks 1127, 1128 (partial) and 1129." (R. 19926)

C. There is No Substantial Evidence that the non-ATURA Portion of Project Site was Blighted before the Project Was Announced and FCR Started Acquiring and Emptying Buildings.

In addition to improperly treating the two distinct areas is if they were a single homogeneous area, the court below improperly deferred to the Blight Study's unreliable analysis of individual parcels within the non-ATURA area to find that it was blighted. Specifically, the court relied on the Blight Study's conclusion that 30 of the 52 lots exhibit one or more blight characteristics, including "serious structural problems, unsanitary and unsafe conditions, underutilization, vacant lots and vacant buildings."[36] (R. 50a)

This conclusion cannot be supported by any objective view of the evidence. The finding that the non-ATURA portion of the Project site was blighted ignores the fact that when the Blight Study was conducted, two and one half years had passed since the Project was announced. In 2003, the area was in the midst of a wave of redevelopment of former warehouse and factory buildings for residential uses. Four of the largest buildings became substantial residential conversions in the previous five

[36] In fact, ESDC designated 33 of 52 lots on Blocks 1127, 1128 and 1129 as blighted.

years creating around 210 new apartments, many of them luxury condominiums. There was no reason to believe that would not continue. The project announcement stopped that wave cold.

By May 2006, when the Blight Study was conducted, FCRC, either directly or through other entities, had acquired the majority of the properties in the non-ATURA portion of the Project area. The Blight Study did not acknowledge the effect that the announcement of the Project and the developer's purchase and emptying of property had on the "physical condition (e.g. exterior and interior conditions) and use characteristics (e.g., occupancy status and site utilization)" in the non-ATURA blocks. (R. 221) The Blight Study failed to address the extent to which the developer's purchase and emptying of properties contributed to higher vacancies and the physical deterioration of the properties. And the Blight Study even claimed some properties vacant which were occupied.

The Blight Study did not include any market or other economic analysis assessing real estate and land use trends in the project area. The study included conclusory statements about the conditions in the area without supporting data, or even referencing any data.

These points, among many others, were presented to ESDC in

hundreds of pages of detailed written comments on the DEIS and Blight Study. The FEIS did not respond to the comments on the Blight Study. When DDDB commented on that omission before the ESDC approved the project, ESDC staff asserted that the Blight Study was not part of the EIS, and that the EIS adequately described the blighted conditions. (R. 20280)

The only indication that ESDC ever considered the blight comments is in a summary memorandum provided to the ESDC Board of Directors on the day the project was approved. (R. 19919) In less than three pages, it was stated that staff reviewed the comments and simply disagreed. (R. 19924-19926) There was no meaningful analysis of the comments, simply dismissive conclusions that the comments were wrong and the Blight Study was correct. The memo repeatedly claims that the Blight Study supports the conclusions. However, the Blight Study does not provide any qualitative analysis of the conditions on the southern blocks.

While the Blight Study provides a lot-by-lot description of the characteristics of each lot, the Study does not provide any evaluation or determination as to why a particular lot is deemed blighted. The Study does not even provide a list of the blighted lots. The only way of knowing which lots are blighted is to look at the Blight Map (R. 218) and then find the

individual lot descriptions.[37] Then it is simply a guess to determine why the lot was blighted since there is no specific listing as to if a lot is blighted and why. It appears that the it can be based on cracked plaster, some graffiti or broken sidewalks. There is no analysis upon which a reviewing court can determine if the determination is rational.

The substantive comments that were ignored are too numerous to recount here. DDDB alone submitted 191 pages of comments (R. 19133-19314), 79 of which contained a lot-by-lot critique of the Blight Study (R. 19144-19223). All were ignored.

One lot in particular is worth considering. Lot 85, Block 1128 is at the project boundary, bisecting the block. There is a two-story clapboard house that appears in very good condition and the Blight Study does not indicate any blighting conditions other than its size. (R. 396-397). ESDC ignored DDDB's comments pointing out that the home had been in the same family for half a century, was in fine condition and that the Blight Study was wrong. (R. 19198).

Section B of the Blight Study provides an overview of the area as the

[37] It is striking that Blight Study does not contain a map that provides individual lot numbers, despite the lot-by-lot description, thus making it difficult to determine where a particular lot is located on the Blight Map. Instead, reference must be made to maps in the FEIS. (R. 647)

basis for determining its boundaries. It uses photographs to demonstrate the supposed blighted conditions on the blocks. (R. 231-239). DDDB pointed out that the photos alleging showing Blocks 1127, 1128 and 1129 actually showed the blocks north of Pacific Street, 1119, 1120 and 1121. (R. 19118). ESDC ignored the comment.

An objective review of the descriptions of the properties, discounting supposed blighting conditions as underutilization, peeling paint and some cracked sidewalks, but looking at the properties holistically reveals that the southern blocks are not dominated by blighting influences. On Block 1127 of the 25 lots, instead of the 14 lots designated blighted by ESDC, only 4 should qualify (Lots 19, 20, 55 and 56, R. 331, 335, 379, 384).38 Two other lots are vacant, one of which is used for parking.

On Block 1128, ESDC claimed 5 of the 8 lots are blighted. However, only two are vacant, and the balance are used productively and include reasonably attractive moderate residential buildings. (R. 389-406).

Similarly on Block 1129, 14 of the 19 lots are marked blighted, but objectively only 4 could be and the five lots used for parking are kept neat and are utilized to benefit adjoining buildings. (R. 407-483).

38 The accuracy of the Blight Study is further questioned by the fact that Lot 55 was demolished because it was allegedly unsafe (R. 379), yet it is not designated blighted on the map. (R. 218).

Thus rather than having a situation where unblighted parcels are surrounded by blighted properties, the properties with objective blighting characteristics are in the minority and surrounded by sound buildings and land uses.

Despite the comments, the summation of ESDC's basis for confirming its blight determination is that it made its study is accurate because it says so. Just saying something is true does not make it so. *Parhat v. Gates*, ___F.3d___, 2008 WL 2576977 (D.C. Cir. Jun. 20, 2008).

Having failed to explain its determination or respond to comments, ESDC's determination is *per se* arbitrary and capricious.

D. ESDC Improperly Used Underutilization as a Basis for Blight Determinations

In the Blight Study, ESDC relied heavily on what it characterized as "underutilization" of properties, based on a comparison of the gross square footage of buildings on the property with the maximum building area permitted under current zoning (i.e., Floor Area Ratio, or FAR). (R. 246) While factors such as vacancy rates and underutilization may be among other factors considered in determining blight, we are aware of no reported New York case law in which a court has affirmed a blight determination based primarily on a claim that properties were not built to the maximum

permissible FAR. By ESDC's implication, any building that is 60% or less of the allowed density is by definition underutilized and thus a blighted structure or a blighting influence. That is absurd. This arbitrary classification, without reference to the actual use of the building and its overall utility, would if applied throughout the borough, render most of Brooklyn blighted. The New York City Zoning Resolution does not require that all lots be built out to their maximum density.

The court below disregarded a recent decision by the Supreme Court of New Jersey, *Gallenthin Realty Development, Inc. v Borough of Paulsboro,* 191 NJ 344 (2007) which found that underutilization alone was an insufficient basis for a blight determination. Justice Madden dismissed *Gallenthin* as being limited to New Jersey constitutional and statutory law. However, the New Jersey Supreme Court was applying what it recognized as nearly universal definitions of blight that had the common desire to remove slum-like and deteriorating conditions. The Court found that simply designating a property blighted because it was not being used to its full potential, absent other factors indicating blight, would render virtually any property susceptible to such a determination, because properties can almost always be put to a more profitable use. Rather than dismissing *Gallenthin*,

that case should be recognized as setting forth a comprehensive discussion of the intent and purpose of blight determinations and a warning of the risks associated with casual determinations that a property is underutilized.

Instead, the Court belowrelied upon *Jo & Wo Realty Corp.*, 157 A.D, 2d 205 (1st Dept. 1990) *aff'd* 76 N.Y.2d 962 (1990) and *G & A Books, Inc. v. New York State Urban Development Corp.*, 771 F.2d 44 (2nd Cir. 1985) *cert den* 475 U.S. 1018 (1986). Neither case states that underutilization can be the basis for a blight determination.

Jo & Wo Realty is exclusively concerned with the sale of the former New York Coliseum and whether the agency selling the property was permitted to dispose of it through a Request for Proposals or was required to accept the highest bid. The court specifically recognized that was the sole question and in considering that question traced the history of the redevelopment of Columbus Circle in the 1950's as an urban redevelopment project. The court found that in deciding to sell the Coliseum site, the agency was rationally relying upon the construction of the Javits Center which had rendered the Coliseum vacant, abandoned and underutilized. The action to sell the site was not a new determination that the area was blighted, but a continuation of the original determination and a subsequent realization

that the prior urban renewal project, the Coliseum, itself needed to be replaced.

G & A Books, concerned the redevelopment of Times Square and challenged the actions by UDC to condemn buildings containing adult uses as an infringement of First Amendment rights. The court did not rule on the legitimacy of the blight determination, which was not under review, but whether the determination infringed on access to adult entertainment. In reaching its determination the court noted the basis for the blight determination, including the deterioration of Times Square, the high crime levels and the derelict buildings – often where adverse uses on the first floor resulted in decay and vacancies on higher floors. The court also noted that the blight in the area had precluded the expansion of the mid-town office uses into the area and the pre-dominance of unproductive buildings not utilizing their full potential and the inability of market forces to improve those conditions.

The instant case is a marked distinction. Many of the lots in the southern blocks are being designated as blighted solely or primarily due to underutilization without reference to other conditions that may be indicative of blight. In making those determinations, ESDC did not evaluate the

overall condition or economics of the buildings for which underutilization was a determinative factor.

For example, a large part of Block 1127 is comprised of Lot 1 which is occupied by a gas station. The study notes the presence of graffiti, some façade damage and cracks in the pavement. Otherwise the determining factor appears to be that the property is not fully built out. (R.311) Comments by DDDB noted the importance of the gas station and that it is a clean, attractive business open 24/7 and that its loss would mean that there would be no service stations left in Prospect Heights. (R. 19168) ESDC ignored these comments and never considered the function and utility of the property as a prosperous gas station. It simply relied upon the fact that the there wasn't a large building, using the concept of underutilization without any consideration of the context.

A similar situation exists on Block 1127, Lot 18 which contains a three-story multi-family residence. (R. 329-330) Again, the determining blight factors are not articulated. Based upon the analysis there appear to be generally unstated building code violations, none of which apparently resulted in any administrative finding that the property was uninhabitable. While the property is vacant, it also is "underutilized" as it is only built to

53% of the permissible FAR. Again DDDB commented on the lack of specifics and the failure of the study to recognize that the vacancy was due to the chilling effect of the project's announcement on the ability to rent the units. (R. 19173) As demonstrated by the pictures in the study, the building cannot be considered a blighted or underutilized structure. (R. 330)

E. The Court Below Deferred to ESDC Too Much

Acknowledging that there is no case directly on point analyzing "blight" for purposes of designating a "land use improvement project" under the UDCA (Decision, page 34, fn. 22), the court below proceeded to apply a "liberal" interpretation of "blight," relying on cases involving eminent domain takings under the Fifth Amendment of the Constitution. *See, e.g.*, Y*onkers Community Development Agency v. Morris*, 37 N.Y.2d 478, *app. dismissed*, 423 U.S. 1010 (1975). While appellants do not argue a narrow interpretation of "blight" in the context of urban renewal plans like the one at issue in *Yonkers*, it was error to accord ESDC the same level of deference, and apply the concept of "blight" as broadly, as the eminent domain cases. In those cases, blight determinations were made by legislative bodies in the context of urban renewal plans. Here, the blight determination was made by a quasi-executive agency at the behest of a private developer and based

solely on a blight study paid for by that same developer as a post hoc justification 31 months after unveiling the project.

In *Kaskel v. Impellitteri*, 306 N.Y. 73, 78 (1953), the Court of Appeals, while affirming a blight finding under a deferential standard, noted:

> One can conceive of a hypothetical case where the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary, in which case, probably, the conditions for the exercise of the power would not be present. However, the situation here actually displayed is one of those cases as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts.

306 N.Y. at 80.

That hypothetical case has arrived. The physical conditions of the three wholly discrete blocks south of Pacific Street are such that it is irrational and baseless to call them "substandard or insanitary," or that they have a "blighting influence" on their surroundings.

While courts generally defer to an agency's rational decision-making process, the Court should not defer to an agency's blight determination that "was made 'corruptly or irrationally or baselessly'". *East Thirteenth Street Community Ass'n v. New York State Urban Dev. Corp.*, 189 A.D.2d 352,

359, 595 N.Y.S.2d 961, 965-66 (1st Dep't 1993), quoting *Kaskel v. Impellitteri*, 306 N.Y. at 78. ESDC's finding that the Non-ATURA Blocks are "blighted" lacks a sufficient rational basis, and should be annulled.

POINT VI: THE BARCLAYS CENTER ARENA IS NOT A "CIVIC PROJECT" UNDER THE UDCA

As noted above, the New York Urban Development Corporation ACT ("UDCA") permits ESDC to undertake only specific, enumerated types of projects. ESDC chose to designate the proposed Barclays Center Arena – intended to be the home of a professional basketball franchise – as a "civic project" under the UDCA. The Court below correctly found that the alleged civic benefits from the non-professional sports uses of the arena are "*de minimus* when compared with the primary use of the arena by the Nets", but erred in proceeding to find that an arena whose primary purpose is to provide a home for a national, professional basketball team is a "civic project" as defined and contemplated by the UDCA.

The UDCA defines a "civic project" as

> [a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes.

UDCA § 6253(6)(d). This definition comports with the legislative

declaration pertaining to "civic projects": a "serious need throughout the state for adequate educational, recreational, cultural and other community facilities, the lack of which threatens and adversely affects the health, safety, morals and welfare of the people of the state." UDCA § 6252 (emphasis supplied).

The Court below determined that the Barclays Center Arena qualifies as a "civic project" under the UDCA because it is a facility designed and intended for "recreational" purposes. The word "recreational" is, as the Court below found, one of ordinary import, and it was not error to turn to the dictionary for guidance in interpreting it. But in isolating the word, and ignoring the more important term "civic," the court's interpretation of the UDCA resulted in the "absurdity and contradiction" which the rules of statutory construction prohibit. *See Matter of Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 93 N.Y.2d 729, 737 (1999).

The definition of "recreational facility" does not, as the Court below indicated, turn on whether the recreation is active or passive, or whether the public is watching or playing. If the arena were intended for leasing to community groups, schools and other civic groups, for the purpose of exhibiting their sports competitions, appellants would have no argument.

And in fact the cases on which the Court below relied in finding that the Barclays Center is a “recreational facility” as contemplated by the UDCA actually support the argument that it is not. (R. 42a)

The issue presented in both *Diamond v. Springfield Metropolitan Exposition Auditorium Authority*, 44 F.3d 599 (7th Cir. 1995) and *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987) was the definition of “recreational facility” under the two states’ respective tort immunity acts. Both cases involved facilities owned and operated by public authorities; in both cases the facilities were clearly used for civic purposes.

In *Diamond*, the facility was

> a building which provides the people of Springfield and surrounding areas a place to hold public events. A great many of these events are recreational in nature. Even if some of these events are not strictly recreational, they are still examples of members of the community being offered available space to help facilitate their needs.

44 F.3d at 601. In *Frazier*,

> the testimony shows that among the activities conducted in Chrysler Hall were, 'Broadway shows, three school musical groups a year[,] ... [travelogue], Norfolk forum, many beauty contests, Nutcracker Suite which includes a lot of children, ... religious groups frequently, whether they are professional or church groups, [speeches, and] a broad cross section of events.’ A symphony orchestra performed regularly in the building.

234 Va. at 390.

The determination in both cases to grant the government tort immunity turned on the question of whether or not the activities in these public facilities were "recreational", and not on whether the public participated as spectators or players. The courts interpreted the term "recreational" broadly in this context, given the legislative intent to provide a broad grant of municipal tort immunity in the maintenance and operation of public recreational facilities.

Context is important in statutory construction, and may not be ignored simply because a statute uses words of "ordinary import."

> While statutes may appear literally 'unambiguous' on their face, the absence of ambiguity facially is never conclusive. Sound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope.

New York State Bankers Ass'n v. Albright, 38 N.Y.2d 430, 434 (1975).

The Court's focus on the distinction between watching versus playing in the context of "recreation" was misplaced. "Recreational" is not the only pertinent statutory term, and it must be interpreted within the broader context of "civic."

The term "civic" describes the project type and, in its definition, modifies and qualifies each listed example (facilities for "educational,

cultural, recreational, community, municipal, public service or other civic purposes") (emphasis supplied). Clearly, the term "civic" circumscribes any definition of "recreational." Thus, the question is not what constitutes recreation (basketball clearly does), but what are civic purposes as contemplated by the UDCA.

Merriam-Webster defines "civic" as "of or relating to a citizen, a city, citizenship, or community affairs", as in "civic duty" and "civic pride." It stretches credulity that the 1968 Legislature, when it authorized an urban development corporation to sponsor "civic" projects without prior legislative approval, had in mind a privately-owned and operated, for profit professional sports arena. Just as they surely also didn't have in mind privately owned bars, bowling alleys (where one can watch or participate) or OTB.

This is evident in the fact that the UDCA requires that a civic project be leased or owned by:

> the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose.

UDCA § 6259(1).

The Court below overrode this limitation and any notion of "civic purpose" by relying, again out of context, on a single phrase in the UDCA's 10-paragraph "Statement of legislative findings and purposes" (UDCA §6252), to the effect that ESDC should encourage "maximum participation by the private sector of the economy." But Section 6252 enumerates a host of purposes and possible projects for ESDC sponsorship, including industrial, manufacturing, commercial and housing projects. The sale or lease of ESDC's interest in such projects to a wholly private, for-profit entity "at the earliest time deemed feasible" (*id.*) would not violate the character of an industrial, manufacturing, commercial or housing project.

But the statute expressly limits who may own or lease a "civic project." Under no stretch of the imagination can FCRC or a professional basketball franchise be considered an "entity which is carrying out a community, municipal, public service or other civic purpose" – unless one engages in circular reasoning. What the Court below essentially held was that FCRC is an entity engaged in a "civic purpose" because the Barclays Center is a "civic project." Quite to the contrary, FCRC is a wholly owned subsidiary of a publicly-traded corporation, wholly and legally responsible not to "civic purposes" but to its shareholders.

Appellants have found no decision in which a New York court has ever determined that a professional sports arena is a civic project under the UDCA. In the few instances in which the courts have condoned state support of professional sports stadiums, there had been specific legislative authorization for the sports facility in issue. *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) (upholding tax exempt status of Erie county stadium based on enabling legislation); *Dubbs v. Board of Assessment Review of the County of Nassau*, 81 Misc.2d 591 (Sup. Ct. Nassau Co. 1975) (upholding tax exempt status of Nassau Coliseum based on enabling legislation).

The court in *Murphy v. Erie County,* on which case the Court below relied heavily, rejected the argument that an agreement to lease the County stadium to a private entity deprived the stadium of its public purpose. This was because the stadium's purposes as declared by the Legislature – the ability to view sporting events and cultural activities – were being met regardless of the identity of the party operating it. There was no dispute in that case that the Erie County Stadium served a public purpose, as found by the Legislature. There has been no legislative determination here that a basketball arena for the New Jersey Nets located at Flatbush and Atlantic

Avenues will serve a public purpose.

There is no question that the Legislature may determine that a commercial sports arena serves a civic or public purpose, and in fact, as the Court below discussed, the Legislature has made such determinations. The Erie County Stadium at issue in Murphy was authorized in 1968, the same year the Legislature enacted the UDCA. New York Sessions Laws of 1968, ch. 252. In 1993 the Legislature passed a law authorizing ESDC to extend loans for the development of HSBC Arena in Buffalo and for the construction of the Binghamton Municipal Stadium (now known as the NYSEG Stadium). New York Session Laws of 1993, chapter 258. In 2005 the Legislature passed a law authorizing the leasing of public parkland in connection with the construction of the new Yankee Stadium. NY Session Laws of 2005, ch. 238.

In each such instance specific legislative findings were made that the specific stadium or arena would benefit the public and that therefore the use of public resources was appropriate. That is as it should be: a commercial sports arena is a considerable undertaking that should be left to the Legislature, not shoehorned by non-legislative actors into a limited legislative grant of authority to sponsor "civic projects."

Indeed, the fact that the Legislature, in a single, limited instance, found it necessary to pass a discrete law in order to enable ESDC to undertake the funding and construction of sports stadiums in Buffalo and Binghampton (L. 1993, c. 258) shows the Legislature's intention to exclude commercial sports arenas from ESDC's general mandate under the UDCA. This is a perfect example of how similar and related actions of the Legislature can provide guidance as to legislative intent. *See Betz v. Horr*, 276 N.Y. 83, 88 (1937); *Di Marco v. Hudson Valley Blood Services*, 147 A.D.2d 156 (1st Dep't 1989);.

The purpose of the Session Law was to authorize ESDC to extend loans for the development of HSBC Arena in Buffalo, New York, as the home of a National Hockey League Team and commercial entertainment venue, and for the construction of the NYSEG Stadium in Binghamton, New York (then known as the Binghamton Municipal Stadium) to be the home of a minor league baseball team. Therefore, the law explicitly applied to "the development and modernization of professional major league sports facilities, professional minor league baseball stadia and other sports facilities of regional or national significance (hereinafter referred to as 'sports facilities') to retain and attract professional sports teams . . ." L. 1993, c.

258, § 1, and defined a "project" under that law as "a civic project of the corporation that entails the development or modernization of a sports facility." *Id.* at § 2.

Thus, the Legislature explicitly expanded the terms "project" and "civic project" to include "the development or modernization of a sports facility", for purposes of a limited program for loans to assist in the development of specific sports facilities with the explicit recognition that these facilities should be primarily privately funded, and with a limited "public-private" funding mix. This Session law did not amend the UDCA; it was a stand-alone authorization for ESDC to undertake the funding of specific sports facilities for professional teams. The Barclays Center is not part of this funding program.

Given that the Legislature found it necessary to pass a special law authorizing ESDC to fund the construction of professional sports facilities for professional teams, it is obvious that the Legislature understood that the UDCA did not authorize ESDC to undertake the program. Moreover, the Legislature also found it necessary to make new legislative findings that the public funding of facilities for professional sports teams was in the public interest.

Just as significantly, the Legislature did not choose to amend the UDCA to provide ESDC with broader powers to undertake facilities for professional sports teams. The UDCA still does not recognize a facility built for a professional sports team as a civic project, and still does not allow a civic project to be leased to, and effectively owned by, a private for-profit entity for purely commercial purposes. The Legislature knew how to authorize sports facilities for professional teams and did so in a limited manner

As Justice Cardozo long ago recognized,

> few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity….Adherence to the letter will not be suffered to 'defeat the general purpose and manifest policy intended to be promoted'.

Surace v. Danna, 248 N.Y. 18, 21 (1928) (citations omitted).While the Court below correctly ruled that effect must be given to the plain language of the statute, the court violated this principle by giving disproportionate emphasis to the term "recreational" and ignoring both the term and concept of "civic," resulting in an improper expansion of legislative intent.

CONCLUSION

For the foregoing reasons, Appellants submit that the Court below erred in determining that (i) PACB was not required to make its own environmental findings under SEQRA, (ii) ESDC was not required to address the known impacts relating to the risk of terrorism in the EIS, (iii) ESDC's use of incorrect build years was not fatal to its analyses in the FEIS, (iv) ESDC did not unreasonably disregard evidence that the Non-ATURA Blocks would have developed without the Project, iv) ESDC's designation of the Non-ATURA Blocks as part of a land use improvement project under the UDCA was proper, and (vi) ESDC's designation of the Barclays Center Arena as a civic project under the UDCA was proper. Therefore, Appellants respectfully request that this Court reverse the Supreme Court and grant the Petition.

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