SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of

DEVELOP DON'T DESTROY BROOKLYN, INC., et al.

Petitioners-Plaintiffs-Appellants,

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

-against-

URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, et al.

Respondents-Defendants-Respondents.

Index No. 104597/07
County of New York

AFFIRMATION IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

PETER KARANJIA, an attorney duly admitted to practice law before the courts of this State, hereby affirms under penalty of perjury as follows:

1. I am Special Counsel to the Solicitor General in the office of Andrew M. Cuomo, Attorney General of the State of New York, which represents respondent the New York State Public Authorities Control Board (the "PACB"). I make this affirmation in opposition to the appellants' motion for a preliminary injunction staying construction work at the Atlantic Yards Civic and Land Use Improvement Site (the "Project Site").[1] I make this affirmation based on my personal knowledge, documents created

[1] On January 18, 2008, this Court (Mazarelli, J., in Chambers) denied appellants' emergency motion for an interim stay of destruction of a bridge in connection with development at the Project Site.

and/or maintained by the Attorney General's office, and conversations with employees of the Attorney General's office.

2. Appellants' motion to stay construction work at the Project Site should be denied because appellants fall far short of satisfying the exacting standards for obtaining preliminary injunctive relief. As this Court has observed, "[p]reliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers . . . . The movant must establish: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position." Koultukis v. Phillips, 285 A.D.2d 433, 435 (1st Dep't 2001). See also Abinanti v. Pascale, 41 A.D.3d 395, 396 (2d Dep't 2007); Coinmach Corp. v. Fordham Hill Owners Corp., 3 A.D.3d 312, 314 (1st Dep't 2004).

3. While appellants cannot establish any of the requirements for the relief they seek, this affirmation will address solely appellants' inability to establish their likelihood of success on the merits insofar as they claim that the trial court erred in holding that the PACB was not required to make environmental findings under the New York State Environmental Quality Review Act ("SEQRA").[2] (See the

[2] The papers submitted by the Metropolitan Transit Authority ("MTA") and the Urban Development Corporation d/b/a Empire State

Affirmation of Jeffrey S. Baker, executed on January 18, 2008 ("Baker Aff.") at ¶¶ 21-26). Contrary to appellants' claims, the court below correctly concluded that, when the PACB approved the ESDC's financial participation in the Project in a December 2006 resolution, that resolution was not an "action" subject to SEQRA, and, accordingly, the PACB was not required to make any environmental findings under that statute. (See Decision, Order and Judgment of Madden, dated January 11, 2008 ("Judgment") at 14-17).

4. In the thirty-one years that the Public Authorities Control Board has been in existence, it has reviewed innumerable project financing applications from public authorities and approved billions of dollars of bond issuances. Yet never has it been held subject to SEQRA. The PACB has never acted as a "lead agency" or "involved agency" within the meaning of SEQRA, and has never prepared an environmental impact statement or held public hearings pursuant to SEQRA. Moreover, no court has ever held that the PACB was required to make environmental findings under the statute, and the sole case to address the question (other than the decision below) correctly concluded that the PACB was not subject to SEQRA. (See ¶ 17, infra; see also Exhibit A hereto at pp. 10-11). The same conclusion applies here.

Development Corporation ("ESDC") in opposition to appellants' motion to stay construction work address in detail appellants' inability to establish irreparable harm and a balancing of the equities in their favor.

Consistent with its purpose and statutory mandate, the PACB properly confined its review of ESDC's financial participation in the Project solely to the sufficiency of the commitment of funds, and so the PACB's resolution approving ESDC's financial participation was not subject to SEQRA.

THE PUBLIC AUTHORITIES CONTROL BOARD

5. The origins and purpose of the PACB are directed toward financial – rather than environmental – concerns. As the trial court noted, the Legislature created the PACB in 1976 in response to a credit crisis caused by dramatically increased debts incurred by certain public benefit corporations, "without effective or comprehensive monitoring by the State government." Judgment at 16 (citation and internal quotation marks omitted). After the Urban Development Corporation defaulted in 1975 on more than $100 million in bond anticipation notes, a commission appointed by the Governor of New York recommended the enactment of a "control mechanism" to bring greater scrutiny to the issuance of debt by public authorities. (Id.) This initiative led to the creation of the PACB in § 50 (and later § 51) of the Public Authorities Law.

6. Under Public Authorities Law § 51(1), the PACB is directed to control the debt and other financial commitments of public authorities by receiving "applications for approval of the financing and construction" of projects proposed by various

enumerated public authorities, including ESDC. Without the PACB's approval, such public authorities may not "make any commitment, enter into any agreement or incur any indebtedness for the purpose of acquiring, constructing, or financing" a project. Public Authorities Law § 51(1).

7. The PACB has three voting members and two non-voting members. Public Authorities Law § 50(2). Since the PACB's inception, its chair, who is chosen by the Governor, has always been the Director of the Budget - the gubernatorial appointee who runs the Division of the Budget. (See the Affidavit of Todd D. Scheuermann at ¶¶ 43-45 (annexed hereto, without its exhibits, as Exhibit B)). Before it can approve an application from a public authority, the PACB must first give the State Comptroller an opportunity to comment. Public Authorities Law § 51(2).

8. Further underscoring the PACB's overarching financial focus, the statute provides that the PACB may approve applications from public authorities "only upon its determination that . . . there are commitments of funds sufficient to finance the acquisition and construction" of a proposed project. Id. § 51(3).

THE PACB'S RESOLUTION OF DECEMBER 20, 2006

9. In September 2005, ESDC announced that because the Atlantic Yards Project might have a "significant effect" on the

environment, it would act as lead agency in preparing an environmental impact statement under SEQRA.

10. In June 2006, the New York State Legislature appropriated $100 million to ESDC to help pay for new infrastructure improvements relating to the Project. (Ex. B ¶ 55). The Legislature also authorized ESDC to issue $100 million of bonds for the same purpose. (Id.) Before ESDC could spend the appropriation, or issue the bonds, however, the legislature understood that ESDC first would have to ask the PACB to approve the proposed financing relating to ESDC's financial participation in the Project. (Id. ¶ 56).

11. Following its adoption in December 2006 of a modified plan for the Project and its issuance of a final environmental impact statement, ESDC submitted an application to the PACB seeking its approval to participate financially in the Project. (Id. ¶¶ 56-59).

12. At its December 20, 2006, meeting, after giving the State Comptroller an opportunity to comment, and after asking for additional financial data relating to ESDC's financial participation in the proposed Project, the PACB adopted a resolution approving ESDC's "participation in the Project . . . in accordance with section 51 of the Public Authorities Law" (the "Resolution"). (Id. ¶¶ 60-69). Because neither the PACB's limited review of ESDC's proposed financial participation in the Project, nor the adoption of its Resolution, was subject to

SEQRA, the PACB did not make a statement of written findings pursuant to SEQRA. (Id. ¶¶ 53-54).

APPELLANTS ARE NOT LIKELY TO PREVAIL ON THEIR ARGUMENT THAT THE PACB WAS SUBJECT TO SEQRA

13. Appellants fall far short of establishing that they will likely prevail on their argument that the trial court erred in concluding that the PACB's Resolution was not an "action" within the meaning of SEQRA and that the PACB was accordingly not required to make environmental findings and issue an environmental impact statement pursuant to that statute.

14. Under the Public Authorities Law, in deciding whether to approve ESDC's application to financially participate in the Project, the PACB had a circumscribed statutory duty to determine if "there [were] commitments of funds sufficient to finance the acquisition and construction" of the Project. Public Authorities Law § 51(3). In determining the "sufficiency of commitments of funds," the statute directs the PACB to consider "commitments of funds, projections of fees or other revenues and security," which may include "collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken." Id. Accordingly, the PACB properly based its decision to adopt its Resolution solely on its review of ESDC's financial participation in the Project under the criteria established by the Public Authorities Law.

15. SEQRA does not suggest otherwise. That statute applies to "any action . . . which may have a significant effect on the environment." E.C.L. §§ 8-0109(2). But, as the court below noted, the statute expressly exempts from its application "official acts of a ministerial nature, involving no exercise of discretion." E.C.L. § 8-0105(5)(ii); see also 6 N.Y.C.R.R. § 617.5(c)(19); Judgment at 15. As the court acknowledged, "'[i]n determining whether an agency decision falls within SEQRA's purview, . . . the courts cannot rely on a mechanical distinction between ministerial and discretionary acts alone.'" Judgment at 15 (quoting Vill. of Atlantic Beach v. Gavalas, 81 N.Y.2d 322, 326 (1993)). Rather, the "pivotal inquiry" in this case is: could the information contained in an environmental impact statement have any bearing on the PACB's narrow decision, based solely on financial concerns, to approve ESDC's financial participation in the Project? See Gavalas, 81 N.Y.2d at 326.

16. The court below correctly answered that question in the negative. In its comprehensive review of the Public Authorities Law (which appellants do not even address in their motion for preliminary injunctive relief, see Baker Aff. ¶¶ 21-26), the court correctly observed that "[w]hile the PACB undoubtedly has certain discretion," that discretion is confined to reviewing financial aspects of proposed debt-incurring projects, which bear "no relationship to the environmental concerns that may be raised

in an [environmental impact study]." Judgment at 17 (emphasis added).

17. This conclusion is, moreover, consistent with the only other decision we have located that addresses the question of whether the PACB is required to make findings under SEQRA. In N.Y. Public Interest Research Group, Inc. v. N.Y. State Public Authority Control Board, Index No. 6944-97 (Sup. Ct. Albany County Sept. 10, 1998) (Ceresia, J.S.C.), petitioners brought an Article 78 proceeding to annul the PACB's approval of a major acquisition by the Long Island Power Authority. Like appellants here, the petitioners alleged that the PACB had failed to consider the acquisition's environmental impact and had thereby violated SEQRA. The court rejected that argument, holding that the PACB's discretion was "limited to consideration of financial aspects of the project and did not authorize review of environmental factors," or authorize the PACB to "conduct a SEQRA review." (See Ex. A at 10-11).

18. Appellants' criticisms of the trial court's similar conclusion in this case (Baker Aff. ¶¶ 22-26) are without merit, and stand no reasonable prospects of success on appeal. For example, appellants assert that the court "ignored the inherent discretion vested in the PACB that requires the unanimous consent of the three voting members of the Board" (Id. ¶ 23). But the court in fact took into account the fact that the PACB has "certain discretion," limited to financial considerations.

(Judgment at 17). In any event, that the PACB has "inherent discretion" does not suggest that such discretion encompasses a review of environmental (as opposed to financial) considerations.

19. Appellants' argument that the Legislature "could have" expressly exempted the PACB from SEQRA (Baker Aff. ¶ 26) fares no better, because it incorrectly assumes that the PACB is subject to SEQRA in the first place. Nor do the broad and precatory statements in the Environmental Conservation Law suggest a contrary conclusion (id. ¶ 24). See E.C.L. § 8-0103(8) ("It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources").

CONCLUSION

20. In sum, because the PACB undertook a circumscribed review only of ESDC's financial participation in the Atlantic Yards Project, its Resolution was not an "action" for purposes of SEQRA, and the trial court correctly held that the PACB was therefore not required to make any SEQRA findings or issue any environmental impact statement under SEQRA. (Judgment at 17).[3]

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[3] The trial court's conclusion was also correct on other grounds including, inter alia, that the State Finance Law § 68-b(11) exempts from SEQRA review the PACB's resolution authorizing the sale and issuance of Personal Income Tax Revenue Bonds. (See Memorandum of Law of New York State Public Authorities Control Board in Opposition to the Petition, at 12-18, filed in the proceedings below).

Unable to establish any likelihood of this Court's reversal of that holding on appeal, appellants fail to establish one of the essential elements to obtain the "drastic" relief they now seek. Koultukis, 285 A.D.2d at 435; Abinanti, 41 A.D.3d at 396; Coinmach Corp., 3 A.D.3d at 314.

WHEREFORE, appellants' motion for preliminary injunctive relief staying construction work at the Project should be denied.

Dated: New York, New York
January 25, 2008

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.; CITIZENS ADVISORY PANEL; ANNE F. MEAD, as Chairperson of CITIZENS ADVISORY PANEL; BARRY PINTO and JAMES CORRIGAN,

Petitioners,

-against-

NEW YORK STATE PUBLIC AUTHORITIES CONTROL BOARD; PATRICIA WOODWORTH in her capacity as chairman of the New York Public Authorities Control Board; LONG ISLAND POWER AUTHORITY; RICHARD M. KESSEL in his capacity as chairman of the Long Island Power Authority; LONG ISLAND LIGHTING COMPANY; and the BROOKLYN UNION GAS COMPANY,

Respondents,

For a judgment pursuant to CPLR Article 78.

All Purpose Term - County of Albany
Hon. George B. Ceresia, Jr., Supreme Court Justice, Presiding
RJI #: 0197-ST8292 Index #: 6944-97

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Petitioners have instituted this CPLR Article 78 proceeding seeking to annul a July 16, 1997 decision of the Respondent New York State Public Authorities Control Board ("PACB") approving Resolution 97-LI-1, which essentially approved with conditions[1], a series of agreements and transactions by which respondent Long Island Power Authority ("LIPA") is to substantially acquire respondent Long Island Lighting Company ("LILCO") as legislatively

[1]See, Suffolk County v. LIPA, et al. Supreme Court, Nassau County (Index No. 34878/97) (3/24/98) dismissing a challenge to LIPA's August 21, 1997 determination ratifying the Agreements with LILCO and accepting the conditions imposed by the PACB's July 16, 1997 Resolution challenged herein. The Court held LIPA's acceptance of the PACB-imposed conditions was exempt from SEQRA under PAL 1020-S(2).

intended by title 1-A of the Public Authorities Law ("PAL") (see, PAL §1020 et seq.) The sole cause of action asserted is that PACB failed to comply with the State Environmental Quality Review Act ("SEQRA") by failing to consider the environmental impact of the agreements approved in the underlying Resolution. Petitioners contend that the Resolution was thus arbitrary, capricious and improper and must be annulled, and PACB must be directed to comply with SEQRA. All respondents have filed pre-answer motions to dismiss, claiming (1) that LIPA's acquisition of LILCO and the PACB's Resolution approving LIPA's acquisition of LILCO are exempt from SEQRA under PAL 1020-s(2) (the "LIPA exemption"); and (2) PACB's finance-based approval is also exempt from SEQRA as a ministerial act not involving environmental factors (see, PAL §§ 1020-f[aa]; 51 [1][K]; 1020-b[12-a]). Petitioners reply that (1) the LILCO-BUG merger was part of, and approved in, the PACB's Resolution and was subject to SEQRA; and (2) the SEQRA-LIPA exemption (PAL §1020-s[2]) applies narrowly to those portions of the agreements involving LIPA's acquisition of LILCO's stock or assets but all other portions of the agreements are subject to SEQRA review. For the foregoing reasons, respondents' motions to dismiss the verified petition in its entirety for failure to state a cause of action is granted, in all respects.

Background

The PACB was created in 1976 to exercise statewide approval power over the "financing and construction" of proposed debt-incurring projects by enumerated public benefit corporations (PAL §§ 50, 51; see, "Historical and Statutory Notes" to PAL §50 in McKinneys Cons. Laws of N.Y., Book 42, at p. 6). In 1986, the Legislature created LIPA as a not-for-profit corporate municipal

entity and political subdivision of the State with essential government powers (PAL §1020-c; see, §§1020-f; 1020-g; 1020-h). The 1986 LIPA Act declared that excessive electricity rates in the service area of LILCO[1], an investor-owned utility, posed a threat to health, safety and economy of residents and businesses in that area, and LILCO's investment in the Shoreham Nuclear Power Plant had been imprudent and financially strained LILCO (PAL §1020-a). Based on the foregoing findings, the Legislature determined that the situation could best be dealt with by replacing LILCO with a publicly owned power authority. It created LIPA, authorizing it to acquire LILCO's securities or assets through negotiated agreement, tender offer or eminent domain provided LIPA determines that such acquisition would not adversely affect utility rates (PAL 1020-a; 1020-h). LIPA was specifically directed and authorized to negotiate with LILCO to effect this stock and/or asset acquisition "upon such terms as [LIPA], in its sole discretion, determines will result in [favorable] rates" (PAL §1020-h[1][b] [emphasis added]). LIPA was given very broad powers to effect this acquisition and the purposes of title 1-A of the PAL (see, PAL §§ 1020-f; 1020-g; 1020-h through 1020-k). Significantly, the Legislature unequivocally provided that "[SEQRA] shall not be applicable in any respect to such acquisition [by LIPA of the assets or securities of LILCO] or any action [of LIPA] to effect such acquisition" (PAL §1020-s[2] [the "LIPA exemption"]).

In 1991, the Court of Appeals upheld a 1989 Settlement Agreement by which LIPA acquired and decommissioned the Shoreham Nuclear Power Plant (a LILCO asset) but did not acquire all of LILCO's assets and securities, and held that this Agreement was not

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[1]The LILCO service area includes Nassau and Suffolk Counties, and parts of Queens County.

subject to SEQRA review (Matter of Citizens for an Orderly Energy Policy v. Cuomo et al., 78 NY2d 398, affg. 159 AD2d 141 [3d Dept 1990], affg. 144 Misc2d 281).

In 1995, the Legislature amended the PAL to require certain LIPA projects to obtain PACB financing and construction approval (PAL §51[1][k]; 1020-f[aa]) if they had certain financial impacts (PAL §1020-b[12-a]). The Legislature set forth specific criteria for PACB's consideration and review of LIPA's projects which related to utility rates, real property taxes and financial feasibility but not to environmental factors (PAL §1020-f [aa] [1-4] [L.1995, ch.506]). The LIPA exemption from SEQRA was not disturbed (PAL §1020-s [2]).

As it was legislatively directed and authorized to do, LIPA negotiated with LILCO and others to effect the contemplated acquisition (PAL §1020-h [1][b]) and entered into a series of highly complex, structured and interrelated commercial transactions and agreements (PAL § 1020-f [h]). All parties to this special proceeding agree that these Agreements effectively accomplish LIPA's acquisition of most of LILCO, although petitioners contend that these agreements "go far beyond mere 'acquisition' by LIPA of the 'securities or assets of LILCO'", and to that extent are subject to SEQRA (cf. PAL § 1020-s[2].

The acquisition arrangement was structured as follows. First, LILCO and BUG agreed to merge and form a new holding company -- NEWCO-- to manage their combined businesses. Then LIPA, LILCO, NEWCO and affiliated parties entered into what PACB labeled the "Acquisition Agreement" (i.e. the Agreement and Plan of Merger) and entered or proposed several additional "related agreements" necessary to implement the acquisition of LILCO by LIPA.

The Resolution

On July 6, 1997, the PACB adopted the Resolution at issue approving LIPA's project, i.e. the Acquisition Agreement and related agreements (see, PAL §51[1][k]; 1020-f [aa]; 1020-b [12-1][iii] [provision triggering PACB review of this LIPA project]). The LIPA project approved by the PACB Resolution was described as the "execution and delivery of all such agreements as may be required for the proposed acquisition of [LILCO] in accordance with the terms of this resolution". The Resolution approved LIPA's entry into the "related agreements" to effect the Acquisition Agreement, including but not limited to the proposed (1) Management Services Agreement - under which NEWCO will manage the transmission and distribution system under LIPA policies; (2) the Energy Management Agreement - under which NEWCO will provide fuel and power supply services; (3) Power Supply Agreement - pursuant to which LIPA will purchase electrical capacity and energy from NEWCO; (4) Generation Purchase Right Agreement - giving LIPA the future option to purchase all generating assets from NEWCO, subject to certain approvals and conditions and (5) Hedge Partnership Agreement - enabling LIPA to enter transactions to mitigate the risks of interest rate increases. PACB's Resolution approved "all other agreements contemplated" by the related agreements.

Contrary to petitioners contention, while the PACB certainly considered the separate and distinct LILCO-BUG merger deal in approving the LIPA acquisition deal, that LILCO-BUG merger between private companies was not submitted to PACB for approval, and no such PACB approval was required under the PAL (see, PAL §51 [Powers and duties of PACB]. An Environmental Impact Statement (EIS) related to that LILCO-BUG merger has been filed with the Public Service Commission, a case which was pending when petitioners

instituted this proceeding (see, PSC Case 97-M-1567). The PACB Resolution at issue herein did not and could not "approve" of that merger.

The SEQRA Challenge

As noted, petitioners contend that the PACB's approval of the agreements underlying the Resolution must be annulled because PACB failed to conduct an environmental review or initial determination of significance before adopting its Resolution. As an initial matter, to the extent that petitioners' submissions suggest that SEQRA applies to LIPA's entry into the Acquisition Agreement and related agreements, that contention is flatly refuted by the plain language of the LIPA exemption from SEQRA (§1020-s[2]). The PAL clearly provides that SEQRA "shall not be applicable in any respect" to LIPA's acquisition of the securities or assets of LILCO, and that SEQRA is inapplicable to "any action" of LIPA "to effect such acquisition" (PAL §1020-s[2] [emphasis added]). The agreements LIPA entered or proposed in fact effected the contemplated acquisition of LILCO and thus the SEQRA exemption applies.

Petitioners contend that the approved agreements involve more than LIPA's mere acquisition of LILCO and to that extent are subject to SEQRA. However, the highly complex, interrelated agreements negotiated by the parties to effect LIPA's acquisition are inseparable. LIPA exercised its statutory duty to use its discretion to negotiate acquisition terms with LILCO which will be favorable to rate payers (PAL 1020-n [1][b]). This court cannot and should not parse up these highly complex commercial transactions to separate "acquisition" terms from other interrelated elements of this overall project. LIPA negotiated

terms to effect the acquisition of LILCO. Agreements entered by LIPA to that end are not subject to SEQRA "in any respect", (PAL 1020-s [2]). "Any action" of LIPA "to effect such acquisition" is exempt from SEQRA (§1020-s[2]), and the fact that the understandably complex series of transactions to accomplish the acquisition are not strictly limited to asset or stock acquisition does not subject them to SEQRA, because it is still integral action "to effect" the acquisition. Indeed, the negotiated Acquisition Agreement was specifically conditioned on the "related agreements" being consummated, and together they effected LIPA's exempt acquisition (see, Acquisition Agreement, §4.4(a) and §8.1 (c)). Petitioners' characterization of the related agreements as "collateral" is unavailing. LIPA clearly determined these agreements were an integral part of the complex and highly structured overall transaction required and negotiated to affect the acquisition.

Further, LIPA was not required, as petitioners suggest, to purchase all of LILCO's assets and securities and was not precluded from allowing LILCO to continue to participate directly or through a subsidiary in supplying electric power in the LILCO area. Rather, the extent, timing and terms of the acquisition were entrusted to LIPA's sole discretion so long as the resulting acquisition did not have an unfavorable effect on utility rates (PAL 1020-h [1][b]. (see, Matter of Citizens v. Cuomo, supra, 78 NY2d at 413-414). Thus, all the LIPA-negotiated agreements approved by the Resolution effected the acquisition and thus were SEQRA-exempt. "Nothing in this respect could be plainer" (Matter of Citizens v. Cuomo, 78 NY2d supra at 415).

The next issue is whether PACB's approval, by Resolution, of the underlying agreements is subject to SEQRA review. The

Resolution approved LIPA's entry into agreements deemed necessary to acquire LILCO's assets and securities. The LIPA exemption provides that SEQRA shall not apply "in any respect" to LIPA's acquisition of LILCO, or to "any action" by LIPA "to effect such acquisition" (PAL 1020-s[2]). Thus, in order to give effect to this exemption, SEQRA cannot apply to PACB's Resolution approval of LIPA agreements whereby LIPA will acquire LILCO. Applying SEQRA to the PACB's approval would completely undermine the plaining meaning and legislative intent not to subject this legislatively authorized acquisition to SEQRA review. Just as the PSC's approval of LIPA's acquisition of LILCO's Shoreham facility was exempt from SEQRA review, so too was PACB's approval of LIPA's acquisition of assets and securities as agreed to. Both the agreements for the acquisitions of LILCO assets and securities and "all approvals[3] thereof by various agencies were statutorily exempt [from SEQRA]" (Matter of Citizens v. Cuomo, supra, 159 AD2d 141, 159 [3d Dept 1990][emphasis added], affd. 79 NY2d 398, 415, rearg denied 79 NY2d 851, 79 NY2d 852). Thus, the LIPA exemption from SEQRA applies to agency approvals of LIPA's actions and agreements to acquire LILCO (id.), i.e. to PACB's Resolution herein.

The Citizens' interpretation of the LIPA exemption from SEQRA was bolstered by the Legislature's 1995 amendments to the PAL which (for the first time) subjected certain LIPA projects to PACB approval (PAL §51 [1][k]; 1020-b[12-a]; 1020-ff [aa]) but did not alter or narrow the LIPA exemption; or indicate that SEQRA applies to PACB approvals of LIPA projects (§1020-s[2]); or include environmental factors in the very specific list of criteria PACB

[3]The 1989 agreement in Citizens between the Governor and LILCO provided for Shoreham to be transferred to LIPA and closed. The agreement was approved by the PSC. PACB approval of LIPA projects was not required until the 1995 Amendments to the PAL.

was authorized to consider in reviewing a proposed LIPA project (PAL §1020-f[aa][1-4]) (see, Knight-Rider Broadcasting v. Greenberg, 70 NY2d 151, 157). Construing the LIPA-SEQRA exemption as applicable to PACB's approval of LIPA's acquisition is consistent with Citizens, the broad statutory language and clear legislative intent, and is in accord with the Legislative directive that the LIPA Act shall be "liberally construed" to give effect to the purposes of the Act (PAL §1020-ff) (see, Matter of Citizens v. Cuomo, supra, 78 NY2d at 412 [Courts should not construe PAL in a "strained and inflexible fashion, producing absurd results."]). Subjecting PACB's approval of LIPA's acquisition to SEQRA - while LIPA's acquisition itself is exempt - would thwart the explicit Legislative intent to exempt this contemplated acquisition from SEQRA, and would be inconsistent with SEQRA's provision for environmental review "[a]s early as possible in the formulation of a proposal" (ECL 8-0109[4]; 6 NYCRR 617.1[b]). The provision of the LIPA Act carving out a broad SEQRA exemption to streamline LIPA's acquisition of LILCO takes precedence over other laws requiring such SEQRA review (see, PAL §1020-gg).

Furthermore, while PACB had discretion whether to pass the Resolution approving the underlying agreements, that discretion was limited to consideration of financial aspects of the project and did not authorize review of environmental factors (see, PAL §§ 51 [1][k][PACB reviews "financing and construction" of proposed projects]; 1020-f[aa][lists factors for PACB's consideration]). PACB may only approve proposed projects based upon a determination that there are sufficient funds to finance the project's acquisition and construction (PAL §51 [3]). The PAL simply does not empower the PACB to consider environmental effects of proposed projects. Thus, while PACB has certain discretion related to

review of a project's financial matters, "that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS", and thus PACB approval is not an "action" subject to SEQRA's EIS requirement but instead is considered "ministerial" for purposes of SEQRA (Incorporated Village of Atlantic Beach v. Gavalas, 81 NY2d 322; ECL 8-0105[5][ii]; 6 NYCRR 617.5[c][19]). Indeed, preparation of an EIS and information contained therein would in no way aid the PACB in its limited review of the financial feasibility and impact of a proposed project or provide the basis for its decision to approve or disapprove a proposed project (PAL §1020-f[aa]; Gavalas, supra, 81 NY2d at 326-327; see also, Matter of 67 Vestry Tenants Assn. V. Raab, 172 Misc2d 214, 658 NYS2d 804, 810-811 [Supreme Court, NY County 1997]). The PACB was created by the Legislature to oversee and approve financial aspects of proposed debt-incurring projects of public benefit corporations (PAL §51; §50 [Historical and Statutory Notes: Powers Functions and Duties of PACB, supra; PAL 1020-f[aa]), and is not authorized to consider environmental issues in its review, or to conduct a SEQRA review.

Accordingly, respondents' motions to dismiss the Verified Petition are, in all respects, granted and the Verified Petition is dismissed.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorney for respondent New York State Public Authorities Control Board who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: September 10, 1998
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

In the Matter of	
DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,	Index No. 104597/07 IAS Part 11 Justice Joan A.Madden
Petitioners-Plaintiffs,	
- against -	**AFFIDAVIT OF TODD L. SCHEUERMANN IN OPPOSITION TO PETITION**
URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, et al.,	
Respondents-Defendants.	

State of New York)
)ss.:
County of Albany)

1. I am an Assistant Chief Budget Examiner in the New York State Division of the Budget. As part of my duties as an employee of the Division of the Budget, I also serve as the designated representative of Paul E. Francis, who is the Director of the Budget and Senior Adviser to the Governor, and is also a member and Chairman of the New York State Public Authorities Control Board ("PACB"). I have done so since being designated by the predecessor to Mr. Francis in August 2006. I respectfully submit this affidavit in support of the PACB's answer and objections in point of law and in opposition to the petition-complaint.

2. This affidavit and the exhibits annexed to it—which to the best of my knowledge include all documents and data that the PACB relied on in making its determination—constitute

the "transcript of the record of the proceedings" for the PACB's adoption of its December 20, 2006, resolution for purposes of CPLR § 7804(e).

New York State's 1970s Credit Crisis

3. The PACB was established in 1976 as a temporary response to the credit crisis precipitated by the Urban Development Corporation's default the year before on $105 million in bond anticipation notes, a form of so-called moral obligation debt.

4. Governor Hugh Carey responded to the credit crisis, and the need to make public authorities more accountable, by appointing a commission under New York's Moreland Act to examine the process of the creation and management of all the State's public debt, in particular the origin and growth of moral obligation financing. *See* New York State Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies, *Restoring Credit and Confidence: A Reform Program for New York State and its Public Authorities* (March 31, 1976) (the "Comm'n Report"). (A copy of relevant portions of this report—the Summary and Recommendations and Commentary—is annexed as Exhibit A.) The PACB grew directly out of the Moreland Act Commission's findings and recommendations.

5. Moral obligation financing involved bonds issued not by the State, but by public authorities, including the UDC. They were backed by the public authority's pledge to create, out of funds raised by the bonds, a reserve fund equal to one year's debt service on the bonds. Should a public authority, because of insufficient revenues, be required to draw on the reserve fund to meet debt service, the Governor was required to so certify to the Legislature, which was then obligated to *consider* whether to appropriate the amount needed to make up the deficiency in the reserve. Neither the Legislature nor the State, however, had any legal obligation to do so. What the

bondholders counted on was that the State was likely to appropriate the money because failure to do so would cripple the State's credit. The UDC's 1975 $105 million default was the first time that the State had to confront its moral obligation even though billions of dollars of such bonds had been issued. Comm'n Report, at 1-6.

6. The Moreland Act Commission found that since 1960, when the Housing Finance Agency first introduced moral obligation bonds, *id.* at 3, the State had made no effective attempt to control the volume of moral obligation bonds issued by the State's public authorities. *Id.* at 4. The UDC—a public authority established in 1968, and charged with promoting a vigorous and growing economy through a multi-purpose approach combining industrial development and sponsorship of housing in urban renewal areas—relied heavily on moral obligation bonds to help finance its construction projects. The Moreland Act Commission found that financing for the UDC's projects, which specifically involved issuing UDC general obligation bonds backed by the full faith and credit of the State (rather than revenue bonds), was "inherently more risky" than the housing projects, hospitals, universities, and mental institutions financed by the Housing Finance Agency. *Id.*

7. In addition to the inherent risks of the types of projects UDC undertook, the Moreland Act Commission noted that the UDC had rapidly accumulated construction commitments that "had got it too far ahead of its ability to go to market with its bonds to finance such commitments." *Id.* at 10.

8. By 1976, the State's public authorities had issued billions of dollars in moral obligation bonds, which gravely exposed the State's credit. "The independence enjoyed by authorities," the Moreland Act Commission found, "while necessary to successful implementation

of the State's social and economic programs, allowed authority debt and project commitments to increase dramatically to the point that the credit of the State is now threatened." *Id.* at 31.

9. The Moreland Commission also found that "neither the Executive nor the Legislative Branches of the government made any preparation against the day when a part of the State's moral obligation behind the billions of dollars of construction projects might have to be met." *Id.* at 4. Instead, the Moreland Act Commission observed, it had been assumed that the projects for which the moral obligation bonds were issued would always be able to pay their own way, including all debt service on the bonds. *Id.* Albany, the Moreland Act Commission noted, "looked to the bond market, rather than to the underlying projects, to determine the financial condition of the issuing public authorities." *Id.* at 10.

10. Yet despite New York State's credit crisis, which it blamed primarily on the uncontrolled issuance of moral obligation bonds, the Moreland Act Commission concluded that New York had no choice but to continue to rely on public authorities to finance, construct, and operate public improvements. *Id.* at 19-20. Public authorities, the Moreland Act Commission found, offered the State significant advantages: they could finance capital construction programs without resorting to additional taxes or statewide referenda; they could supersede local jurisdictional boundaries and restrictions; and, they had "independent management" that freed them from "established, monolithic bureaucracy." *Id.* at 19.

11. But the Moreland Act Commission also found that the "rapid proliferation of public authorities and of authority debt" was not "adequate[ly] monitor[ed]" by the State. *Id.* at 19-20. The Moreland Act Commission further found that the Executive, Legislature, and the State Comptroller all had failed to "take account of the potential impact of authority debt on State debt

and credit." *Id.* And there was a lack of "overall state financial planning and debt management." *Id.*

12. "Public authorities in New York ," the Moreland Act Commission concluded, "have been allowed to create debt obligations without adequate coordination, supervision or control by the Executive and Legislative branches of government." *Id.* at 9.

13. Accordingly, the Moreland Act Commission called on the State to devise a means "for controlling the volume and pace of authority borrowing and commitments, coordinating authority debt with that of the State and allocating priorities among programs without destroying the initiative of public authorities." *Id.* at 20. It recommended that the Legislature create a Public Authorities Control Commission (PACC), within the Executive Chamber, to review "certain selected debt issues or projects which are particularly significant in terms of their size, degree of risk, or potential impact on the State's or the authority's financial condition." *Id.* at 20-21.

14. As envisioned by the Moreland Act Commission, the PACC would afford added protection to the State's financial and credit status by exercising certain specific powers. One was the general power to disapprove or modify the amount and form of an authority obligation, including its terms, conditions, rates of interest, amount, or form. *Id.* at 22-23. Specifically, the Moreland Act Commission recommended giving the PACC the power to require public authorities to make yearly allocations out of project reserves in an amount sufficient to satisfy that year's debt service requirements. *Id.* at 23. In addition, the Moreland Act Commission recommended that the PACC should not approve any bond issue if the issuing public authority was permitted to apply bond proceeds to uses not directly related to the construction of the public authority's projects. (The UDC had done just that in the past). *Id.*

15. The Moreland Act Commission also recommended that the PACC be able to review and disapprove or modify any covenants or other agreements with bondholders of obligations in connection with the issuance of any bond by a New York public authority. *Id.* at 23-26. Such covenants, it noted, might impair the authority's future flexibility, or interfere with the State's ability to pursue of its public policy in the future. *Id.* at 25. It was understood that interest rates payable on bonds would increase in direct proportion to the amount of flexibility achieved. *Id.* The PACC was to "strike a delicate balance between the maximum possible flexibility and the lowest possible interest rate." *Id.*

16. A third concern of the Moreland Act Commission was the competition among authorities, municipalities, and the State for financing through the private credit market. *Id.* at 26. To ensure that authority debt issues not compete unnecessarily (and expensively) with the State's full faith and credit issues, the Moreland Act Commission recommended that the PACC supervise the scheduling of authority debt issues. Specifically, the Moreland Act Commission recommended giving the PACC the power to regulate the timing and amounts of any sale of obligations by public authorities.

17. Finally, the Moreland Act Commission recommended that the PACC have the power to disapprove the committing of any funds, resources or assets of any public authority for any capital project for which funds, resources or assets had not yet been contractually obligated. *Id.* at 26-28.

March 1976: Establishment of the Public Authorities Control Board

18. The Governor and the Legislature moved swiftly to implement the Moreland Act Commission's call for a "control mechanism" over the public authorities' issuance of debt and

project financing commitments. Agreeing with the Moreland Act Commission, the Legislature found that the amount of debt incurred by public authorities "has grown dramatically and without effective or comprehensive monitoring by the State government" and as a result "the traditional markets for bonds and notes of the State" and its cities have been "adversely affected," and are "virtually closed to all issues offered" by public authorities. L. 1976, c. 39, § 1. And so, in March 1976, the Legislature passed, and the Governor approved, legislation creating the New York State Public Authorities Control Board. L. 1976, c. 38 and 39. (Copies of these two laws are attached as Exhibit B.)

19. The Legislature also imposed a cap on the issuance of further moral obligation debt. L. 1976, c. 38.

20. There was at least one significant difference between the Moreland Act Commission's proposed "control mechanism" and the new PACB. The Moreland Act Commission wanted the "control mechanism" established within the Executive branch of the State government, which it believed "more suited" than the Legislature to exercising the review and control powers needed to control the "volume and pace of authority borrowing and commitments." *Id.* at 20-21. Believing that the Governor's office "cannot assume the full burden of personally regulating" the financial operations of all public authorities, however, the Moreland Act Commission called for a three-member body appointed by the Governor, established within the Executive Chamber, with a full-time chair who would be a member of the Governor's Cabinet. *Id.* at 21.

21. Although the Legislature agreed with the Moreland Act Commission's call for a "control mechanism," it chose not to create it wholly within the Governor's office. As established

in 1976, the PACB had three members, all appointed by the Governor, one on the recommendation of the Speaker of the Assembly and one on the recommendation of the Senate Majority Leader. L. 1976, c. 38, § 15. The PACB was required to act by unanimous vote of its three members. The Governor designated one member to serve as chair.

22. Although the Legislature provided initially that the PACB would exist only for a few years, it was made permanent in 1978. L. 1978, c. 47.

23. As created in 1976, the PACB was authorized to review applications for approval of the financing and construction of projects undertaken by three public authorities. L. 1976, c. 39, § 2. The UDC and its subsidiaries were added in 1978. L. 1978, c. 47. Since then, the Legislature has added more, while others have expired. At present the PACB reviews applications from ten public authorities. Pub. Auth. Law § 51(1). (These ten are by no means all of the State's public authorities. The State Comptroller in February 2005 stated that there are over 200 public benefit corporations within the State and local authorities. Report of the State Comptroller, *New York State's Debt Policy: A Need for Reform* (February 2005), *available at* http://www.osc.state.ny.us/press/debtreport205.pdf .

24. The Legislature conferred on the PACB "[c]ertain express and limited powers, functions and duties." L. 1976, c. 39, § 2. It directed the PACB to receive applications from specified public authorities "for approval of the financing and construction of any project" proposed by the public authority. Before it could approve an application, the PACB first was required to give the State Comptroller an opportunity to review and comment on it. *Id.*

25. The PACB was allowed to approve an application for the financing and construction of a project only if it first determined that "there are commitments of funds sufficient to finance the acquisition and construction" of the project. L. 1976, c. 39, § 2(3).

26. This criterion—the sole criterion on which PACB reviews applications submitted by public authorities for project financing—is now codified as Public Authorities Law § 51(3). It has come to be known as "funds sufficiency." The PACB has delayed many proposed projects that it felt did not meet this funds-sufficiency test. And public authorities often have had to revise their proposed projects to satisfy the PACB's funds-sufficiency test.

27. Six years after creating the PACB, the Legislature in 1983 expanded its jurisdiction to include six additional public authorities, and gave it two more members. L. 1983, c. 838. Joining the three members chosen by the Governor and the leaders of the legislative majorities, were two members appointed on recommendations by the leaders of the legislative minorities. But, unlike the members chosen by the Governor and the leaders of the legislative majorities, those two new members had no vote. (Their comments could be entered on the PACB's "official record" unless one of the voting members objected.)

28. The 1983 amendment also recognized that when the PACB considers whether there is a sufficient commitment of funds so that a project will not jeopardize the State's financial standing, it also "reasonably [must] reflect the projected ability of an applicant [i.e. a public authority] to repay a proposed indebtedness or assure against potential liabilities." Memorandum of State Executive Department, *reprinted in* McKinney's 1983 Session Laws of New York, at 2695-97. (A copy of the memorandum is annexed as Exhibit C.) Accordingly, the amendment

added statutory language "to specify, in statute, the considerations underlying approval of new projects." *Id.*

29. That new statutory language specified that in determining funds sufficiency, the PACB "may consider commitments of funds, projections of fees or other revenues and security," which could include "collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken." L. 1983, c. 838 § 2. The Executive Department's Memorandum noted that "[a]n effectively functioning PACB lessens the possibility of future calls for State moneys to assist financially distressed authorities." *Id.*

30. As set forth in its organic legislation, the PACB's review of a proposed project is limited to determining whether there are "commitments of funds sufficient to finance the acquisition and construction" of the proposed project. Pub. Auth. Law § 51(3). In particular, when a public authority proposes to issue bonds in connection with a project, the PACB reviews the public authority's ability to repay a proposed indebtedness, and considers the total amount of already outstanding public authority debt.

The PACB's Statutory Powers Embody the Moreland Act Commission's Recommendations

31. The sufficiency-of-funds-review power, and the other powers that the PACB exercises under the Public Authorities Law, are directly traceable to recommendations first made by the Moreland Act Commission in 1976.

32. The Moreland Act Commission was concerned with ensuring that sufficient funds existed to support an authority's financial commitments for a proposed project. Funds that the PACB authorizes public authorities to borrow and spend generally support the acquisition and

construction of projects by paying debt service on long-term bonds. As the Moreland Act Commission noted, the issuance by public authorities of long-term debt affects the State's credit for years and thus future generations of New Yorkers. To ensure that public authorities will be able to meet all their future debt service requirements the PACB, before it approves any proposed bond issue, first reviews in detail projected revenues and expenses of proposed projects, expected bond ratings by financial ratings firms, and security arrangements.

33. Forms of security for public authority projects typically are combinations of (1) restrictive financial covenants (which restrict the pledging of assets and the incurring of additional debt; (2) early warning covenants (which warn of impending credit deterioration); (3) provisions for the use of qualified management consultants should other covenants not be met; (4) credit enhancements (including municipal bond insurance and irrevocable standby or direct–pay letters of credit issued by a commercial bank); and (5) debt service reserve funds (funded with letters of credit, surety bonds, or certain proceeds from sales of obligations).

34. As it reviews applications from public authorities for project financings under Public Authorities Law § 51, the PACB can modify specific financial conditions, and often does so, based on its power—as recommended by the Moreland Act Commission and conferred by statute—to receive applications including the terms and conditions, including rates of interest, amounts, and forms of any authority obligation, as well as dates of repayment of State appropriations authorized by law pursuant to a repayment agreement; and, approving such applications only if it determines, through consideration of commitments of funds, projections of fees, other revenues and security, that there are commitments of funds sufficient to finance the project.

35. Each PACB resolution approving a proposed project financing contains a sources-and-uses page. Typically, a sources-and-uses page spells out highly specific terms, conditions, amounts, and forms of any authority obligation, including specified dollar amounts for various components of the proposed project. A sources-and-uses page also specifies a "do not exceed" amount for the maximum allowable issuance of bonds. Each sources-and-uses page identifies the name of the project or refunding and, when applicable, the components of the named project to be funded with the bond proceeds. Meanwhile, each PACB resolution approving a proposed project acquisition, grant, or loan financing contains a terms-and-conditions page. Typically, a terms-and-conditions page sets forth specific financial terms, conditions, and amounts for, and identity of, the project, either in a matrix or a list format. For certain resolutions approving single or multiple tax-exempt loans all of which contain the same term and interest rate, the term and interest rate is specifically presented in "Whereas" clauses within the body of the resolution, while the terms-and-conditions page contains a list naming the projects, their components, and specified dollar amounts for the projects.

36. In addition, bondholder covenants proposed by public authorities must conform to the PACB's rules, practice, precedent, and to Public Authorities Law § 51. Over the years, as the PACB has reviewed proposed debt issues, it has altered conditions of proposed bond sales. Public authorities and bond underwriters also have undertaken to comply with the PACB's rules concerning bond issuances.

37. Seeking lower interest rates for new money and refunding bond issuances, the PACB sometimes has insisted on not-to-exceed interest rate reductions more restrictive than the public authority sponsoring the project or the underwriter would prefer, in order to conform with

available rates and reduce debt service. Moreover, seeking greater debt service savings on behalf of projects for which refinancing bonds would be issued, the PACB has frequently insisted on a requirement that a bond refinancing meet a minimum savings test. On the whole, however, bond issuances have been flexible enough to conform to overall State policy and project requirements beyond just interest rates and minimum savings requirements.

38. To elevate credit security, the PACB sometimes adds to a resolution approving a bond issue a "Whereas" clause, or other minimum requirements. Members of the PACB have objected to proposed bondholder covenants that needlessly altered the State's fiscal policy.

The New York Public Authorities Control Board Today

39. The various legislative enactments creating the PACB and giving its powers now are codified as sections 50 and 51 of the Public Authorities Law.

40. The PACB has five members, though only three members have a vote, and those members must act by unanimous vote.

41. Although formally the Governor appoints all the PACB's members, four are chosen by the Senate Majority Leader, the Assembly Speaker, and the leaders of the Senate and Assembly minorities. Each member can be replaced at any time at the behest of the person who chose them.

42. Members of the PACB are unpaid and if they are public employees—as they always have been—they are entitled to no reimbursement for any expenses.

43. The Governor designates one member as chair. Beginning with Governor Carey, each of the four governors since the PACB was established 31 years ago has chosen to be represented on the PACB by his Director of the Budget (who have also served as chair). Similarly, the four legislative leaders have always chosen only sitting members of the Legislature. Often, the

Assembly Speaker and the Senate Majority Leader choose the chairs of their respective houses' finance committees—the Senate Finance Committee and the Assembly Ways and Means Committee—to represent them on the PACB.

44. In December 2006, when it adopted the resolution at issue in this proceeding, the PACB's three voting members were John F. Cape, the then-Director of the Budget (chair), chosen by the Governor; the Hon. Sheldon Silver, Speaker of the Assembly, chosen by himself; and, Senator Owen H. Johnson, chair of the Senate Finance Committee, chosen by Senate Majority Leader Joseph L. Bruno. The two non-voting members were Senator Thomas K. Duane (the Assistant Minority Leader for Policy and Administration) chosen by the Senate Minority Leader, and Assemblyman Brian M. Kolb, chosen by the Assembly Minority Leader.

45. In January of 2007, Paul E. Francis, Governor Spitzer's Director of the Budget and Senior Adviser to the Governor, was appointed by Governor Spitzer to the PACB (and designated its chair), replacing Mr. Cape. Speaker Silver, Senator Johnson, and Assemblyman Kolb continue to serve; Senator John L. Sampson is now the Senate Minority Leader's choice as a non-voting member.

46. Unlike conventional State boards and commissions, such as the Public Service Commission or the Racing and Wagering Board, which have paid, full-time commissioners, board members, or directors, as well as numerous full-time employees who assemble and analyze information and present formal recommendations for action, the PACB has no staff of its own.

47. As part of his duties as a full-time employee of the Division of the Budget, Dennis Hodges, Senior Budget Examiner, devotes a substantial portion of his time to tasks relating to the PACB. As the PACB's Secretary, Mr. Hodges, among other duties, ensures that all notices of

PACB meetings are given and served, keeps the minutes of PACB meetings; certifies the correctness of copies of the PACB's records and resolutions; and, ensures that the PACB's members receive all necessary materials relating to matters pending before the PACB. Another full-time employee of the Division of the Budget, George Westervelt, Principal Budget Examiner, has been designated the PACB's Assistant Secretary. He devotes approximately one-quarter of his time to the PACB. In addition to my numerous other duties as an Assistant Chief Budget Examiner, I chair meetings of the PACB, acting as a duly authorized representative of Paul E. Francis, the Governor's appointee and the Director of the Budget.

48. Staff from the State Senate and the Assembly provide similar assistance to the PACB's two other voting, and two non-voting, members, who are chosen by the leaders of the legislative majorities and minorities.

49. From time to time, briefings are held for members of the PACB or their representatives to provide additional financial information about applications submitted to the PACB. Mr. Hodges, in his capacity as Secretary, facilitates these briefings. These briefings generally concern funds sufficiency.

50. Other than the work spaces occupied by the Division of the Budget employees who perform PACB-related duties, the PACB maintains no offices. Meetings are held, usually on the third Wednesday of each month, in a hearing room in the State Capitol in Albany.

51. The PACB receives no appropriations from the Legislature.

The Public Authorities Control Board is Not Subject to the State Environmental Quality Review Act

52. In the 31 years since it was established to protect the State's interest with respect to the financial commitments and debt obligations undertaken by public authorities, the PACB has reviewed and approved hundreds of applications from public authorities relating to the financing and construction of proposed projects, and has approved billions of dollars of bond sales.

53. The PACB does not consider its limited review and approval of proposed financial commitments by public authorities to be subject to the State Environmental Quality Review Act (SEQRA). For that reason, it has never served as a "lead agency," prepared an environmental impact statement, nor acted as an "involved agency" and made a written findings statement. Nor to my knowledge has anyone ever asserted that the PACB is subject to SEQRA. Certainly, this proceeding is the first time this issue has ever been litigated.

54. The PACB's determinations as whether to approve a public authority's proposed financing of a project are to provide some added assurance that the State's financial interests are not at risk. This limited determination would not be informed by the type and scope of information contained in an environmental impact statement.

The Resolution Approving ESDC's Financial Participation in the Atlantic Yards Project

55. In April 2006, the Legislature appropriated $100 million to the Empire State Development Corporation (ESDC) to help finance new infrastructure relating to the ESDC's Atlantic Yards Land Use Improvement and Civic Project (the Atlantic Yards Project) including streets and sewers, garages, transit connections, improvements to the Long Island Rail Road, and

publicly accessible open space. At the same time, the Legislature also authorized ESDC to issue $100 million of bonds to finance this appropriation.

56. Because the Empire State Development Corporation is the Urban Development Corporation's doing-business-as name, it is one of the public authorities specified under the PACB's statute. Pub. Auth. Law § 51(1). In December 2006, ESDC submitted an application to the PACB relating to the Atlantic Yards Project. (A copy of the ESDC's initial application is annexed as Exhibit D.)

57. ESDC sought the PACB's approval for two things. First, ESDC applied for approval to issue bonds to assist in financing the development of the Atlantic Yards Project. Specifically, ESDC wanted approval for the sale and issuance of $100 million of Personal Income Tax Revenue Bonds, which are authorized by the Revenue Bond Financing Program (set forth in Article 5-C and section 92-z of the State Finance Law) to pay for the State-financed infrastructure improvements.

58. The Revenue Bond Financing Program is designed to reduce borrowing costs for certain specified public authorities, including ESDC. Under the program, a public authority issues debt that is backed by a percentage of the State's personal income tax revenue that will be pledged or earmarked for payment of debt service. This debt is rated the same as general obligation debt and a notch higher than other appropriation-backed debt because it is backed by the State's largest revenue source, even though the pledged revenues are still subject to annual appropriation by the Legislature.

59. ESDC also wanted the PACB to conduct a funds-sufficiency review of the adequacy of the Atlantic Yards Project's corporate sponsor's commitments to ESDC to pay all

costs that ESDC incurred in connection with its expected acquisition by eminent domain of certain properties as part of the Atlantic Yards Project.

60. As required by section 51(2) of the Public Authorities Law, ESDC's application (and several other applications that also were on the agenda for the PACB's December 2006 meeting) was furnished to the State Comptroller. The State Comptroller provided some comments but did not comment specifically on the Atlantic Yards Project. (A copy of the State Comptroller's letters, dated November 15 and December 20, 2006, are attached as Exhibit I.)

61. The following describes additional information relating to the Atlantic Yards Project that was provided to members of the PACB before it met on December 20, 2006.

62. To assess the funds sufficiency of the proposed Atlantic Yards Project, members of the PACB asked for and obtained from ESDC and the Atlantic Yards Project's corporate sponsor, Forest City Ratner Companies (FCRC), certain confidential financial documents. Among them was a memorandum prepared by KPMG LLP at the request of a New York law firm, Skadden, Arps, Slate, Meagher & Flom LLP, to assist it in reviewing FCRC's projected cash flows for the Atlantic Yards Project. (A copy is annexed as Exhibit H.) Skadden, Arps was representing ESDC in the preparation and adoption of the Atlantic Yards Project's Modified General Project Plan.

63. Members of the PACB requested this confidential cash flow analysis to help fulfill their statutory duty to evaluate the funds sufficiency of the proposed Atlantic Yards Project, specifically ESDC's proposal to enter into commitments to provide funds to accomplish the acquisition of property and infrastructure improvements.

64. Another package of documents, which was distributed to PACB members (dated December 13), provided additional detail on costs and financings relating to the proposed Atlantic

Yards Project, including sources and uses of funds; infrastructure budget; and, mitigation budget. (A copy is annexed as Exhibit F.

65. PACB members later in December 2006 asked for and were provided certain additional analyses of projected revenue, expenses, and income for the arena (a part of the proposed Atlantic Yards) through the year 2012, and of projected land, master planning, site, and infrastructure costs and for projected rental, office, condo, and hotel cash flow through the year 2015, to help assess funds sufficiency for the proposed Atlantic Yards Project. (Copies of these documents are annexed as Exhibit G.)

66. The PACB duly gave notice that it would consider ESDC's application at a meeting on December 20, 2006. (A copy of the Notice of a Meeting and Agenda is annexed as Exhibit J.)

67. The minutes of the PACB's December 20, 2006, meeting indicate that two voting members of the PACB asked questions relating to ESDC's proposed financial participation in the Atlantic Yards Project. (A copy of the minutes, which the PACB approved at its March 14, 2007, meeting, is annexed as Exhibit K, and a copy of the notice and agenda for the March 14, 2007, meeting is annexed as Exhibit L.) One asked if the PACB was being asked to approve $100 million in bonds to help pay for "infrastructure support," and was told yes. Another asked when the State's liability would end, and who would finance the construction of proposed housing.

68. By unanimous vote, the PACB on December 20, 2006, adopted Resolution No. 06-UP-953. (A copy of the Resolution is annexed as Exhibit M.)

69. The Resolution states that PACB "approves [ESDC's] participation in the Project" and does so "in accordance with section 51 of the Public Authorities Law. As I noted earlier, the PACB determined, as required by section 51(3) of the Public Authorities Law, that with respect to

the ESDC's financial participation in the Atlantic Yards Project "there are commitments of funds sufficient to finance the acquisition and construction of such project." In reaching that determination, the PACB considered "commitments of funds, projections of fees or other revenues and security" including "collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities" that ESDC proposed to undertake.

Dated: Albany, New York
April 25, 2007

Todd L. Scheuermann

Sworn to before me this
25th day of April, 2007

Notary Public

MICHAEL P. KENDALL
Notary Public, State of New York
No. 01KE6031437
Qualified in Albany County
Commission Expires October 4, 20 09