To be Argued by:
JEFFREY S. BAKER

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New York Supreme Court

Appellate Division—First Department

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

Petitioners-Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR PETITIONERS-PLAINTIFFS-APPELLANTS

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

– against –

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

Respondents-Defendants-Respondents.

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PRELIMINARY STATEMENT

Appellants Develop Don't Destroy (Brooklyn), Inc., et al. ("Appellants") hereby reply to the opposition papers of Respondents New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"), Forest City Ratner Companies ("FCRC"), Metropolitan Transit Authority ("MTA"), and New York State Public Authorities Control Board ("PACB") (collectively "Respondents") to Appellants appeal herein.[1]

LEGAL ARGUMENT

POINT I: ESDC'S BLIGHT DETERMINATION IS ARBITRARY AND CAPRICIOUS, AND ESDC INTENTIONALLY IGNORED ECONOMIC TRENDS IN THE STUDY AREA

Respondents continue to defend ESDC's blight determination by repeating a mantra that the area is substandard, unsanitary and the determination was rational. Despite the vociferous protests that the determination was rational, the reality demonstrates that the blight decision was predetermined. ESDC went out of its way, as part of its public-private partnership with FCRC to facilitate the necessary blight determination, regardless of the lack of support to designate the blocks south of Pacific

[1] Defined and abbreviated terms used herein have the same meaning as in Appellants appeal brief.

Street.

Appellants have consistently pointed out that the Blight Study never provided any qualitative analysis to determine whether particular lots were blighted, despite the lot-by-lot descriptions. The only indication of which lots were considered blighted, was in a tax lot map that did not even have lot numbers. In their reply, for the first time, Respondents attempt to provide that qualitative analysis. If the results were not so serious, the effort would be laughable as the "explanations" are so contradicted by the Blight Study itself.

Significantly, despite ESDC's contention that it had no obligation to consider real estate and economic trends for Blocks 1127, 1128 and 1129, it initially instructed its environmental consultant AKRF to do such an analysis for the Blight Study. For unknown reasons, however, ESDC and AKRF did not include that information in the Blight Study. (*See* Point C below.) Given ESDC's vociferous denials of the credibility of the substantial evidence of ongoing redevelopment of the non-ATURA Blocks cited by Appellants, it appears likely that ESDC purposely excluded this information from the Blight Study because it undermined its desired finding that the entire Project footprint is blighted.

A. The Court Should Not Simply Rubber Stamp ESDC's Blight Determination

Respondents misrepresent Appellants' arguments regarding the extent of judicial review and the deference that should be afforded an agency making the determination. Appellants recognize the limits of judicial review, but also recognized that "judicial review must be meaningful". *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). Especially where, as here, ESDC, as a non-elected quasi-public corporation, exercises its extraordinary powers to override local laws and regulations, the Court should carefully consider the record and determine whether ESDC acted rationally based upon substantial evidence. For it is only a meaningful judicial review that will assure that the process is fair and that the determination is supportable, otherwise the potential for abuse is terrifying. As demonstrated below, ESDC did not undertake its responsibility to exercise its powers with care and instead facilitated a private developer.

B. ESDC Does Not Deny That Alleviation of Blight Was An Afterthought

ESDC does not deny that there is no mention of blight as a justification for the project in its administrative record until the publication of the Draft Scope for the DEIS, nearly two years after the project was

announced. ESDC's only response is that at the time of the February 2005 MOU, it was not required to state what kind of project it was undertaking and whether alleviation of blight was the purpose. (ESDC Brf. at 29). However, ESDC does not deny that the MOU states that ESDC will find a means to classify the project. Nor does ESDC state when or why it was determined that alleviation of blight was a primary purpose of the project.

Contrary to ESDC's mischaracterization, Appellants do not argue that ESDC altered its determination after adopting findings. Rather, Appellants contend the blight determination was a post-hoc rationalization because it only years after the Project was announced was there was any mention that its purpose was to alleviate blight. Prior to the release of the Draft Scope for the EIS, the only articulation of the project purpose was to provide housing and an arena for the Nets basketball team. Therefore, the Court should be properly skeptical in considering whether the blight determination is really supported by the record.

C. ESDC Contracted for a Study of Market Trends But Never Completed the Task

Determining blight is more than simply compiling a catalogue of the physical attributes of an area. An agency considering such a determination obviously should not operate in a vacuum, purposefully ignoring real estate

and economic development trends. The agency cannot look at the area in a snapshot without reference to recent developments and trends, and economic underdevelopment is a factor in assessing blight. *See Yonkers Community Development Agency v. Morris,* 37 N.Y.2d 478 (1975). But to assess economic development there must be some context to consider the conditions in the area being studied and compared with surrounding areas to gain a point of reference and comparison. To do otherwise and to ignore such trends can have the absurd result that buildings currently vacant or in marginally substandard conditions are deemed blighted despite imminent plans at redevelopment. That is what happened in this case.

Appellants have consistently argued for the need for context in the analysis and ESDC's obligation to consider trends. Appellants have also questioned the basis and genesis for a blight study area that is coterminous with the previously established project area without undertaking any analysis as to what constitutes the boundaries of the blighted area.

Respondents have dismissed and mocked Appellants' arguments. ESDC claims that Appellants are only hypothesizing about future market led revivals and ESDC "as a matter of law" must only look at conditions on

the date the findings are made. (ESDC Br. p. 38).[2] ESDC is essentially defending its ostrich-like head in the sand attitude.

It is now clear however that ESDC knew it could not proceed with such a narrow perspective. In the Fall of 2005, ESDC signed a contract with AKRF for the preparation of environmental analyses and documents, including the EIS and the Blight Study. The contract included a detailed description of the scope of work which AKRF was to perform (referred to as the "EIS Contract Scope"). As stated therein, AKRF's Blight Study was to include, among other things, the following:

> A. Determine the study area for analysis of blight conditions and prepare and draft criteria that will be used as the basis for the blight study area, in conjunction with state and city agencies, including ESDC and DCP.
>
> B. Document blighted conditions, including the following:
>
> - Analyze residential and commercial rents on the project site and within the study area;
> - Analyze assessed value trends on the project site, and compare sample blocks with comparable uses in the study area, such as Atlantic Center;
> - Describe residential and commercial vacancy trends;

[2] ESDC does not cite to any legal authority for its claim that its determinations should not consider economic conditions on the site or study area.

- Compare current economic activity on the project site, such as direct and indirect employment, with relevant surrounding sites.

(RA 28)[3]

None of this information was contained in the actual Blight Study which ESDC relies on to support its blight designation. The Blight Study contains no analysis, comparison, or discussion of rents, real estate value trends, vacancy trends, or economic activity, and the "study area" excludes all property that FCRC had not already determined would be part of the Project.

By omitting economic and real estate trends, ESDC was able to ignore the rapid, ongoing, organic redevelopment and rising property values on the non-ATURA Blocks, which did not conform to ESDC's pre-determined blight designation.. Thus, ESDC looked at vacant buildings in 2006 to determine the area was blighted, without reference to what was happening in 2003 when the project was announced, and without considering how the

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[3] ESDC failed to include the EIS Contract Scope in the Administrative Record it produced to the Court below. Appellants only recently learned of the existence of the EIS Contract Scope on around August 15, 2008, after a reporter obtained it from ESDC through a Freedom of Information Law request and discussed in an online blog. "RA" refers to the Reply Appendix submitted herewith in conjunction with Appellants' Motion to Supplement the Record.

announcement of the Project stymied plans of property owners and investors to continue to redevelop those blocks.

D. The Record Does Not Support ESDC's Designation of the Non-ATURA Blocks as Blighted

As noted, the Blight Study does not actually state which lots on Blocks 1127, 1128, and 1129 ESDC deems blighted, or explain which of the stated blighting criteria are present on each lot, and the only such indication is provided in a "Blight Map". (R. 218). ESDC's opposition brief on this appeal represents the first time it has attempted to explain whether and why individual non-ATURA lots were deemed blighted. (ESDC Brf. at 30-37) However, the attorneys can only point to the non-evaluative descriptions in the Blight Study and there is no reference to any analysis by AKRF or ESDC staff that demonstrates that such an evaluation was ever undertaken. Nevertheless the explanations provided in ESDC's brief demonstrate the tortured lengths that ESDC went to designate parcels as blighted.

Block 1127

There are 25 tax lots on Block 1127, 15 of which are designated blighted on ESDC's Blight Map. (R. 218) Appellants concede that four of those lots (19, 20, 55 and 56) can be deemed blighted due to their past

demolition, but the 11 remaining lots are in dispute.[4] ESDC now provides an explanation for only eight of the 11 contested lots, apparently conceding that lots 18, 30 and 33 are not blighted. (ESDC Brf. at 30-32)

Lot 1 contains a gas station, and ESDC justifies its blight designation of that block by citing "a history of gasoline spills that have resulted in severe soil contamination and groundwater pollution on a grossly underutilized lot" (ESDC Brf. at 30), even though the Blight Study notes that the soil and groundwater contamination are already being remediated under the jurisdiction of the DEC. (R. 311). The only remaining justification is purported underutilization, even though neither ESDC nor the Blight Study addresses why it would be appropriate to ignore the economic vitality of the existing use in favor of a mechanistic measurement against the ultimate potential build-out regardless of profitability.

ESDC's brief describes Lot 12 as "a garbage –strewn yard with barbed wire fence and two small buildings that have been vacant for years". (ESDC Brf. at 30). That is not true, as lot 12 the yard referred to is actually on Lot 13. (*Compare* R. 321-324 and 325-328). ESDC offers no support for its claim that the building has been "vacant for years", as the Blight Study

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[4] The disputed lots are 1, 12, 13, 18, 22, 29, 30, 33, 47, 48 and 54.

only notes that it was vacant when FCRC's subsidiary took title in 2005. While there are open building code violations, the majority are attributable to a single boiler, and ESDC did not undertake to inspect its condition or due any structural inspection, despite its accessibility due to FCRC's ownership.

Lot 22 was apparently deemed blighted because it was underutilized and had graffiti on its façade (ESDC Brf. at 31), even though, as the Blight Study notes, apart "from some graffiti" and cracks on the sidewalk no unsanitary or unsafe conditions were observed. The building was occupied until vacated after FCRC purchased it, and ESDC has proffered no assessment of its economic utility or any determination that full build-out would be beneficial or necessary.

Lot 29 is designated as blighted solely because the property is not fully built out to the available FAR. (ESDC Br. p. 31). Again there is no assessment of its economic utility and why it must be deemed blighted given that it was actively used until FCRC acquired it and has no other blight attributes.

ESDC now describes Lot 47 as "a garbage-strewn informal parking lot surrounded by a barbed wire fence". (ESDC Brf. at 31). In contrast, the Blight Study describes it as "some weeds and trash lining the fence." (R.

365) ESDC ignores the use of the parking lot by the employees of a nearby paint and linoleum store. ESDC also ignores the fact that the lot must be important to the store since it still owned the lot at the time of the Blight Study despite FCRC's efforts to buy all the properties in the area.

Lot 54 is deemed blighted because it is vacant with "numerous building code violations". some graffiti. and interior water damage. (ESDC Brf. at 32). However, the study only notes that the building was vacant when purchased by FCRC in 2004 and does not state how long it was vacant beforehand. (R. 375). The indicated building code violations dated from 1983 to 1990 were primarily related to public assembly or unknown issues. (R. 375, 655) The Blight Study also noted that while there is some water damage, there was no evidence the building is substantially compromised. Since there is no indication that the building code violations are related to structural or sanitary issues, they are not a legitimate basis for the blight determination.

Finally, ESDC claims its blight designation of Block 1127 is further supported by being across Pacific Street from Block 1119, which is part of the concededly blighted, MTA-owned rail yard. Most of the buildings on Block 1127 fronting onto Pacific Street are, by its ESDC's own definition,

not blighted. Moreover, two recent condominium conversions (the Spalding Building and Atlantic Arts Building) are on located on Block 1127 fronting onto Pacific Street, soundly refuting the claim. Had ESDC completed its real estate trend analysis as originally planned, it would have had to consider that information.[5]

Block 1128

Of the 8 lots on Block 1128 included in the Project area, five are designated blighted on EDSC's Blight Map, although the three "unblighted" lots comprise more than half of the purportedly blighted portion of Block 1128. (R.218).[6]

Although ESDC now contends that the buildings on Lot 4 are blighted (ESDC Brief p. 33) its Blight Map in the study indicates otherwise. (R. 218) In any event, the outstanding building code violations pertain primarily to the building's elevator and boiler, and the Blight Study noted the building was occupied and fully utilizing the available zoning, and had only minor graffiti and rust on a door. (R. 393)

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5 The confusion as to which lots ESDC considers blighted and why appears to be widespread. In its brief (p. 39), FCRC identifies lots 21 (R. 339) and 51 (R. 373) as blighted. Neither are listed on the Blight Map nor are they so described in ESDC's brief.

6 Lots 1,2,85,87 and 88 are marked as blighted.

Lot 85 contains a two-story single-family home that has been deemed blighted simply because it only uses 40% of the available FAR (R. 396). The adjoining Lot 86 contains a three-story residence that is not deemed blighted, simply because it has one additional floor. (R. 398)[7]

Lot 88 is shown on the Blight Map as blighted, but is not addressed in ESDC's brief, so ESDC apparently now concedes it is not blighted.

Conversely, Lot 89 is not identified as blighted on the Blight Map, but ESDC now describes it as blighted because of a vacant commercial store front, cracked sidewalk, "graffiti decorated façade" and five building code violations. (ESDC Bf. at 33). ESDC fails to point out that the commercial space, while unoccupied, is leased. (R. 404) O the five building code violations, two date from the 1980s and are of unknown reason, and the other three are from 2000 for failing to maintain

a boiler. As for the graffiti, the photographs in the Blight Study sufficiently illustrate what ESDC considers to be a "graffiti decorated façade". (R. 406)

Confusingly, ESDC also buttresses its blight designation of Block 1128 by pointing out that it lies across Pacific Street from the blighting influence of the MTA –owned rail yard on Block 1120, even though the only

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[7] Although neither the Blight Map nor ESDC's opposition brief identifies Lot 86 as blighted, FCRC argues that Lot 86 is blighted. *See* FCRC Brf. at 39, citing R. 398.

portion of Block 1128 in the project area across from Block 1120 is Lot 4, which is ESDC concedes is not blighted. Moreover, ESDC has no explanation of why the Newswalk Building was converted into luxury condominiums, despite its location on Block 1128 directly across Pacific Street from the rail yards.

Block 1129

ESDC contends that lots 1 and 3 on Block 1129 are deemed blighted because of the presence of abandoned cars, miscellaneous debris, and a drum. (ESDC Brf. at 34). FCRC has owned these lots since 2004, and it simply defies common sense for ESDC to designate them as blighted because the Project's developer which owns the lots has failed to maintain them. (R. 407)

Lots 5 and 6 are active parking lots that are attractively maintained and serve the adjoining building. (R. 413) Other than their being parking lots, ESDC does not explain why they are blighted. (ESDC Brf. at 34)

Lot 13 is deemed blighted because it contains a "predominantly vacant" building with 23 building code violations. (ESDC Brf. at 34) ESDC simply ignores the fact that the tenant was renovating the building to a hotel at the time Atlantic Yards was announced, but then assigned the lease

to FCRC. (R. 22788). ESDC also fails to point out to the Court that the owner of the building has submitted plans to redevelop the property. (R. 22789).

ESDC also identifies Lot 39 as blighted. (ESDC Br. p. 34). That lot has not previously been identified as blighted by ESDC. (R. 218)

ESDC's expansion of the "blight" designation, which was already applied to ATURA, to include the three thriving non-ATURA Blocks south of Pacific Street was done without careful consideration and without any reference to the market forces taking place at the time the project was announced, resulting in a *per se* arbitrary study that could only produce the predetermined outcome desired by ESDC and FCRC.

POINT II: ESDC'S DESIGNATION OF THE BARCLAYS CENTER ARENA AS A "CIVIC PROJECT" UNDER THE UDCA IGNORES THE LANGUAGE AND LEGISLATIVE PURPOSE OF THE STATUTE

Throughout its argument supporting its claim that Barclays Center Arena is a "civic project" under the UDCA, ESDC repeatedly asks this Court to ignore both the express language of the statute, and the clear purpose of the statute as a whole. However, ESDC's lengthy argument notwithstanding, it is a very simple issue -- to qualify as a civic project, the project must necessarily have a civic purpose and be owned or leased by an

entity which is carrying out a civic purpose. To argue that the legislature intended anything else is simply nonsensical.

Respondents would also have this Court ignore the fact that the legislature considered it necessary to go through the trouble of writing separate legislation authorizing ESDC to provide for the funding and construction of two stadiums for professional sports use in New York State, and that, absent similar legislation, ESDC has the authority under the UDCA to undertake the construction and funding of the Barclays Center Arena. To the contrary, rules of statutory construction require that the Courts consider the actions of the legislature in that almost identical situation to ascertain its intent with regard to the scope of ESDC's authority when it comes to building and funding an arena for a professional sports team.

Rather than refute Appellants' arguments that set forth the simple analysis that is required on this issue (Appellants' Brief, pp. 96-106), respondent ESDC chooses instead to distract the Court with several ancillary arguments that are completely lacking in merit.[8]

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[8] ESDC makes the odd argument that the Atlantic Yards Project is really a Land Use Improvement Project and need not be characterized as a Civic Project. (ESDC Br. p. 49). However, the resolution and findings adopted by ESDC clearly state the project is both a Land Use Improvement Project and a Civic Project under the UDCA. Should one basis of ESDC Board's approval be overturned, it is not the role of the Courts to re-frame

A. ESDC Is Not Entitled to Deference in Its Interpretation of the UDCA

First, ESDC suggests that the standard for review of an administrative agency's interpretation of a statute is whether it has a rational basis. However, there is no support in law for this specious argument. ESDC relies on *Barklee v. NYS Div. of Hous. & Community Renewal*, 159 A.D.2d 416 (1st Dep't 1990), a case in which the primary issue was whether an administrative agency's factual determination was sufficient under the controlling statute. While Appellants agree that in those instances in which an agency has developed a particular expertise with regard to policies of a particular law, deference should be granted to the agency's interpretation. However, deference is inappropriate where, as here, the issue is one of pure statutory construction.

The Court of Appeals addressed the distinction between the two related but different standards in *Moran Towing and Transportation Co., Inc. v. New York State Tax Commission*, 72 N.Y.2d 166 (1988):

> Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the

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the approval but to remand to ESDC for further consideration and action in accordance with the UDCA and applicable laws.

> governing statute . Ultimately, however, legal interpretation is the court's responsibility; it cannot be delegated to the agency charged with the statute's enforcement. Where as in the instant case "the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight.

(internal citations omitted).

In other words, "[d]eference to an agency's interpretation is not required . . . if the determination is based on pure statutory construction, dependent only on accurate apprehension of legislative intent [with] little basis to rely on special competence". *Rosen v. Public Employees Relations Bd.*, 72 N.Y.2d 42, 48 (2006).

In *Barklee v. NYS Div. of Hous. & Community Renewal, supra*, the court deferred to the interpretation of the Division of Housing and Community Renewal ("DHCR"), as to exactly what constituted compliance with the rule requiring that 80% of all violations be corrected before a landlord could obtain a maximum base rent increase. In that case, the court deferred to the factual determination of the DHCR, refusing to overturn it in the absence of arbitrariness or capriciousness. Certainly, however, that does not apply to the case at bar, where the question is one of "pure statutory

construction", and the determination of legislative intent does not depend on the special competence of ESDC. Therefore, this court has every right and the responsibility to substitute its judgment for ESDC's in determining the meaning of the term "civic project and the intent of the legislature in requiring that a civic project be "owned or leased by an entity with a civic purpose."

Second, ESDC argues without any substantive support that Appellants did not raise before the court below the particular question of the meaning of the word "recreation" under USCA § 6253(6)(d). That argument is specious, as Appellants directly and specifically challenged ESDC's determination that Barclays Center Arena is a civic project because it is "recreational".

However, even if Appellants had not raised and argued the issue at length (which they did), a party is not barred from raising a different legal argument on appeal provided the argument is supported by facts already in the record. *See DeRosa v. Chase Manhattan Mortgage Corp.*, 10 A.D.3d 317, 319 (1st Dep't 2004) (citing exemplar cases). Accordingly, this argument by ESDC should be ignored as well.

Third, ESDC incorrectly claims that Appellants "suggest" that ESDC

cannot proceed with a civic project without "project specific" legislative authorization. Of course, that is not even close to Appellants' argument, and ESDC's intention is clearly to divert the Court from the substantive and problematic argument raised by Appellants: that a private arena or stadium does not constitute a civic project under the UDCA in the absence of a legislative finding of such, and the legislature's actions in so finding in one single, limited instance not only highlights the legislature's understanding of the limitations of the term "civic project" as used in the UDCA, but demonstrates what the legislature believes is necessary to allow ESDC to provide support to a private arena or stadium.

That single, limited instance was the Sports Facilities Assistance Program, established under the New York Session Laws of 1993, ch. 258. The legislature apparently determined that the UDCA was inadequate to authorize ESDC to sponsor various stadiums and arenas, including an arena for a professional hockey team in Buffalo and a stadium for a minor league baseball team in Binghamton. Accordingly, it determined to define the particular projects it intended to fund as "civic projects" under the UDCA, and thereby authorized ESDC to make a certain amount of public loans, so long as there were sufficient private loans as well. Significantly, the

legislature did not decide to amend the definition of civic project under the Act, but chose instead to make that finding for that particular project. In other words, if "civic project" under the UDCA was broad enough to include a public stadium, there would have been no need for this legislation and ESDC would have had the authority to act without additional legislation. If it was a matter of providing project funding, it could have been covered in the state budget. However, in that case the Legislature not only specified the project and the essential elements, but made specific findings that professional sports facilities served a public purpose – for the purpose of that act, not to amend the UDCA generally. Despite Respondents' desire that this Court does so, the Court cannot ignore this clear expression of the legislature's understanding of the limitations of the term "civic project" under the UDCA.

B. Appellants Correctly Characterized the Barclays Center Arena as a Privately Owned, Professional Sports Arena, and the Court Below Agreed That Its Purported Civic Benefits Are *De Minimus*

ESDC argues that Appellants have mischaracterized the Barclays Center Arena to bolster their argument, even though Respondents have been less than forthright with the facts surrounding the ownership, leasing and nature of the Barclays Center Arena. ESDC claimed that the arena will be

owned by ESDC or a local development corporation under ESDC's control. But such an arrangement is merely a legal fiction – the arena will be net leased to FCRC for $1 per year for at least 30 to 40 years, with all profits and losses accruing to the developer, including a breathtaking $400 million for the naming rights (thus the significance of the name "Barclays Center" that ESDC tries to minimize despite Barclays Bank's own www.barclayscenter.com) – a blatant attempt to shoehorn a private arena into the coverage of the statute, in order to afford the developer as many public benefits and as much private profit as possible. Clearly, this was not the purpose of the legislature when they said that the civic project must be publicly owned or leased to an entity that has a civic purpose.

As for Respondents' challenge to Appellants' characterization of the Arena as a professional sports arena, even the lower court didn't buy Respondents' flimsy claim that the Barclays Center Arena will provide "civic benefits". As the lower Court stated, "the commitment as to those uses [for cultural gatherings, collegiate competitions, and graduations] for ten events a year is *de minimus* when compared with the primary use of the arena by the Nets..." Certainly the purported "civic benefit" is even more dubious if one considers that the "reasonable cost" at which the developer

intends to rent the arena was estimated by the developer's independent accountant to be $100,000 per event (R 40a) Therefore, the characterization of the Barclays Center Arena by Appellants as a professional sports arena certainly appears to be accurate.

Having disposed of the extraneous, misleading arguments made by Respondents, this Court must return to the express statutory requirements – that, by definition, and express provision of the statute, the project must have a civic purpose, and that the entity that operates it must itself have a civic purpose.

ESDC argues that under the UDCA, recreation is, by definition, a civic purpose. However, such shallow reasoning does not hold weight if the UDCA is read as a whole. Certainly, without the "civic" component, the project would not satisfy the general purpose of the UDCA to provide "adequate educational, recreational, cultural and other community facilities" (emphasis added).For the reasons more fully set forth in Appellants' brief, primary use of the Barclays Center Arena as a professional basketball arena, with *de minimus* benefit to the community, does not fit within the definition of recreation with a civic purpose as required by the UDCA..

C. "Maximum Participation" by the Private Sector Does Not Supplant the UDCA's Requirement That a Civic Project Be Owned or Leased by an Entity Carrying Out a Civic Purpose

More importantly, this Court cannot ignore the second statutory requirement – that the arena be owned or leased by an entity with a civic purpose. *See* UDCA § 6260(d)(3). Respondents argue that the general statement of legislative findings and purposes of the UDCA encouraging "maximum participation" (UDCA § 6252) somehow overrides the more specific requirement of UDCA §§ 6259(1) and 6260(d)(3). ESDC's position requires this Court to overlook another important and elemental tenet of statutory construction: when both general and particular statutory provisions are contained in the same statute, the more specific provision will prevail. *Delaware County Electric Cooperative, Inc. v. Power Authority of the State of New York*, 96 A.D.2d 154 (4th Dep't 1983), *aff'd*, 62 N.Y.2d 877 (1984); 97 N.Y. Jur. 2d Statutes 187; *see also* McKinney's Cons. Laws of New York, Book 1, Statutes 238. "[W]henever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable". *Izzetti v. City of New York*, 94 N.Y.2d 183 (1999); *Alabi v. Community Bd. No. of Brooklyn*, 17 A.D.3d 459 (2nd Dep't 2005).

It is noteworthy that the legislature did not require such leasing or ownership for other types of projects under ESDC's jurisdiction, i.e. industrial projects (UDCA §§ 6258 and 6260(b)), residential projects (UDCA §§ 6257 and 6260(a)) and land use improvement projects (UDCA §§ 6256 and 6260(c)) do not have a requirement that the project be owned or leased by an entity with a civic purpose. Yet, ESDC would have this Court believe that there is no significance to the inclusion of the requirement in sections 6259 and 6260 that the project be owned or leased by an entity carrying out a civic purpose. Clearly, despite Respondents' arguments to the contrary, this Court simply cannot ignore the express requirement that a civic project must be owned or leased to an entity with a civic purpose, in favor of the more general language contained in the legislative findings that the UDCA is designed to encourage "maximum participation of the private sector".

Nor can this Court reasonably accept Respondents' bootstrap argument that, presuming *arguendo*, the Barclays Center Arena is a civic project (which Appellants in no way concede) the entity that owns or leases it therefore, again by definition, has a civic purpose. To so hold would violate yet another basic precept of statutory construction, that each word

and phrase must be given meaning. *See Ragucci v. Professional Construction Services*, 25 A.D.3d 43 (2 Dep't 2005) ("principles of statutory construction require that we give meaning and effect to all language of a statute")(emphasis in original), quoting *Ronser v. Metropolitan Property and Liability Ins. Co.*, 96 N.Y.2d 475 (2002); McKinney's Cons. Laws of New York, Book 1, Statutes 231 ("In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning"). Clearly, if such an argument were true, there would be no need for the separate and distinct requirement set forth in sections 6259(1) and 6260((d)(3) of the UDCA that the project be owned or leased by an entity with a civic purpose.

Equally clearly, it is impossible to argue that FCRC is an entity with a "civic" purpose – as Appellants argue in the Brief on Appeal FCRC is a wholly owned subsidiary of a publicly-traded corporation, which is wholly and legally responsible to its shareholders, not to any civic purpose.

In light of the foregoing arguments and those contained in Appellants' Brief on Appeal, this Court is constrained to find that ESDC has no jurisdiction over the building of an arena, which is one of the most

significant elements of the Atlantic Yards Project, and accordingly, the Project cannot proceed in its current form.

POINT III: ESDC CANNOT CREDIBLY DENY THAT IT'S UNDERLYING RATIONALE FOR REJECTING ALTERNATIVES WAS THAT THE NON-ATURA BLOCKS WOULD NOT DEVELOP WITHOUT THE PROJECT

ESDC argues that whether the non-ATURA blocks would remain "blighted" if not included in the Project was only one of several factors in its consideration of alternatives to the Project. The fact remains, however, that in the EIS and its responses to public comments, ESDC repeatedly refers to the purported difficulty of redevelopment of and elimination of "blight" in areas including the non-ATURA Blocks as a basis for going forward with the Project and rejecting alternatives. (*See, e.g.*, R. 11792-94, 11803, 11805, 11817, 11829, 11845, 11847, 11978, 11983-84, 11993.) Indeed, elimination of blight is the justification used by ESDC to designate the Project as a land use improvement project under the UDCA.

The law is clear that, under SEQRA, an agency is required to make "reasonable consideration of alternatives" to a proposed project and to set forth its "reasoned elaboration of the bases for its determination" in an EIS. *Town of Dryden v. Thompkins Bd. of Representatives*, 78 N.Y.2d 331, 334

(1991). There should be no controversy as to Appellants' argument that a "reasoned elaboration" and "reasonable consideration" cannot be based on an unsupported, conclusory assumption directly contradicted by the known facts. Respondents either misunderstand or deliberately misrepresent Appellants' argument by contending that the Blight Study sufficiently supported ESDC's stated assumption that the non-ATURA blocks would not develop on their own without the Project, even though the Blight Study does not address ongoing development or market trends in the Project footprint. (FCRC Brf. at 35; ESDC Brf. at 115)

Rather than affirmatively deny evidence that the rapid redevelopment and gentrification of the non-ATURA blocks would have continued but for the Project – which they cannot truthfully do – Respondents try to diminish the evidence cited by Appellants, mischaracterizing it as "conclusory statements by individual project opponents" or "unreliable internet 'evidence'". (FCRC Brf. at 35; ESDC Brf. at 114-15) In reality, Appellants rely almost entirely on verifiable facts contained in public records, including Department of Buildings records, contemporaneous news reports, and references in ESDC's Administrative Record. (App. Brf. at 61-67) The fact that the current owner of 754 Pacific Street on Block 1129 is opposed to the

Project does not alter that fact the prior owner filed a plan with the DOB in 2002 to convert it into a luxury residential building. (R. 22788) And the fact that Newswalk residents who submitted written comments in response to the DEIS may have opposed the Project does not alter the fact that condominium apartments in their building overlooking the "blighting influence of the rail yard" were selling for around $600,000 to nearly $3 million in 2003. (R. 14034-43, 14178-81, 14185-87, 15502-06)

FCRC also tries to diminish the relevance of the ongoing development and rising property values on the portion of Block 1128 adjacent to the Newswalk Building, by wrongly asserting that that portion was excluded from the Project footprint "for the very reason that it was not blighted." (FCRC Brf. at 35) That assertion has no support in the record, which includes no blight analysis of properties outside the Project footprint, and ignores that Block 1128 fronts directly onto the supposedly insurmountable blighting influence of the Vanderbilt Rail Yards, just as adjacent Blocks 1127 and 1129 do. (R. 218)

Moreover, that assertion is patently illogical, given that FCRC had already identified the portions of the non-ATURA blocks that it intended to include in the Project well before the Blight Study was conducted or the

Project was even announced. The only reasonable explanation for the Project's shallow U-shaped footprint is that FCRC decided it was simply too expensive to pay fair market value for the 137 Newswalk condominiums. The continuing development and rising property values on the portion of Block 1128 that was excluded from the Project, which lies in the center of the non-ATURA portion of the Project footprint and directly across from the rail yards, serve as the best proxy for what would have occurred on the rest of the non-ATURA blocks had their redevelopment not been stopped dead in its tracks by the Project's announcement.

It is not necessary, however, to look to the ongoing redevelopment of Block 1128 in order to establish that ESDC's stated rationale that the non-ATURA blocks "would remain blighted" unless redeveloped by FCRC. (R. 11847) There is no dispute that within two years before the announcement of the Project, three separate luxury condominium conversions contained a total of around 189 new residential units opened on Blocks 1127 and 1128, directly across Pacific Street facing the "blighting influence of the rail yards". (R. 11793) Nor do Respondents dispute that a plan had been filed to redevelop yet another building into luxury residences on Block 1129, again on Pacific Street directly facing the rail yards.

FCRC, which has long been active in the Brooklyn real estate market, certainly was aware of these facts. Moreover, ESDC retained AKRF to analyze rents and assess value and vacancy trends in the Project footprint, and to compare them with the surrounding area – although this information was not included in the Blight Study – and, therefore, ESDC also must have known about the existing redevelopment on the non-ATURA blocks and the market trends. (RA 29; POINT I.C, *supra.*) Given the facts known at the time to both FCRC and ESDC, ESDC's statements in the EIS that the non-ATURA blocks would not significantly redevelop unless they were included in FCRC's development had no rational basis.

POINT IV: ESDC's BUILD YEARS WERE IRRATIONAL BECAUSE THEY IGNORED THE REALITIES OF THE REAL ESTATE MARKET AND FINANCING

ESDC's response to Appellants' argument that it either intentionally or mistakenly underestimated the Build Years of the Project is similar to its attitude toward the environmental review process in general – overwhelm the Court with irrelevant and extraneous information, and "win" by distraction and obfuscation. However, the court need not concern itself with any of the details of any particular impact which Respondents attempt to minimize; even by its examples, ESDC acknowledges that a change in Build

Years by even a couple of years will affect the negative impacts of the Project.

Nor can Respondents reasonably deny that basic premise – as ESDC stated in the FEIS in its response to Public Comments on the likelihood of longer periods to complete each phase: "Should the project phasing and/or program change in a magnitude necessary to warrant a modification of the General Project Plan (GPP), the proposed project would require additional environmental review to reassess the impacts on environmental conditions."[9] (R. 2091, Response 2-5)

Accordingly, in light of the admissions made by Respondents in both the FEIS and their Brief, the only question which this court must address is whether ESDC's choice of the Build Years for the Project is rationally based, and not an abuse of its discretion.

A. ESDC Wrongly Insists On Only Considering Construction Scheduling Without Consideration of Financing and Market Force

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[9] ESDC complains that "Appellants would have the Court set aside the years of painstaking work ESDC devoted to the environmental review" (which was actually a little over a year, from the scoping hearing on October 18, 2005 to the adoption of the FEIS on November 27, 2006); however, by its own admission, this is exactly what is required if there is a significant change in the timetable of the Project. (ESDC Brf. at 104)

The crux of Respondents' argument is that ESDC reasonably relied on the construction schedule provided by Turner Construction Company, the General Contractor retained by FCRC. As stated by ESDC in its Brief, "This detailed construction schedule addressed not only the construction sequence, but also equipment and labor requirements, deliveries, and locations of equipment and work activity on the project site." (ESDC Brf. at 97, citing R 11566, R13102-13149) Even if the court ignores the obvious prejudice of a company retained by the developer toward providing a schedule palatable to the public[10], the Record is devoid of any suggestion that other, "real world" effects on the schedule were even considered, much less factored into the determination of the construction schedule relied on by ESDC in establishing the Build Years. The Turner construction schedule may or may not be *physically* possible, but it is clearly unrealistic as individuals deeply involved in the effort to bring this Project to fruition understand and have publicly stated.

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[10] ESDC notes that Appellants did not provide any "affidavits from persons knowledgeable in project scheduling, construction or project management". (ESDC Brf. at 97) Interestingly, however, Respondents also did not submit any affidavit attesting to the reasonableness or plausibility of the construction schedule given the ordinary delays occasioned on any large scale, large city project of this kind.

Specifically, the construction schedule relied on by ESDC fails to take into account the affects of the market – not just the current credit market and its impact on the ability of the developer to get financing to even commence the Project, but the financial viability of selling and leasing the Project, and the impact that vagaries in the market would have on anticipated completion dates for both Phases. By way of illustration, if commercial or residential spaces in the first building erected do not rent or sell immediately, then that impact will delay commencement of the rest of the Phase, and therefore its completion. For ESDC, an agency whose central focus is economic development, to completely ignore the impact of the marketability of the Project on the timetable for the Project's completion is simply not rational, and cannot be described by any stretch of the imagination as "reasoned consideration". *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986).

In fact, this specific comment was raised to ESDC as a comment on the DEIS by Appellant Council of Brooklyn Neighborhoods. It was pointed out that the construction schedule was unrealistic and should take into account real estate market conditions and that the actions of investors will drive the schedule, not just the contractors. (R. 2428) In response, ESDC

merely repeated its position regarding construction timing, ignoring ignored the comment that the project timeline would be driven by market forces. (R. 2428)

Similarly, the Turner construction schedule fails to consider the delays that would be occasioned by lawsuits that would certainly be filed against the Project, particularly because of the use of eminent domain to take private homes and businesses to give them to a private developer; in fact, several weeks before the FEIS was accepted, a federal lawsuit had been filed by a number of Project footprint owners and tenants challenged the takings as violative of the US Constitution. [11] In the post-*Kelo* climate of national backlash against the use of eminent domain under the guise of economic development, and in light of the almost routine and lengthy challenges to the takings of homes and businesses, it was irrational for ESDC to adopt a timetable that took no account whatsoever of the impact of litigation.

B. CEO Chuck Ratner Properly Addressed the Reality of a Market-Driven Project

The realities of any construction timetable on a large-scale project, of course, are exactly what Chuck Ratner, Chief Executive Officer of Forest

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[11] *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y.2007), was filed on October 26, 2006, one month before the FEIS was certified.

City Enterprises (parent company to FCRC), and Laurie Olin, the Project's landscape architect, were talking about when they stated unequivocally that the Project would take at least 15 years (in the case of Mr. Ratner), and probably 20 years (according to Mr. Olin).[12] After Mr. Ratner's statement was published and created a public fury, FCRC issued the press statement the next day that ESDC now relies on – his "clarification" that what he *really* meant when he said "the build out would take 15 years" (emphasis added) is from the time they thought up the idea until completion, not from the time work commenced. That damage control "clarification" was far afield from the commonly understood meaning of the term "build out," and it certainly doesn't erase Mr. Ratner's candor about the timeline when speaking at Citigroup's 2007 CEO Conference. It is impossible to believe the construction schedule in the FEIS when FCRC's parent company's CEO has substantially and realistically contradicted it.

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12 In fact ESDC fails to mention that Mr. Ratner then went on to explain his prediction as follows: "We're very good at estimating markets, we're very good at estimating rents, at estimating lease-ups, and estimating costs. We are terrible, and we've been a developer for 50 years, on these big multi-use, public private urban developments, to be able to predict when it will go from idea to reality. All we know is that if we pick the right place and we're in with the right people, that over time we're going to create tremendous value."
See Presentation at the Citigroup 2007 Global Property CEO Conference, www.atlanticyardsreport.blogspot.com/2007/03/cleveland-ratner-offers-timeline_08.html .

As for Mr. Olin's comments that the project would probably take 20 years to build, ESDC basically denigrates him as a laymen who has no idea what he is talking about when it comes to construction scheduling. In stark contrast is this profile excerpt of Mr. Olin on FCRC's Project website:[13]

> "Laurie Olin, who is designing the publicly accessible open space at Atlantic Yards, has directed some of the most extraordinary transformations of the human environment in the last several decades, including Bryant Park and Battery Park in New York City and Canary Wharf in London. His firm, Olin Partnership, is an internationally acclaimed, award-winning landscape architecture and urban design firm dedicated to creating artistic, sensitive and timeless environments.

Mr. Olin is a professional, partnering with FCRC and Project architect Frank Gehry, who clearly knows of what he speaks, through expertise and experience.

Combine the foregoing statements by representatives of the developer with the fact that, even at the time that the FEIS was certified, the developer was already behind this "reasonable construction schedule", the lower court should have conducted a hearing into the legitimacy of the timetable, and whether ESDC had mistakenly, or intentionally, misrepresented the Build Years to make it more likely that those in authority would not object.

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13 *See* www.atlanticyards.com/html/ay/olin.html.

ESDC's selection of build years for purposes of the EIS plainly had no rational basis.

POINT V: ESDC's CATEGORICAL EXCLUSION OF TERRORISM-RELATED ENVIRONMENTAL IMPACTS FROM THE EIS VIOLATED SEQRA

Given the high profile and inherent attractiveness of the Project as a potential target for terrorists, and the extensive efforts already undertaken by FCRC to study the issue and identify mitigation measures, ESDC should have addressed the potential terrorism-related impacts and mitigation measures in the EIS. SEQRA and its implementing regulations define environmental impacts and the scope of an EIS broadly enough to include discussion of terrorism in these circumstances, and ESDC's interpretation of SEQRA to categorically exclude terrorism-related impacts from the EIS in this case was wrong.

A. ESDC Cannot Preclude the Court from Considering Appellants' Arguments by Manufacturing "Procedural Roadblocks"

ESDC complains that Appellants' arguments on appeal are not identical to the arguments articulated before the Court below, and, on that basis, contends that this Court should not consider them. (*See* ESDC Brf. at 72-76.) But that is not a valid basis for avoiding consideration of the merits

of Appellants' arguments, because a party is not barred from raising an argument on appeal as long as the argument is supported by facts already in the record. *See DeRosa v. Chase Manhattan Mortgage Corp.*, 10 A.D.3d 317, 319 (1st Dep't 2004) (citing exemplar cases).

Appellants do not raise any new facts or legal issues on appeal. "Where, as here, a party does not allege new facts but, rather, raises an 'argument which appeared upon the face of the record and which could not have been avoided . . . if brought to [the opposing party's] attention at the proper juncture', the matter is reviewable." *Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205 (1st Dep't 1996) (City not barred from arguing raising new, inconsistent legal argument regarding issue already addressed in motion court), quoting *Gerdowsky v. Crain's New York Business*, 188 A.D.2d 93, 97 (1st Dep't 1993) (punctuation and omission in original). *Cf. Atlantic Mutual Ins. co. v. Goglia*, 44 A.D.3d 558, 562 (1st Dep't 2007) (party barred from raising common-law choice-of-law argument for first time on appeal).

Relying on briefs submitted to the Court below, which are not in the record on appeal, ESDC contends that Appellants based their argument below only on section 617.9(b)(6) of the SEQRA regulations, and therefore

should be barred from arguing on appeal that section 617.9(b)(5)(iii) encompasses the terrorism-related environmental impacts which Appellants contend ESDC was required to address in the EIS. But, as Justice Madden noted, Appellants acknowledged the limited scope of section 617.9(b)(6), and did not argue that its language supports their position. (R. 54a) Although Justice Madden focused her analysis on that section of the SEQRA regulations, Appellants argued below, as they do on appeal, that the SEQRA statutes and regulations as a whole support them.

In any event, Respondents' argument that the omission of an explicit reference to terrorism from section 617.9(6) precludes interpreting section 617.9(b)(5)(iii) to include impacts related to terrorism, has no merit. Section 617.9(b)(6), by its express language, pertains only to impacts with respect to which information is unavailable, and does not limit the scope of section 617.9(b)(5)(iii) with respect impacts for which substantial information has already been obtained, which is the case here. Rather than address that point, discussed fully in Appellants' initial appeal brief, Respondents have chosen simply to ignore it.[14]

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[14] Respondents do rebut Appellants' attempt to distinguish the facts of *Municipal Art Society of New York, Inc. v. New York State Convention Ctr. Dev. Corp.*, 2007 N.Y. Misc. LEXIS 3701, 237 N.Y.L.J. 103 (Sup. Ct. N.Y. Co. May 21, 2007), by citing to

ESDC twists an excerpt of Justice Madden's opinion out of context to argue that Appellants somehow "abandoned" the argument that the FEIS should address the environmental impacts of a terrorist attack. (ESDC Brf. at 75) Justice Madden noted in her opinion that, in response to Respondents' arguments that sensitive security information should not be disclosed to the public, Appellants "are 'asking for the same level of detail' provided in" other EISs cited as examples by Appellants. (R. 55a) Appellants did not limit the scope of the impacts that should be disclosed, and Justice Madden did not state so in her opinion.

B. The "Rule of Reason" Does Not Apply to ESDC's Interpretation of SEQRA

New York law is clear that ESDC's interpretation of SEQRA to exclude environmental impacts related to "intervening criminal acts of terrorists" is subject to *de novo* review by this Court. *See* Appellants' Brf. at 30-31. ESDC's reliance on the "rule of reason" to shield its decision from *de novo* review is misplaced, because the "rule of reason" governs the degree of detail with which the various factors encompassed in an

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affidavits apparently submitted to the court in that case describing security analyses that were not referenced in the unpublished decision. (*See* FCRC Brf. at 14; ESDC Brf. at 87-88.) As already stated by Appellants, however, Justice Stallman focused only on section 617.9(b)(6), as did Justice Madden.

environmental review must be addressed – not whether a category of environmental impacts falls under SEQRA in the first place. None of the cases cited by ESDC on that issue states differently. *See* ESDC Brf. at 77.

Specifically, in *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986), the UDC had not only explicitly acknowledged and discussed the project's impact on elderly residents in the FEIS, but had also identified and endorsed specific mitigation measures, and the petitioners contended that UDC had not given the issue sufficient attention. *See* 67 N.Y.2d at 419. Likewise, in both *Akpan v. Koch*, 152 A.D.2d 113, 119 (1st Dep't 1989), *aff'd*, 75 N.Y.2d 561 (1990), and *Aldrich v. Pattison*, 107 A.D.2d 258 (2d Dep't 1985), the question before the court was whether an agency had taken the requisite "hard look" at issues already addressed in its environmental review. Therefore, in each of those cases the court reviewed the agency's determination under the "rule of reason".

The issue herein is more akin to that in *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359 (1986), in which the petitioners objected to the City's negative declaration under SEQRA because the City had failed to address at all the issue of whether the project would accelerate displacement of low-income residents through gentrification or otherwise

alter the character of the community. The Court of Appeals showed no deference to the City's determination to ignore those impacts, because it was based on statutory and regulatory interpretation. *See id.* at 365 ("we note that there is no basis here to rely on any special expertise of the agency since all that is involved is the proper interpretation of statutory language.")[15]

Here, while ESDC tries to portray its decision to exclude terrorism-related impacts from the FEIS as a reasoned determination that terrorism was not a "reasonable worst-case scenario" for the Project, it acknowledges that it based that decision on its own interpretation of SEQRA to exclude "impacts that are occasioned by something wholly distinct from the agency action, like the intervening criminal acts of terrorists". ESDC Brf. at 80, 82. Like the City's argument in *Chinese Staff and Workers*, ESDC's determination involves the proper interpretation of statutory language, and, as such, there is no basis to show any deference to ESDC.

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[15] In *Chinese Staff and Workers*, the City argued that the scope of "environment" as defined in the SEQRA regulations was limited to direct physical impacts of a project – such as, for example, if a project altered existing population patterns or altered the community's character by directly displacing low-income residents or businesses – and excluded the potential "social or economic" impacts on the surrounding community identified by the petitioners. *See* 68 N.Y.2d at 366. The Court found that "population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any physical impact on the environment", and annulled the City's negative declaration. *Id.*

C. Respondents Mischaracterize the Issue, Presenting a False Choice Between Public Participation in the Environmental Review Process and Legitimate Security Concerns

Respondents exaggerate and misrepresent the nature and extent of the discussion of terrorism-related environmental impacts the EIS would need to include in order to provide sufficient disclosure for public involvement in the planning process. Although Respondents imply otherwise, Appellants have never demanded that ESDC publish sensitive security information about the Project.

ESDC directs a particularly hyperbolic attack on Appellants' expert Professor Norman Groner, Ph.D, suggesting that his advocacy of addressing terrorism issues in the EIS is tantamount to demanding that ESDC "spoon-feed potential terrorists with the information they need to plan their crimes". (ESDC Brf. at 89) ESDC should know that it is possible to discuss a project's security vulnerabilities and mitigation measures in an EIS, as Prof. Groner advocates, without compromising security, because its own environmental consultant, AKRF, has done so in EISs for other projects.

For example, Prof. Groner asserted that "[t]he EIS should have analyzed threats posed by forced entry, covert entry, ballistics, explosions, chemical, biological and radiological weapons." (R. 241a) This is

consistent with the GEIS for the World Trade Center Memorial and Redevelopment Plan which identified "[e]xplosive event threats delivered by vehicles and/or persons", firearms, and airborne and water contaminants, among other security threats. (R. 22884) The GEIS then discussed specific mitigation measures, such as "ultrafiltration" of indoor air to protect against chemical or biological attack, vehicular screening, reinforced building cores, separate normal and reserve power systems for each building with automatic transfer switches, an internal antenna system for communications among emergency responders, smoke purge and filtration systems, stairway pressurization systems for areas more than 75 feet above grade, redundant egress paths, and "refuge space" on stair landings for wheelchairs. (R. 22882-22886) The GEIS also discussed ongoing examination of evacuation, emergency responses procedures, and threat mitigation, including a study of probable factors contributing to the collapse of the Twin Towers and the related evacuation and emergency response experience, in order to provide guidance to the project design and operations. (R. 22884-22885)

While explicitly declining to discuss certain security measures, the GEIS still provided enough information for meaningful public comment and

input. Respondents cannot credibly deny that many aspects of terrorism-related environmental impacts and mitigation measures can be addressed publicly without compromising security.

FCRC criticizes Appellants' point that the Barclays Center Arena has the same 20-foot setback from the street that prompted street closures around the Prudential Arena in Newark, contending there is no evidence that similar "operational protocols" will be required for the Barclays Center Arena that might have environmental impacts not addressed in the EIS. (FCRC Brf. at 16) Tellingly, neither FCRC nor ESDC actually asserts that they are not considering the same security measures for the Barclays Center Arena that have already been deemed necessary in Newark, and to the extent there may be insufficient evidence in the record of the likely environmental impacts of "operational protocols" in Brooklyn, it is because ESDC has purposely excluded that entire category of environmental impacts from its environmental review of the Project. Given that closing adjacent blocks of Flatbush and Atlantic Avenues during arena events cannot be done in secret, Respondents can hardly argue that addressing that impact in the EIS would compromise security.

D. The Record Plainly Establishes That FCRC Has Recognized and Studied the Substantial Risk of Terrorism to the Project

None of Respondents actually posits an affirmative argument that FCRC did not recognize that the risk of terrorism to the Project is substantial and real. Nevertheless, ESDC disingenuously argues that that one should not reach that conclusion based on the record on appeal. ESDC's argument is not credible, as the extensive efforts undertaken to study terrorism risk and mitigation measures described in Jeffrey Ventner's affidavit speak for themselves. (R. 884a-893a)

ESDC misleadingly suggests that one can 'reasonably infer' from Mr. Ventner's affidavit that similar security assessments and plans are routinely drawn up for "ordinary office buildings and shopping centers."[16] (ESDC Brf. at 84) The only projects Mr. Ventner avers his firm has done similar work for that one might arguably describe as "office buildings and shopping centers" are high-profile targets such as the Freedom Tower, and other buildings at the World Trade Center site; the Time Warner Center at Columbus Circle; the MetLife Tower (formerly the PanAm Building)

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[16] Notably, FCRC does not attempt to claim that a TARA is routinely made for ordinary buildings, but argues that its efforts "reflect prudent planning" appropriate for "any large scale development in New York City." (FCRC Brf. at 16)

adjacent to Grand Central Terminal; the Renaissance Plaza in Brooklyn, which includes the "highly secure Brooklyn District Attorney's offices, a Marriot Hotel, and several levels of parking"; Metrotech in Brooklyn, which includes the "extremely secure space occupied by the Brooklyn Supreme and Family Courts"; and the 60-story Bank of America headquarters near Times Square. (R. 886a-887a) None of those projects is an "ordinary" office building or shopping center.

ESDC's overwrought warning that a decision by this Court in favor of Appellants on this issue "would apply equally to any kind of real estate development constructed by a prudent developer" is baseless. (ESDC Brf. at 85) There is nothing in the record to suggest that TARAs are routinely found to be warranted or performed for "ordinary" developments of "any kind". Where the risk of terrorism to projects subject to SEQRA is high enough to warrant substantial study and analysis, however, the associated environmental risks and mitigation measures should be addressed in the EIS. This does not present any undue burden on the agency preparing the EIS, because the information is already available.

ESDC and its lawyers may feel comfortable disparaging Appellants' terrorism concerns as "alarmist" (ESDC Brf. at 83), but, unlike them,

Appellants' constituents will actually live in the shadows of the Project's Barclays Center Arena and skyscrapers in Brooklyn. The 18,000-seat arena by itself presents a target for terrorists, and the major underground transit hub over which the arena and other portions of the Project will be built has already been the intended target of a thwarted terrorist bombing in 1997. (AR 15293-96) These issues are "reasonably related" environmental impacts of the Project and are of great interest to the public, and should be addressed in the EIS.

POINT VI: THE PACB'S ABSOLUTE DISCRETION RENDERS ITS APPROVALS ACTIONS UNDER SEQRA VOID

Respondents, particularly the PACB, continue to insist that the PACB is implicitly exempt from SEQRA, despite the fact that PACB's approval of ESDC's projects is inherently discretionary. PACB's primary rationale for ignoring its obligations under SEQRA is that it has never adhered to SEQRA and that its enabling legislation makes no mention of environmental concerns. PACB glosses over the fact that agencies seeking approval for their funding decisions, and the applicants who are the recipients of that funding, cannot force approval simply upon demonstration of meeting unspecified financial criteria. Since SEQRA requires all agencies to incorporate environmental considerations into their decision-making, and the

Legislature has not provided a specific exemption, then PACB must comply SEQRA, despite its failure to do so in the past.

PACB relies heavily upon the decision in *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993) for its argument that its approval of projects is essentially ministerial and any discretion it has is limited to financial issues. However, the PACB and the court below read *Gavalas* far too narrowly. While the Court in *Gavalas* did note that the distinction between discretionary and ministerial approvals is not mechanical, it also stated that the issue rested upon whether information derived from an EIS can affect the decision and whether the agency's "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." *Gravalas,* 81 N.Y.2d at 326. Implicit in that reasoning is that the agency must approve or deny the application and that an applicant has the right to the approval having met the applicable statutory requirements necessary for the agency's approval. *Gravalas*, concerned the issuing of a building permit. The discretion was very constrained and the applicant had a right to demand the permit. Where the agency has broader discretion, and the applicant cannot force the approval, it must be an action under SEQRA.

Respondents understate PACB's role, by downplaying the nature of PACB's authority. While agencies cannot commit to a project unless first obtaining PACB approval, the PACB itself "may 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]. Its approval is inherently discretionary and cannot be mandated.

That point is made in Appellants' initial brief and has been ignored by all of the Respondents and not addressed by Justice Madden. While it is recognized that approval requires the unanimous vote of the voting members of the PACB, Respondents do not explain how if the PACB's considerations are so narrowly constrained, why an applicant could not force an approval if it demonstrates the necessary commitment of funds.

The PACB ignores the Legislature's mandate that all agencies act as stewards to protect the environment. ECL § 8-0105(8). It conducts its affairs with a conscious disregard for its obligations. As discussed in Appellant's brief, the decision not to approve the stadium for the Jets, demonstrated the discretionary authority of the board members. When Sheldon Silver directed his representative not to vote to approve the project

he acted, as he stated, out of concerns about the impacts of the project. The fact that the Chair deemed a board member's questions regarding the project's impacts is not germane. The Chair had already determined that it was going to ignore environmental issues. That a member was asking questions demonstrates that as a Board it has a duty to consider environmental issues before granting its approval, as mandated by SEQRA.

The PACB's legal obligations, governing how it must conduct its business, are not limited to the criteria, as set forth in Sec 51 of the Public Authorities Law. Numerous statutes governing activities must be read in conjunction with other statutes affecting how those activities must be undertaken. While no specific references are included in the Public Authorities Law, the PACB is still subject to the requirements of the Open Meetings Law, the Freedom of Information Law , and the Administrative Procedures Act. In the same manner, SEQRA is a gloss upon all agencies, requiring them to follow its procedures to consider environmental impacts before acting.

The PACB is not the only agency that lacks, in its enabling legislation, references to environmental considerations. Other agencies have stated purposes and powers that omit such references, but comply with

SEQRA in taking actions. The Dormitory Authority of the State of New York has a broad range of powers to issue bonds and financing for projects in the state. However there is no reference to the environment in Public Authorities Law Sec. 1678, "Powers and Duties". Nevertheless, there is no question that DASNY's decision to issue bonds (PAL §1678(11)) are actions subject to SEQRA. *27th Street Block Ass'n v. Dormitory Authority of the State of New York*, 302 A.D.2d 155 (1st, Dep't 2002).

The New York State Department of Transportation has wide-ranging powers and duties, including the right to sell or lease land. Highway Law §10(38). That grant of authority by the legislature does not mention the environment, however there is no question that when DOT acts under that statute, it must comply with SEQRA. *Crown Communication* v *Department of Transportation*, 4 N.Y.3d 159 (2005).

The foregoing are examples where the agencies do not have specific obligations to consider the environment nor to comply with SEQRA. It is simply recognized that SEQRA applies to *all* agencies taking discretionary actions. Where there is discretion in undertaking the action, and the

outcome is not predetermined by compliance with objective factors, then SEQRA applies.[17]

PACB also relies upon *New York Public Interest Research Group, Inc. v. PAC*, Index No. 6944-97 (Sup. Ct. Albany Co., Sept. 10, 1998), an unreported case that in *dicta* states that based upon *Incorporated Village of Atlantic Beach v. Gavalas*, *supra*, that PACB is not subject to SEQRA. The issue in *NYPIRG* was whether PACB's approval of the financing and acquisition of LILCO by the Long Island Power Authority (LIPA) was subject to SEQRA. The court found that since the Legislature explicitly exempted all aspects of LIPA's acquisition of LILCO from SEQRA, (Public Authorities Law §1020-s(2)), that exemption also applied to PACB's approval of LIPA's action. After holding that the PACB review was statutorily exempt from SEQRA, the court added as *dicta* a reference that PACB's review was so constrained that it was not subject to SEQRA, citing *Gavalas*. *NYPIRG* is limited to its unique circumstance where the Legislature made clear its intent and is not a controlling or persuasive

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[17] PACB argues that it has never been a Lead Agency under SEQRA and does not have the staff to comply. Appellants do not claim that PACB should be Lead Agency, or that there would likely ever be a situation where it would assume that role. However, it must review the FEIS that exist for projects before it and issue its own Findings that the project satisfies the SEQRA requirements.

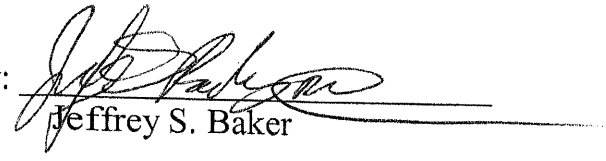
authority. Justice Madden did not cite it has having any bearing on her decision.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellants prior papers, 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.

Dated: August 22, 2008

YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC

By: 
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