



by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, and of areas reasonably accessible thereto[,] ... [to provide] educational, recreational and cultural facilities, and ... [to] encourage[] ... participation in these programs by private enterprise.

Urban Development Corporation Act (“UDC Act”) § 2, codified at McKinney’s Unconsolidated Laws of New York (“Unconsol. L.”) § 6252.

3. ESDC has authority under the UDC Act to adopt and approve various types of projects, including a “land use improvement project” and a “civic project.” UDC Act § 10(c) and (d), Unconsol. L. § 6260(c)–(d).

4. ESDC is directed to pursue its statutory mission by “encouraging maximum participation by the private sector of the economy, including the sale or lease of ... [ESDC’s] interest in projects at the earliest time deemed feasible.” UDC Act § 2, Unconsol. L. § 6252.

5. ESDC has been involved in the development of numerous successful land use improvement projects. Recent ESDC projects in New York City include: the 42<sup>nd</sup> Street Development Land Use Improvement Project, involving the construction of more than 8 million square feet of office, retail, hotel and entertainment space in the Times Square neighborhood of Manhattan, and the Hunters Point (Queens West) Waterfront Development Land Use Improvement Project, involving the construction of a 9 million-square-foot development along the East River in Queens.

6. ESDC has also been involved in the development or improvement of numerous sports facilities statewide, including the new Yankees and Mets stadiums currently under construction, the Ralph Wilson Stadium (home of the Buffalo Bills), and an arena for the Buffalo Sabres of the National Hockey League. Each of these sports facility projects was adopted and approved by ESDC as a civic project under the UDC Act.

7. The project at issue in this proceeding is the Atlantic Yards Land Use Improvement and Civic Project, which is also referred to as the Atlantic Yards Arena and Redevelopment Project (hereinafter, the “Project” or “Atlantic Yards Project”).

8. On December 8, 2006, ESDC adopted and approved the Project as both a land use improvement project and a civic project under the UDC Act. Administrative Record (“AR”) at 19929–31.

### **Initiation of Preliminary Planning**

9. When a development project in New York City or New York State is proposed as a public-private undertaking, it becomes subject to scrutiny by the City and State. For the Atlantic Yards Project to go forward, numerous government actions would be required, including funding from the City of New York (the “City”) and State, adoption of a General Project Plan (“GPP”) pursuant to the UDC Act by ESDC, condemnation by ESDC of certain properties at the proposed project site, and disposition by the Metropolitan Transportation Authority (“MTA”) of certain property interests at the proposed project site. The Project would therefore be subject to three separate governmental reviews: (a) the process for adopting a GPP under the UDC Act, (b) the condemnation process under the Eminent Domain Procedure Law (“EDPL”) and (c) the environmental review process under the State Environmental Quality Review Act (“SEQRA”), which is codified at Article 8 of the Environmental Conservation Law (“ECL”).

10. Each of these review processes provides for significant public participation. Before it is feasible to proceed with the review processes, however, projects of the magnitude of the Atlantic Yards Project require extensive preliminary planning and discussions

to define the proposed project to the point where plans are sufficient to allow effective consideration of all of its facets and environmental impacts.

11. For example, one of the first steps in the SEQRA review process is to release a draft scoping document to the public. *See* 6 N.Y.C.R.R. § 617.8. The draft scope describes the project and the analysis areas to be studied in the environmental impact statement (“EIS”). *Id.* § 617.8(f). As is evident from the SEQRA regulations and draft scope for the Atlantic Yards Project (AR 22707–47), such a document cannot be prepared until there is a considerable amount of information about the proposed size, location, programming and other aspects of a proposed project.

12. In addition, with respect to projects such as the Atlantic Yards Project, it is common for the developer – in this case, Forest City Ratner Companies and its affiliates (collectively, “FCRC”) – to reimburse ESDC for the cost of the various studies that ESDC must prepare to determine whether the project should be approved, modified or disapproved.

13. Thus, even prior to releasing a draft scoping document to the public under SEQRA, it is necessary for ESDC, other public agencies and the developer to engage in preliminary planning, which often necessitates the execution of letter agreements or memoranda of understanding so as to ensure that the developer reimburses ESDC for the planning costs. These documents are “non-binding” in that they do not in any way obligate ESDC to approve the project. Such documents were executed in connection with the Atlantic Yards Project, as described below.

**Letter dated February 18, 2004**

14. On February 18, 2004, James P. Stuckey, an Executive Vice President at FCRC, sent a letter (the “February 2004 Letter”) to Charles Gargano, the Chairman of ESDC,

setting forth the agreement of FCRC to pay “certain costs incurred by ... [ESDC] with respect to the proposed Atlantic Yards – Brooklyn Arena Mixed-Use Development Project.” AR 22748–54.

15. In the February 2004 Letter, FCRC agreed to pay the costs incurred by ESDC with respect to a “Scope of Work” comprising services to be performed in connection with the proposed Project. These included services to be provided to ESDC by (a) environmental consultants; (b) environmental, real estate and condemnation counsel; (c) appraisers with respect to the proposed condemnation; and (d) other consultants as necessary or appropriate to facilitate the proposed condemnation. AR 22748–49 (February 2004 Letter at 1–2).

16. The February 2004 Letter made clear that it did not constitute ESDC’s approval of the Project, did not commit ESDC to approving the Project in the future and did not even commit ESDC to completing the review process. It provided that “[n]otwithstanding this Letter, the parties hereto recognize and agree that ESD[C] shall have no obligation to commence, continue or conclude the Scope of Work.” AR 22750 (February 2004 Letter at 3). It also provided that FCRC “hereby agrees and acknowledges that ESD[C] ... shall not be deemed to have approved any FCR[C] proposal concerning the Project until, and only if, such approval is set forth in writing by ESD[C] and approved by the Board of Directors of ESD[C] and by any other required public authorities.” AR 22751 (February 2004 Letter at 4). Finally, FCRC acknowledged in the letter that ESDC “has not made any representations whatsoever ... concerning the: (i) outcome of the Scope of Work; or (ii) approval of any FCR[C] proposal concerning the Project by the Board of Directors of ESD[C] or by any other required public authorities....” *Id.*

17. The terms of the February 2004 Letter were agreed to and accepted by Kevin S. Corbett, Chief Operating Officer of ESDC, on February 25, 2004. AR 22752 (February 2004 Letter at 5).

**Arena Development Project MOU dated February 18, 2005**

18. On February 18, 2005, ESDC entered into a Memorandum of Understanding (the “Arena Development Project MOU”) regarding the proposed Project with the City, the New York City Economic Development Corporation (“NYCEDC”) and FCRC. AR 22303–25.

19. The Arena Development Project MOU concerned a proposed project site which included the entirety of Blocks 1118, 1119, 1120, 1121, 1127 and 1129 and eight lots on Block 1128 and three streetbed segments. AR 22303, 22315 (Arena Development Project MOU at 1 and Exh. A-1).

20. Among other things, the Arena Development Project MOU stated that subject to review and acceptance by ESDC, the City and NYCEDC of FCRC’s draft development plan, and in accordance with all statutory requirements, it was the intention of ESDC staff to seek certain approvals with respect to the proposed project, including a determination that ESDC should act as “lead agency” under SEQRA and the determinations that would be required for the proposed project under the UDC Act. AR 20305 (Arena Development Project MOU at 3).

21. The Arena Development Project MOU provided that ESDC, the City and NYCEDC would cooperate with FCRC to take the actions required to implement the Project only “[u]pon . . . completion of the SEQR[A] process.” *Id.* In addition, the Arena Development Project MOU provided that:

It is understood and agreed that the actions and approvals contemplated herein are subject to all applicable legal requirements, which may include, without limitation, compliance with, among others, the State Environmental Quality Review Act, the New York State Urban Development Corporation Act, the Eminent Domain Procedures Law.

AR 20310 (Arena Development Project MOU at 8).

22. The Arena Development MOU also provided that “[w]hether the transaction described herein shall be consummated or not,” FCRC would be required to bear all costs incurred by ESDC, the City and NYCEDC to prepare the environmental analysis required under SEQRA, legal fees, costs associated with the condemnation process and other related costs. *Id.* The document stated that “this MOU is non-binding and does not create or give rise to any legally enforceable rights or legally enforceable obligations or liabilities of any kind on the part of any party hereto [with the exception of the provision requiring FCRC to pay the agencies’ costs].” AR 20310–11 (Arena Development Project MOU at 8-9). Finally, it provided that it would be “terminable at will by the Public Parties [*i.e.*, ESDC, the City or NYCEDC], or FCRC upon 30 days written notice.” AR 20311 (Arena Development Project MOU at 8-9).

**ATURA Development Project MOU dated February 18, 2005**

23. On February 18, 2005, ESDC also entered into a Memorandum of Understanding (the “ATURA Development Project MOU”) with the City, NYCEDC and FCRC. AR 20296–302. ATURA refers to the Atlantic Terminal Urban Renewal Area.

24. The ATURA Development Project MOU concerned a project defined as “the design, development and construction of a mixed-use development consisting of residential development, commercial office space, and retail space” using the unused developments rights attributable to the Atlantic Center site on the north side of Atlantic Avenue (Block 2002, Lot 1) and Site 5 on the south side of Atlantic Avenue (consisting of the entirety of Block 927,

excluding the Brooklyn Bear's Pacific Street Community Garden on the eastern portion of the block). AR 20296.

25. Among other things, the ATURA Development Project MOU stated that, provided that FCRC proceeded with all necessary agreements with respect to the arena and the relocation of the New Jersey Nets to Brooklyn and the associated mixed-use development, as described in the Arena Development Plan MOU, ESDC staff would seek certain approvals with respect to the ATURA Development Project, including a determination that ESDC should act as "lead agency" under SEQRA and the determinations that would be required for the project under the UDC Act. AR 20297 (ATURA Development Project MOU at 2).

26. The ATURA Development Project MOU provided that:

The parties acknowledge that ESDC's participation in the project is conditioned upon the implementation of the Arena Development Project and all applicable legal requirements including compliance with, among others, the State Environmental Quality Review Act, the New York State Urban Development Corporation Act, [and] the Eminent Domain Procedures Law.

AR 20299 (ATURA Development Project MOU at 4).

27. The ATURA Development Project MOU also provided that "[w]hether the transaction described herein shall be consummated or not," FCRC would be required to bear all costs incurred by ESDC, the City and NYCEDC to prepare the environmental analysis required under SEQRA, legal fees, costs associated with the condemnation process and other related costs. *Id.* The document stated that "this MOU is non-binding and does not create or give rise to any legally enforceable rights or legally enforceable obligations or liabilities of any kind on the part of any party hereto [with the exception of the provision requiring FCRC to pay the agencies' costs]." *Id.* Finally, it provided that it would be "terminable at will by the Public Parties [*i.e.*, ESDC, the City or NYCEDC] or FCRC upon 30 days written notice." *Id.*

28. Ultimately, neither the Arena Development Project MOU nor the ATURA Development Project MOU was implemented in the manner described in those documents. Instead, the two ideas were combined into one project by adding Site 5 (excluding the community garden) to the Atlantic Yards Project that is the subject of this proceeding.

#### **Scoping Process and Coordinated Review Under SEQRA**

29. Pursuant to the requirements of SEQRA, ESDC developed a draft scope of analysis (the “Draft Scope”) and initiated a coordinated review of the proposed project.

30. On September 16, 2005, ESDC issued a Notice of Public Scoping and Intent to Prepare a Draft EIS (the “Public Scoping Notice”) and a Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement (the “Combined Notice,” together, with the Public Scoping Notice, the “Scoping Notices”). AR 20330–31, 20326–29.

31. In the Scoping Notices, ESDC announced its intent to serve as “lead agency” for the proposed Project under SEQRA. AR 20326, 20330; *see also* 6 N.Y.C.R.R. § 617.6 (procedure for establishing lead agency).

32. In the Combined Notice, ESDC also determined that the Project could have the potential to result in significant adverse environmental impacts and issued a Positive Declaration, constituting ESDC’s determination that a draft EIS would be prepared. AR 20327–28.

33. In the Scoping Notices, ESDC also announced the availability of the Draft Scope. AR 20328, 20331. The Draft Scope was posted on ESDC’s web site and widely distributed to public officials and agencies and other interested parties.

34. Finally, in the Scoping Notices, ESDC provided notice of the public scoping meeting scheduled for October 18, 2005, at the New York City College of Technology in Brooklyn, and advised that written comments on the Draft Scope would be accepted until October 28, 2005. AR 20328, 20331.

35. The Public Scoping Notice was published in the *Environmental Notice Bulletin* on September 21, 2005; the *City Record* from September 16 to September 19, 2005; and the *New York Daily News*, the *Brooklyn Daily Eagle* and the *Brooklyn Daily Challenge* on September 16, 2005. AR 20332-39.

36. In accordance with SEQRA requirements, the Combined Notice was sent to a number of parties, including all anticipated involved agencies, and was accompanied by Parts 1 and 2 of the Full Environmental Assessment Form (“EAF”), the Draft Scope and a reply form. In the Combined Notice, ESDC requested that agencies use the reply form to indicate whether they consented to ESDC’s serving as lead agency. As provided for in the SEQRA regulations (6 N.Y.C.R.R. § 617.6(b)(3)(i)), ESDC advised the agencies that if no objections were made within thirty days from the mailing of the Combined Notice, it would be assumed that the agencies concurred that ESDC serve as lead agency. AR 20328-29.

37. ESDC received no objections to its proposal to serve as lead agency. As contemplated by the SEQRA regulations, ESDC worked closely with the other involved agencies throughout the SEQRA review process.

38. In particular, MTA (and its constituent agencies, the Long Island Rail Road (“LIRR”) and MTA New York City Transit (“MTA-NYCT”)) and the City (through the Mayor’s Office of Economic Development and Rebuilding, the Department of City Planning and

the Department of Transportation (“DOT”)) participated extensively in the SEQRA review of the Project.

39. In addition, a number of other State and City agencies were consulted in the environmental review, including the New York State Office of Parks, Recreation and Historic Preservation (“OPRHP”), the New York City Landmarks Preservation Commission (“LPC”), the New York City Fire Department (“FDNY”), the New York City Department of Environmental Protection (“DEP”), the New York City Police Department (“NYPD”), the School Construction Authority, the Department of Education, and the New York City Department of Parks and Recreation.

#### **Public Participation in the Scoping Process**

40. The public scoping meeting that took place on October 18, 2005 was well attended. Eighty-five people gave oral comments.

41. The scoping comment period closed on October 28, 2005. More than 150 written comments were submitted, many of which were quite detailed.

42. Over the course of the next several months, ESDC reviewed and considered all comments on the Draft Scope and made significant changes to the scope in response to those comments. In particular, ESDC expanded the primary study area for land use, zoning and public policy impacts from ¼-mile to ½-mile around the project site; expanded the urban design and visual resources study area to include major view corridors; expanded the traffic study area to 93 intersections from approximately 65 intersections; added a quantitative analysis of on-street parking within ¼-mile of the project site; added a discussion of bicycle facilities in the vicinity of the project site; added a weekend post-game peak hour analysis to the transportation analyses; and added the consideration of lower-density alternatives such as the

