



**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	v
INDEX TO ADMINISTRATIVE RECORD .....	ix
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	6
STATUTORY FRAMEWORK.....	6
A. The UDCA .....	6
B. SEQRA .....	8
C. The EDPL .....	9
POINT I   ESDC COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF THE UDCA .....	10
A. ESDC Complied With the UDCA Public Comment Procedures, Including the Requirement to Have a 30-Day Public Comment Period After the Public Hearing. ....	11
1. ESDC’s Decision to Allow the Submission of Oral Comments, as Well as Written Comments, During the 30-Day Public Comment Period Did Not Require ESDC to Extend the 30-Day Period. ....	11
2. ESDC Satisfied – and Even Exceeded – the Public Review Requirements of the UDCA.....	12
3. The Post-Hearing Comment Period Provided by ESDC Satisfied the Statutory Intent of the UDC Act, and Petitioners Suffered No Prejudice. ....	16
B. Petitioners’ Contention That ESDC Failed To “Allow Meaningful Advice” From The Community Advisory Committee Has No Basis In Law Or Fact. ....	18
1. ESDC Acted Reasonably in Organizing the CAC.....	18
2. ESDC Acted Reasonably in Forming the CAC When It Did. ....	21
3. ESDC Submitted Project Issues To, and Received Advice From, the CAC. ....	21

POINT II	ESDC MADE A RATIONAL DECISION THAT THE PROJECT IS A LAND USE IMPROVEMENT PROJECT.....	24
	A. ESDC’s Blight Determination Is Subject to A Highly Deferential Standard of Review.....	24
	B. ESDC’s Blight Determination is Supported By the Record.....	26
	C. The ATURA and Non-ATURA Blocks Do Not Exhibit Materially Different Blight Characteristics.....	27
	D. A Project May Be Designated A Land Use Improvement Project Even Though Certain Parcels or Buildings Within the Project Area Are Not Blighted.....	30
	E. Petitioners’ Predication That Substandard and Insanitary Conditions Might Improve in the Future Without ESDC Action Is Speculative and Irrelevant.....	33
	F. The Crime Statistics Do Not Establish that ESDC Erred in Its Assessment of the Non-ATURA Blocks as Blighted.....	34
POINT III	ESDC MADE A RATIONAL DECISION THAT THE PROJECT IS A CIVIC PROJECT.....	35
	A. The Court Should Give Deference to ESDC’s Determination that the Project is a Civic Project.....	36
	B. ESDC’s Determination that the Arena Supports the Civic Nature of the Project was Based on a Rational Application of the Statutory Provisions Governing Civic Projects to the Facts in this Case.....	37
	1. The UDCA Contemplates Maximum Commercial Participation in All ESDC Projects.....	41
	2. Petitioners Misinterpret the 1993 Session Law.....	42
	3. ESDC Found that the Project will Serve Numerous Civic Purposes other than those Associated with the Arena.....	43
POINT IV	ESDC COMPLIED WITH SEQRA.....	46
	A. ESDC Satisfied SEQRA’s Procedural Requirements.....	48
	1. ESDC Commenced Its SEQRA Review At the Appropriate Time.....	48
	2. ESDC Properly Declared Itself Lead Agency.....	50
	3. ESDC Did Not Delegate Its “Hard Look” Obligation.....	51

4.	A Supplemental EIS Is Not Required to Study Wind.....	56
B.	ESDC’s Consideration of Terrorism Complied With SEQRA.....	59
1.	SEQRA Requires the EIS to Study the Reasonably Foreseeable Impacts of the Proposed Action, Not the Impacts of Criminal Activities. ....	59
2.	ESDC’s Decision Not to Include a Discussion of Terrorism in the EIS was the Product of Careful Consideration and the Exercise of Reasonable Discretion. ....	61
3.	The EIS for the Project Has Not Evaluated Terrorism to A Lesser Degree than the EISs Prepared in Connection with Other New York City Projects.....	63
4.	The Federal Caselaw Upon Which Petitioners Rely Is Inapplicable Here.....	65
C.	ESDC Took A Hard Look At All Potentially Significant Environmental Impacts.....	66
1.	Judicial Review Under SEQRA Is Highly Deferential.....	66
2.	ESDC Took the Requisite Hard Look at Each Issue Petitioners Have Raised In this Proceeding.....	70
POINT V	THE PACB WAS NOT REQUIRED TO MAKE FINDINGS UNDER SEQRA PRIOR TO APPROVING THE FINANCIAL ASPECTS OF THE PROJECT.....	93
A.	The Focus of PACB’s Inquiry Is Narrowly Circumscribed By PAL § 51 and Thus Not An Action For Purposes of SEQRA.....	97
B:	The Cases Upon Which Petitioners Rely Are Not to the Contrary.....	99
POINT VI	PETITIONERS’ MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED .....	102
A.	Petitioners Have No Likelihood of Success on the Merits of Their Claims. ....	103
B.	Petitioners Will Not Suffer Irreparable Harm.....	103
C.	The Balancing of the Equities Strongly Weighs Against Granting a Preliminary Injunction. ....	104
CONCLUSION.....		105

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>67 Vestry Tenants Association v. Raab</i> , 172 Misc. 2d 214 (Sup. Ct. N.Y. Co. 1997).....	96
<i>Aetna Insurance Co. v. Capasso</i> , 75 N.Y.2d 860 (1990).....	102
<i>Akpan v. Koch</i> , 75 N.Y.2d 561 (1990).....	66, 68, 69, 78
<i>Akpan v. Koch</i> , 152 A.D.2d 113 (1st Dep't 1989) .....	67, 83, 84
<i>Aldrich v. Pattison</i> , 107 A.D.2d 258 (2nd Dep't 1985) .....	67, 90
<i>American Chicle Co. v. State Tax Commission</i> , 11 A.D.2d 256 (3rd Dep't 1960).....	23
<i>In re Application of Committee to Preserve Brighton Beach v. Council of the City of New York</i> , 214 A.D.2d 335 (1st Dep't 1995) .....	71
<i>Barklee Realty Co. v. NYS Division of Housing and Community Renewal</i> , 159 A.D.2d 416 (1st Dep't 1990).....	36
<i>Berman v. Parker</i> , 348 U.S. 26 (1954) .....	31, 32
<i>Bronfman v. Flacke</i> , 127 A.D.2d 833 (2nd Dep't 1987).....	69
<i>Chemical Specialties Manufacturers Association v. Jorling</i> , 85 N.Y.2d 382 (1995).....	67
<i>C/S 12th Ave. LLC v. City of New York</i> , 32 A.D.3d 1, 6-7 (1st Dep't 2006) .....	66
<i>CitiNeighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commission</i> , 306 A.D.2d 113 (1st Dep't 2003).....	96
<i>Citizens for an Orderly Energy Policy v. Long Island Power Authority</i> , 78 N.Y.2d 398 (1991).....	49
<i>City of New York v. Plumbers Local Union No. 1</i> , 204 A.D.2d 183 (1st Dep't 1994).....	36
<i>Civil Service Employees Associate Inc. v. SUNY</i> , 280 A.D.2d 832 (3rd Dep't 2001) .....	37
<i>Coalition Against Lincoln West, Inc. v. City of New York</i> , 208 A.D.2d 472 (1st Dep't 1994), <i>aff'd</i> 86 N.Y.2d 123 (1995) .....	85
<i>Coalition Against Lincoln West, Inc. v. Weinshall</i> , 21 A.D.2d 215 (1st Dep't 2005).....	75

<i>Coca-Cola Bottling Co. v. Board of Estimate of the City of New York</i> , 72 N.Y.2d 674 (1988) .....	8, 51, 52
<i>Croton Watershed Clean Water Coalition Inc. v. Planning Board of Town of Southeast</i> , 5 Misc.3d 1010, 2004 WL 2480011 (N.Y. Sup. Ct. Westchester Co. 2004).....	57
<i>Current Audio, Inc. v. RCA Corp.</i> , 71 Misc.2d 831, 834 (Sup. Ct. N.Y. Co. 1972) .....	102
<i>Deane v. City of New York Department of Buildings</i> , 177 Misc.2d 687 (Sup. Ct. N.Y. Co. 1998) .....	102
<i>Develop Don't Destroy Brooklyn v. ESDC</i> , 31 A.D.3d 144, 146 (1st Dep't 2006).....	6, 27, 28
<i>Doe v. Axelrod</i> , 73 N.Y.2d 748 (1988) .....	102
<i>E.F.S. Ventures Corp. v. Foster</i> , 71 N.Y.2d 359 (1988).....	50
<i>East Thirteenth Street Community Association v. NYS UDC</i> , 189 A.D.2d 352 (1st Dep't 1993) .....	7
<i>Eaton v. New York City Conciliation and Appeals Board</i> , 56 N.Y.2d 340 (1982).....	42
<i>Eadie v. Town Bd. of Town of North Greenbush</i> , 7 N.Y.3d 306, 318 (2006).....	66
<i>Essex County v. Executive Department of the State of New York</i> , 172 A.D.2d 970 (3rd Dep't 1991) .....	50
<i>First Amended South Jamaica I, Urban Renewal Area, in Borough of Queens, City of New York</i> , 72 A.D.2d 582 (2nd Dep't 1979) .....	30
<i>Fisher v. Giuliani</i> , 280 A.D.2d 13 (1st Dep't 2001) .....	75
<i>Fix v. City of Rochester</i> , 50 Misc. 2d 660 (Sup. Ct. Monroe Co. 1966).....	31
<i>Flynn v. NYS UDC</i> , 154 A.D.2d 263 (1st Dep't 1989) .....	17
<i>G&amp;A Books, Inc. v. Stern</i> , 770 F.2d 288 (2d Cir. 1985).....	26
<i>Glen Head - Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay</i> , 88 A.D.2d 484 (2nd Dep't 1982) .....	100
<i>Golten Marine Co., Inc. v. New York State Department of Environmental Conservation</i> , 193 A.D.2d 742 (2nd Dep't 1993).....	100, 101
<i>Greenwich Citizens Committee v. Counties of Warren &amp; Washington IDA</i> , 164 A.D.2d 469 (3rd Dep't 1990) .....	13
<i>Halperin v. City of New Rochelle</i> , 24 A.D.3d 768, 774-75 (2d Dep't 2005) .....	51, 58

<i>Housing Justice Campaign v. Koch</i> , 164 A.D.2d 656 (1st Dep't 1991) .....	49, 50
<i>Howard v. Wyman</i> , 28 N.Y.2d 434 (1971) .....	36
<i>Hudson River Sloop Clearwater v. Cuomo</i> , 222 A.D.2d 386 (1st Dep't 1995) .....	49
<i>Incorporated Village of Atlantic Beach v. Gavalas</i> , 81 N.Y.2d 322 (1993).....	94, 95, 99
<i>Industrial Liaison Committee of the Niagara Falls Area Chamber of Commerce v. Williams</i> , 72 N.Y.2d 137 (1988).....	60
<i>In re County of Tompkins</i> , 237 A.D.2d 667 (3d Dep't 1997).....	50
<i>Jackson v. NYS UDC</i> , 67 N.Y.2d 400 (1986) .....	<i>passim</i>
<i>Jo &amp; Wo Realty Corp. v. City of New York</i> , 157 A.D.2d 205 (1st Dep't), <i>aff'd</i> 76 N.Y.2d 962(1990).....	25
<i>Kaskel v. Impellitteri</i> , 306 N.Y. 73 (1953) .....	25, 30, 31, 32
<i>Keegan v. City of Hudson</i> , 23 A.D.3d 742 (3rd Dep't 2005) .....	25
<i>Kelo v. City of New London, Conn.</i> , , 545 U.S. 469 (2005).....	31
<i>Kenneth VV v. Wing</i> , 235 A.D.2d 1007 (3rd Dep't 1997).....	66
<i>Kiernan v. Bronstein</i> , 73 Misc. 2d 629 (Sup. Ct. N.Y. Co. 1973).....	52
<i>Leichter v. NYS UDC</i> , 154 A.D.2d 258 (1st Dep't 1989) .....	16, 17
<i>Lighthouse Hill Civic Associate v. City of New York</i> , 275 A.D.2d 322 (2nd Dep't 2000) .....	95
<i>Magee v. Rocco</i> , 158 A.D.2d 53 (3rd Dep't 1990).....	50
<i>Main Seneca Corp. v. Erie Co. Industrial Development Agency</i> , 125 A.D.2d 930 (4th Dep't 1986) .....	58
<i>McKelvey v. White</i> , 184 A.D.2d 834 (3rd Dep't 1992) .....	50
<i>Mets Parking, Inc. v. UDC</i> , 58 N.Y.2d 1094 (1983) .....	21
<i>Morse v. Town of Gardiner Planning Board</i> , 164 A.D.2d 336 (3rd Dep't 1990).....	75
<i>Nash Metalware Co., Inc. v. Council of City of New York</i> , 14 Misc.3d 1211, 2006 .....	101
<i>Nassau/Suffolk Neighborhood Network v. Town of Oyster Bay</i> , 134 Misc. 2d 979 (Sup. Ct. Nassau County, 1987).....	50

<i>Neville v. Koch</i> , 79 N.Y.2d 416 (1992).....	60
<i>New York City Coalition to End Lead Poisoning v. Vallone</i> , 100 N.Y.2d 337 (2003).....	8
<i>Park Terrace Caterers v. McDonough</i> , 9 A.D.2d 113 (1 <sup>st</sup> Dep't 1959).....	102
<i>Pell v. Board of Education</i> , 34 N.Y.2d 222 (1974) .....	20
<i>Peterson v. Corbin</i> , 275 A.D.2d 35 (2 <sup>nd</sup> Dep't 2000).....	102
<i>Pius v. Bletsch</i> , 70 N.Y.2d 920 (1987) .....	95
<i>Programming and Systems, Inc. v. NYS UDC</i> , 61 N.Y.2d 738 (1984).....	49
<i>Rizzo v. New York State Div. of Housing and Community Renewal</i> , 6 N.Y.3d 104 (2005) .....	42
<i>Rosenthal &amp; Rosenthal Inc. v. NYS UDC</i> , 771 F.2d 44 (2 <sup>nd</sup> Cir. 1985) .....	30
<i>San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission</i> , 449 F.3d 1016 (9 <sup>th</sup> Cir. 2006) .....	65
<i>Save Audubon Coalition v. City of New York</i> , 180 A.D.2d 348 (1 <sup>st</sup> Dep't 1992).....	66, 69
<i>Schodack Concerned Citizens et al. v. Town Board of Town of Schodack</i> , 148 A.D.2d 130 (3 <sup>rd</sup> Dep't 1989) .....	75, 90
<i>Service Station Dealers of Greater New York, Inc. v. NYSDEC</i> , 145 A.D.2d 777 (3 <sup>d</sup> Dep't 1988) .....	60
<i>South Bronx Clean Air Coalition v. NYS Department of Transportation</i> , 218 A.D.2d 520 (1 <sup>st</sup> Dep't 1995).....	66
<i>Spadanuta v. Village of Rockville Centre</i> , 16 A.D.2d 966 (2 <sup>nd</sup> Dep't 1962), <i>aff'd</i> 12 N.Y.2d 895 (1963) .....	30
<i>Stewart Park &amp; Reserve Coalition v. NYS Department of Transport</i> , 157 A.D.2d 1 (3 <sup>rd</sup> Dep't 1990), <i>aff'd</i> 77 N.Y.2d 970 (1991).....	52
<i>Tribeca Community Association, Inc. v. NYS UDC</i> , 200 A.D.2d 536 (1 <sup>st</sup> Dep't 1994) .....	29
<i>Tudor City Association v. City of New York</i> , 225 A.D.2d 367 (1 <sup>st</sup> Dep't 1996).....	85
<i>Washington v. Bodman</i> , 2005 WL 1130294 (E.D. Wash. 2005).....	65
<i>West 41st Street Realty LLC v. NYS UDC</i> , 298 A.D.2d 1 (1 <sup>st</sup> Dep't 2002).....	30
<i>Willets Point Business Association v. NYS UDC</i> , Index No. 19927/85 (Sup. Ct. N.Y. Co. March 6, 1986).....	49

*Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478 (1975).....25, 35  
*Ziemba v. City of Troy*, 37 A.D.3d 68, 75 (3rd Dep't 2006) .....96

**INDEX TO ADMINISTRATIVE RECORD  
(SELECTED DOCUMENTS)**

<b>Document</b>	<b>Date</b>	<b>Page Numbers</b>
<b>Preliminary Planning Documents</b>		
Letter from Forest City Ratner Companies to Empire State Development Corporation	2/18/2005	22748 – 22754
Arena Development Plan MOU	2/18/2005	20303 – 20325
ATURA Development Plan MOU	2/18/2005	20296 – 20302
<b>Scoping Documents</b>		
Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement	9/16/2005	20326 – 20329
Notice of Public Scoping and Intent to Prepare a Draft Environmental Impact Statement	9/16/2005	20330 – 20331
Draft Scope of Analysis	9/16/2005	22707 – 22747
Final Scope of Analysis	3/31/2006	22657 – 22706
<b>Draft Environmental Impact Statement</b>		
DEIS	7/18/2006	20386 – 21731
DEIS, Appendices	7/18/2006	21732 – 22454
Notice of Completion of DEIS	7/18/2006	22455 – 22456
<b>ESDC Directors' Materials</b>		
Memorandum from Charles Gargano	7/18/2006	51 – 56
Resolutions	7/18/2006	57 – 61
General Project Plan	7/18/2006	62 – 101
Design Guidelines (Draft)	7/18/2006	104 – 213
Blight Study	7/2006	214 – 594

<b>Document</b>	<b>Date</b>	<b>Page Numbers</b>
<b>Hearing and Community Forums</b>		
Notice of Public Hearing Pursuant to UDC Act, SEQRA and EDPL	7/24/2006	22458 – 22470
Public Hearing Transcript	8/23/2006	9741 – 10134
Letter from Rachel Shatz to Shirley A. McRae	8/31/2006	22615 – 22617
Notice of Additional Community Forum and Comment Period Extension	undated	22502 – 22503
Additional Community Forum guidelines	undated	22613 – 22614
Community Forum Transcript	9/12/2006	10135 – 10270
Community Forum Transcript	9/18/2006	10271 – 10465
<b>UDCA-Related Materials</b>		
Community Advisory Committee Materials	3/2006 to 9/2006	22621 – 22656
City Planning Commission Letter	9/27/2006	13994 – 14001
<b>Final Environmental Impact Statement (Corrected and Amended)</b>		
FEIS, Volume 1, Chapters 1-23	11/27/2006	10471 – 11897
FEIS, Volume 2, Chapter 24	11/27/2006	11898 – 12454
FEIS, Volume 2, Exhibit (Public Comments)	11/27/2006	14011 – 19916
FEIS, Volume 3, Appendices	11/27/2006	12455 – 14007
Notice of Completion of FEIS	11/27/2006	14008
<b>Comments on FEIS</b>		
Status Briefing Memorandum from Rachel Shatz to Charles Gargano	12/8/2006	20222
Memorandum from AKRF to Rachel Shatz with Response to Comments on FEIS	12/8/2006	20268 – 20295

<b>Document</b>	<b>Date</b>	<b>Page Numbers</b>
Public Comments on FEIS	11/28/2006 to 12/8/2006	20223 – 20267
<b>ESDC Directors' Materials</b>		
Memorandum from Charles Gargano	12/8/2006	19919 – 19928
Resolutions	12/8/2006	19929 – 19931
SEQRA Findings Statement	12/8/2006	1 – 25.69
EDPL Determination and Findings	12/8/2006	26 – 49
Modified General Project Plan	12/8/2006	20052 – 20096
Design Guidelines (Revised)	11/2006	20099 – 20207

## PRELIMINARY STATEMENT

At the heart of this case is a dispute about whether the Atlantic Yards Land Use Improvement and Civic Project (the “Project”) is in the public interest. New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) concluded, in its December 8, 2006 decision documents, that the Project offers many significant benefits and should proceed, subject to the comprehensive program of mitigation measures imposed by ESDC’s Findings Statement under the State Environmental Quality Review (“SEQRA”).

The benefits identified by ESDC include the construction of a new arena in Brooklyn, the return of a professional sports team to the borough, the construction of 2,250 affordable housing units and thousands of units of market rate housing, the construction of new office space, the requirement that the new buildings be certified “green buildings,” the location of intensive development at a major transit hub, the creation of 8 acres of publicly accessible open space, significant subway station improvements, a new and more efficient LIRR rail yard, thousands of new jobs and, over the life cycle of the facility, and billions of dollars of new tax revenues for City and State governments. Administrative Record (“AR”) 19-21 (SEQRA Findings Statement at 18-20).

At the same time, the record establishes that the Project will result in a number of significant adverse impacts with respect to cultural resources, visual resources, open space availability (until the Project’s open space is phased in), shadows, traffic, noise, construction, and school seat availability (if the Department of Education does not implement the mitigation measures). AR 25.62-25.64 (SEQRA Findings Statement at 86-88).

The balance to be struck between the Project’s significant public benefits and significant environmental impacts is a question of public policy and is properly left to the sound discretion of ESDC. ESDC documented its decision-making in its SEQRA Findings Statement

(AR 1-25.69), which explains the basis for the agency's determination that the benefits of the Project far outweigh the environmental impacts it will cause. Notably, petitioners-plaintiffs ("Petitioners") do not challenge those findings, and hardly mention them at all in this proceeding.

Just beneath the surface of Petitioners' litigation papers is the insinuation that the Project was a "done deal" as soon as the Governor and Mayor announced that they supported it. This is a theme looking for a legal theory. There is nothing illegal, or in any way improper, about an elected official holding a press conference to express support for a project in its preliminary stages. Early project endorsements by elected officials occur routinely, but they do not provide a basis to overturn the results of the administrative process by which a project is ultimately approved.

Indeed, every Environmental Impact Statement ("EIS") prepared under SEQRA studies a "proposed action" and in many cases that action involves a project that the agency preparing the EIS has initiated, and wishes to pursue. 6 N.Y.C.R.R. § 617.7(a)(1). Notwithstanding Petitioners' heated rhetoric, there is nothing wrong with this. An EIS cannot be prepared until the proposed action is defined with the detail needed to determine its impacts on traffic, transit, pedestrians, shadows, schools, open space resources, urban design, infrastructure, air quality, noise, construction and other technical areas of analysis. Petitioners' contention that the SEQRA process should have begun before a discrete proposal was hashed out is baseless and, if adopted, would make a proper environmental review impossible.

In the course of making a series of provocative comments questioning the integrity of the state agencies' directors, professional staff, professional consultants and counsel, Petitioners have put forward several discrete causes of action, none of which is viable.

Point I below addresses Petitioners' second cause of action – that ESDC violated the Urban Development Corporation Act (“UDCA”) by providing an inadequate period for public comment and failing to properly constitute a Community Advisory Committee (“CAC”). As described in ESDC’s Verified Answer (the “Answer”), ESDC duly scheduled and convened a combined public hearing under the UDCA, Eminent Domain Procedure Law (“EDPL”) and SEQRA, provided clear and timely notice of that hearing, opened the hearing by presenting a summary of the Project, and closed it after extensive oral comment – both for and against the Project – had been heard. Going above and beyond applicable legal requirements, ESDC also scheduled and convened two additional sessions for the submission of oral comments during the written comment period for the benefit of those who preferred to submit their comments orally, rather than in writing. These sessions were expressly designated as “community forums” – not public hearings. In accordance with the Notice, ESDC also allowed the submission of written comments over a period that extended for a total of 73 days after the DEIS was accepted and the draft general project plan under the UDCA was issued. Moreover, ESDC duly convened and consulted with the CAC, which was properly organized to represent a cross-section of the community. As discussed in Point I, this extensive public outreach satisfied, and in fact went beyond the requirements of the UDCA. Petitioners cite absolutely no authority for their theory that ESDC abused its discretion by attempting to facilitate additional public input by allowing the submission of oral comments during the written comment period.

Point II below addresses Petitioners' contention (in their fourth cause of action) that ESDC erred in approving the Project as a “land use improvement project.” Petitioners note (correctly) that a portion of the project site is not within a City-designated urban renewal area, but there is no requirement that property be within such a designated area to be found blighted.

Petitioners assert that some of the buildings on the project site, unlike the others, are not in an insanitary condition, but authoritative caselaw establishes that an area can be designated as blighted even if individual buildings within the area are not dilapidated. Petitioners also trumpet newspaper articles about New York City real estate to argue that buildings in an insanitary condition today might some day be rehabilitated without government action, but the relevant issue is the status of the property today, not whether blighted conditions might improve sometime in the future. ESDC's blight finding is established by the well documented blighted conditions of the project site, and cannot be upset by the sort of arguments Petitioners advance in this proceeding.

Point III explains how ESDC rationally exercised its discretion to make the findings required under the UDCA for the Project to be approved as a "civic project." Petitioners' contrary arguments (in their third cause of action) have no basis in either the language of the UDCA or the record in this case.

Point IV addresses Petitioners' SEQRA claims. ESDC conducted an exacting environmental review in close consultation with MTA, the New York City Department of Transportation, the City Planning Commission, the Department of City Planning, the New York City Economic Development Corporation, the State Office of Parks, Recreation and Historic Preservation, and other involved and interested agencies, and took a "hard look" at the relevant environmental issues. During the course of this environmental review, ESDC identified all potentially significant impacts, developed a comprehensive slate of measures to avoid or minimize those impacts, and carefully considered a range of reasonable alternatives. Its conclusions with respect to such matters were well documented in its SEQRA Findings Statement. In addition to addressing Petitioners' "hard look" claims (their fifth, sixth, seventh,

eighth and ninth causes of action), Point IV also responds to the contention in Petitioners' tenth cause of action that ESDC made a series of procedural missteps in conducting the environmental review under SEQRA.<sup>1</sup>

As set forth in Point IV, courts have uniformly recognized that their role is not to conduct a *de novo* review of an agency's decisionmaking process and should avoid substituting their judgment for that of the agency. Courts have repeatedly noted that an opponent's submission of information differing from the conclusions in an EIS concerning potential significant adverse impacts is insufficient to make a case that SEQRA has been violated. The record in this proceeding clearly establishes that ESDC took the required "hard look" at environmental impacts.

Point V addresses Petitioners' first cause of action, which asserts that the Public Authorities Control Board ("PACB") also violated SEQRA by failing to make findings under the statute prior to approving the Project. As explained in Point V below, PACB's function under the Public Authorities Law ("PAL") is to assure the fiscal responsibility of public authorities. Accordingly, its decision-making relates solely to the adequacy of the financing of the projects that come before them, and decision-making with respect to such financial considerations is not the sort that would be elucidated by an EIS prepared under SEQRA. For that reason, the resolutions of the PACB are not "actions" subject to environmental review requirements under controlling Court of Appeals precedent.

Finally, Point VI briefly responds to Petitioners' separate request for a preliminary injunction. As noted therein, there is no basis for a preliminary injunction as Petitioners have not established any of the elements required for such relief.

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<sup>1</sup> This Memorandum of Law does not discuss Petitioners' claims against MTA, which are set forth as their eleventh cause of action, since those claims are addressed separately by that agency.

## STATEMENT OF FACTS

As contemplated by the special pleading rules applicable to Article 78 proceedings, ESDC's affirmative statement of facts is set forth in its Answer.

## STATUTORY FRAMEWORK

The specific issues in this case can best be analyzed in the context of the overall framework of the operative statutes – the UDCA, EDPL and SEQRA. These statutes are outlined below.

### A. The UDCA

ESDC is the primary economic development agency of the State of New York. It was created in 1968 with the passage of the Urban Development Corporation Act. The UDCA was passed:

to promote a vigorous and growing economy, to prevent economic stagnation and to encourage the creation of new job opportunities in order to protect against the hazards of unemployment, ... [to] increase revenues to the state and to its municipalities[,] ... to achieve stable and diversified local economies[,] .... to promote the sound growth and development of our municipalities through the correction of such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics 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.

UDCA § 2, N.Y. Unconsolidated Laws (“Unconsol. L.”) § 6252.

The agency's “primary mission ... is to encourage economic investment throughout New York State, and it does so in part by promoting large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas.” *Develop Don't Destroy Brooklyn v. ESDC*, 31 A.D.3d 144, 146 (1<sup>st</sup> Dep't 2006). 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." UDCA § 2, Unconsol. L. § 6252; see *East Thirteenth Street Community Association v. NYS UDC*, 189 A.D.2d 352, 358 (1<sup>st</sup> Dep't 1993).

ESDC has authority under the UDCA to adopt and approve various types of projects, including a "land use improvement project" and a "civic project." UDCA § 10(c) and (d), Unconsol. L. § 6260(c), 6260(d). To do so, ESDC must make specific findings in accordance with the UDCA.

In the case of a "land use improvement project," the area in which the project is to be located must be determined to be "substandard and insanitary," consistent with the statute's purpose of eliminating urban blight and improving surrounding areas. UDCA § 10(c), Unconsol. L. § 6260(c). Recent land use improvement projects that are comparable in size to the Atlantic Yards Project include the 42<sup>nd</sup> Street Development Land Use Improvement Project in Manhattan and the Hunters Point Waterfront Land Use Improvement Project in Queens.

No "blight" finding is required for a civic project. A "civic project" requires the existence of a need for an "educational, cultural, recreational, community, municipal, public service or other civic facility." UDCA § 10(d), Unconsol. L. § 6260(d). Recent ESDC-approved civic projects include the new Yankee Stadium under construction in the Bronx, the new CitiField Stadium for the Mets under construction in Queens, improvements to Ralph Wilson Stadium (home of the Buffalo Bills), and the construction of a new arena for the Buffalo Sabres.

ESDC may not make any commitment, enter into any agreement or incur any indebtedness for the purpose of acquiring, constructing, or financing any project unless the PACB determines that the commitment of funding for the project is sufficient. Public Authorities Law §§ 51(1), (3). The PACB was created in 1976 to help oversee the financing of

public benefit corporation projects and to ensure that adequate funding is available. Its creation was a direct response to a fiscal crisis in the State of New York, which had left a number of public benefit corporations on the verge of financial collapse.

## **B. SEQRA**

The State Environmental Quality Review Act, codified at Article 8 of the Environmental Conservation Law (“ECL”), was enacted to “inject environmental considerations directly into governmental decision making.” *Coca-Cola Bottling Co. v. Board of Estimate of the City of New York*, 72 N.Y.2d 674, 679 (1988). This statutory purpose is achieved through the “elaborate procedural framework” created by SEQRA’s implementing regulations, which have been promulgated by the New York State Department of Environmental Conservation and codified at 6 N.Y.C.R.R. Part 617 (the “SEQRA Regulations”). *New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 347 (2003).

When the project or action involves multiple agencies, it is necessary to determine, before preparation of the EIS, which agency is to act as the “lead agency” in conducting the environmental review. 6 N.Y.C.R.R. § 617.6(b). An agency proposing to assume that role must notify other involved agencies of its intention to do so; if no objection is made to that proposal, the agency may take the lead, and the other involved agencies will continue to play a consulting role in the process. *Id.* § 617.6(b)(3).

Before embarking on the preparation of an EIS, the lead agency is encouraged, but not required, to engage in a “scoping” process. The goal of scoping is to “focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant.” *Id.* § 617.8(a). Once scoping is completed, a draft EIS (“DEIS”) is prepared. Upon completion of the DEIS, the lead agency must certify it as sufficient for public review. ECL § 8-0109(4); 6 N.Y.C.R.R. § 617.9(a)(3).

The lead agency may, in its discretion, conduct a public hearing on the DEIS. ECL § 8-0109(5); 6 NYCRR § 617.9(a)(4). Under the SEQRA Regulations, the “minimum public comment period on the DEIS is 30 days” from the time that a notice of its completion is published in DEC’s *Environmental Notice Bulletin*. After the DEIS has been filed and public comments received and considered, the agency may then prepare a final EIS (“FEIS”). The FEIS must include any changes to the project, relevant new information and studies, and a summary of substantive comments received from the public and interested agencies, together with the agency’s response to such substantive comments. ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.9(b)(8). Once the FEIS has been filed, and a minimum period of 10 days has elapsed after such filing, the agency must adopt SEQRA “findings” with respect to the action. In particular, it must make and file a written “findings statement” setting forth the facts and conclusions contained in the DEIS and FEIS that were relied on to support the decision. The findings statement must provide the rationale for the agency’s decision, state that the requirements of SEQRA have been met, and certify “that consistent with the social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable....” 6 N.Y.C.R.R. § 617.11(d); *see* ECL § 8-0109(8).

### **C. The EDPL**

The Eminent Domain Procedure Law, enacted in 1977, is applicable to projects involving condemnation. The EDPL sets forth the procedures by which property is acquired to assure that just compensation is provided to those individuals whose property rights are affected by the exercise of eminent domain, to establish opportunities for public participation in the planning of projects necessitating the exercise of eminent domain, and to consider the public

use(s) for which the property is being acquired as well as the interest of private land owners, local communities, and the quality of the environment.

Article 2 of the EDPL establishes procedures for public notice and comment regarding proposed condemnations. After providing notice of a project's proposed location, an agency is required to hold a public hearing to outline the purpose and proposed location and receive comments. *See* EDPL § 203. Thereafter, the agency is required to make its determination and findings, which must, at a minimum, specify "(1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality." EDPL § 204(B). While an agency's responsibilities under the EDPL differ from those under SEQRA, the statutes overlap in requiring that environmental effects be identified. *Jackson v. NYS UDC*, 67 N.Y.2d 400, 417 (1986).

## **POINT I**

### **ESDC COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF THE UDCA**

Petitioners advance two claims that ESDC violated the UDCA procedures. First, they argue that ESDC was legally bound to extend the public comment period beyond the initial 30 days it allowed because ESDC facilitated the submission of oral comments, as well as written comments, during the 30 day public comment period. In addition, they allege that ESDC failed to properly constitute and consult the CAC that ESDC created for the Project. Neither claim has any statutory or other basis.

**A. ESDC Complied With the UDCA Public Comment Procedures, Including the Requirement to Have a 30-Day Public Comment Period After the Public Hearing.**

**1. ESDC's Decision to Allow the Submission of Oral Comments, as Well as Written Comments, During the 30-Day Public Comment Period Did Not Require ESDC to Extend the 30-Day Period.**

Petitioners contend that ESDC's decision to allow the public to submit oral comments during the 30-day public comment period, in addition to written comments, required an extension of the time period during which written comments could be submitted. They provide no precedent to support this argument, nor do they explain the logic for the conclusion they draw from it – that ESDC's process for gathering comments in this case violated the UDCA because additional opportunities to comment were provided. As discussed below, Petitioners' claims are baseless because ESDC complied with the procedural requirements of the UDCA, to the letter, and then went beyond those requirements. Moreover, Petitioners make no claim that specific comments were excluded because of the process ESDC established, or that they would have provided additional comments if the period had been extended. Therefore, Petitioners have made no showing that they have been prejudiced by the process ESDC followed to inform the public and gather comments on the GPP. Moreover, the statutory purposes of the public review procedures of the UDCA were achieved by the process followed in this matter.

ESDC implements a project under the UDCA pursuant to a "general project plan" ("GPP"), which is approved by the ESDC board in a two step process. First, a GPP is "adopted" by the board, filed in the ESDC offices and with the affected municipality, and circulated for public comment. UDCA § 16, Unconsol. L. § 6266. Thereafter, the board, upon consideration of any public comments provided, may "affirm, modify or withdraw" the plan. UDCA § 16(3)(d), Unconsol. L. § 6266(3)(d). The UDCA establishes specific procedures for the public review of a GPP. Where ESDC intends to override local zoning or acquire real property by

eminent domain, those procedures require that a public hearing be held “on thirty days notice following adoption of the plan by the corporation,” *id.* § 6266(3)(a); that such hearing “be conduct[ed] ... pursuant to such notice,” *id.* § 6266(2) and (3); and that the public comment period be held open for “thirty days after the public hearing.” *Id.* § 6266(3)(b).

**2. ESDC Satisfied – and Even Exceeded – the Public Review Requirements of the UDCA.**

The plain language of the UDCA sets out the minimum requirements for the public review of a GPP: a hearing on 30 days notice after the GPP has been adopted, followed by a 30 day comment period. UDCA § 16(2)(c), Unconsol. L. § 6266(2)(c); *see also* Unconsol. L. § 6266(3)(b). ESDC satisfied these minimum requirements by (i) publishing notice of a combined public hearing pursuant to the UDCA, EDPL and SEQRA; (ii) holding that hearing as scheduled, and (ii) keeping the period for public comment open for more than thirty days thereafter.

Each day from July 24 to July 28, 2006, ESDC duly published a notice (the “Initial Public Notice”) in the *New York Post* and *City Record*, pursuant to Sections 6 and 16 of the UDCA, Article 2 of the EDPL and SEQRA. AR 22471, 22474, 22477, 22504–06. The Initial Notice announced that the public hearing would take place on August 23, 2006 at the New York City College of Technology (Klitgord Auditorium), 285 Jay Street, Brooklyn, New York, from 4:30 to 8:30 PM. AR 22458-22477. In addition, notice of the public hearing was published in the *Environmental Notice Bulletin* on July 26, 2006, and provided in the DEIS Notice of Completion. The Initial Notice advised the public that the purposes of the hearing were to include “informing the public about the Project,” and allowing interested persons an opportunity to provide comments on the GPP, the DEIS, and the proposed property acquisitions. AR 22459. In accordance with the requirements of the UDCA and SEQRA, the Initial Notice also invited

written comments and established a comment period extending to September 22, 2006. AR 22470. Thus, the notice was crystal clear in establishing a 30-day comment period, and in measuring that period from the scheduled date of the hearing. *Id.*

ESDC thereafter convened the scheduled public hearing “pursuant to such notice,” as required by section 16(2) of the UDCA. Unconsol. L. § 6266(2). The hearing officer opened the hearing by reiterating its dual purposes of: (i) informing the public with respect to the Project, and (ii) allowing the opportunity for the submission comments. AR 9755. Next, ESDCs representatives and consultants made a detailed presentation concerning the Project and its anticipated impacts, and the floor was then opened for comment.<sup>2</sup> After hearing the views of 99 people over the course of seven hours, the hearing officer closed the hearing. Pressed by project opponents for clarity on the point, the hearing officer left no room for debate by concluding the session with the statement: “I can tell you that the hearing now is closed.” AR 10131.<sup>3</sup>

Moreover, as an additional means of public outreach, the Initial Notice allowed for the submission of oral, as well as written comments during the comment period. In

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<sup>2</sup> Petitioners describe the hearing as a “circus.” It certainly was a lively session, with Project supporters and opponents expressing their opinions with equal vigor. However, ESDC and its hearing officer made every reasonable effort to keep order and allow for a balanced presentation of differing points of view. For example, ESDC arranged the order of speakers to assure that both sides were heard in about the same proportion throughout the course of the evening. Answer ¶ 84. While Petitioners allege that many critics of the Project were “effectively excluded and not afforded an opportunity to speak until very late in the evening” and that some people missed the opportunity to speak, these allegations form no basis to challenge the Project. As ESDC stated in response to the criticisms made by Shirley McRae in her letter of August 28, 2006, “[e]very decision ESDC made concerning the conduct of the hearing, the procedures for signing in and assigning speaker order were made with the sole intention of providing a fair and balanced venue for public comment.” AR 22616. Thus, ESDC set “reasonable ground rules on the public hearing,” and the purposes of the hearing were accomplished. *See Greenwich Citizens Committee v. Counties of Warren & Washington IDA*, 164 A.D.2d 469, 474 (3<sup>rd</sup> Dep’t 1990) (rejecting claims that the agency’s hearing was inadequate, observing that simply because “some people were unable to speak at the hearing does not alter the fact that the Agency was well aware of the prevailing sentiment against the project of those in attendance.”).

<sup>3</sup> Petitioners seek to create the impression that by a slip of the tongue the hearing officer indicated the hearing would be continued at the community forum. Pet. Mem. at 19. The record is clear that he did not do so. On the contrary, under grilling by Project opponents at the end of a long evening, he simply did his best to let people know that an additional opportunity would be provided for the presentation of oral comments at the separately convened community forum. AR 10128-10132 (Transcript at 388-92).

particular, the notice announced that comments could be presented orally at a community forum to be held from 4:30 to 8:00 PM on September 12, 2006, and that the community forum would take place at the same location as the public hearing. AR 22470. In response to requests from the public, ESDC thereafter scheduled a second community forum, and extended the period for the submission of written comments until September 29, 2006. The notice issued with respect to these actions stated that “a second community forum, open to all persons, will be held on Monday, September 18, 2006 . . . to receive comments on the [DEIS] for the [Project].” AR 22502. Both community forums were thereafter held as scheduled, and an additional 104 people expressed their views. AR 10135-10270, 10271-10465 (Community Forum Transcripts). In addition, by the end of the comment period more than 1800 written comments were received by ESDC.

By opening the hearing, presenting information about the Project, considering the comments of about 100 members of the public, and bringing the session to an unambiguous close – all as specified in the Initial Notice – ESDC complied with the baseline requirement in the UDCA that a public hearing be held. UDCA §§ 16(2)(c), (3)(a), Unconsol. L. §§ 6266(2)(c), (3)(a). By allowing the submission of comments for more than 30 days after such hearing, it satisfied that additional requirement, as set forth in § 6266(3)(b) of the statute. Indeed, Petitioners go a long way towards conceding as much, stating that “[h]ad the public hearing been limited to that one evening [August 23], then it would have taken place [30 days prior to the close of the comment period] . . . which would have complied with the time frames prescribed in the UDCA.” Pet. Mem. at 16-17.

Petitioners assert, however, that the subsequently held community forums were further public hearings, and argue that the 30-day comment period should have been measured

from September 18 and closed on October 18, some 19 days later than it did. Put another way, Petitioners argue that, by affording the public opportunities to comment that exceeded UDCA requirements, ESDC violated the statute. Petitioners come to this anomalous result by ignoring the plain statutory language, which does not require a public hearing to extend beyond one session, as well as the clearly articulated notices and the explicit statement of the hearing officer.

Petitioners also ignore the fact that the public hearing was of a fundamentally different nature than the two forums that followed it.<sup>4</sup> No substantive information was conveyed to the public about the Project at either of these events, because the forums served one purpose, and one purpose alone: the gathering of oral comments. By contrast, in accordance with the Initial Public Notice and the hearing officer's opening statement, the public hearing served not only that purpose, but also informed the public about the Project and its impacts through presentations given by ESDC's technical experts. These presentations were intended to help the public understand the Project and facilitate the making of informed oral comments at the public hearing and informed written comments during the 30-day public comment period. Petitioners neglect to mention this material difference in seeking to equate the community forums with the public hearing. Rather, they focus on certain elements – such as the presence of a presiding officer and government officials, the transcription of comments, and the use of sign-in sheets – which are common to any well run proceeding.

Notwithstanding Petitioners' arguments to the contrary, the community forums were not the same as the public hearing called for under the UDCA. That event was opened and

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<sup>4</sup> A combined public hearing under the UDCA and the EDPL must be held "on thirty days notice" after the GPP is adopted, in order to satisfy the requirements of the UDCA. At the same time, notice must be published "no less than ten but no more than thirty days prior to such public hearing" under EDPL § 202. To comply with both these requirements, the public hearing in this matter had to have been held 30 days after, but no more than 30 days after the publication of the notice – on August 23.

closed on August 23, 2006 as scheduled by ESDC in the Initial Notice. Accordingly, the statutory period for the submission of written comments under the UDSCA began as of that date.

**3. The Post-Hearing Comment Period Provided by ESDC Satisfied the Statutory Intent of the UDC Act, and Petitioners Suffered No Prejudice.**

The fundamental purpose of the UDCA's public hearing and comment period is "to ensure that the public has a meaningful role in the project review process." *Memorandum of Urban Development Corporation*, McKinney's 1987 Session Laws of NY, p.2539. *See also Leichter v. NYS UDC*, 154 A.D.2d 258, 261 (1<sup>st</sup> Dep't 1989) ("The hearing requirements set forth in the . . . [UDCA are] designed to solicit community involvement in the planning process, not to serve as a vehicle by which public development can be effectively foreclosed."). That purpose was served by the procedures used here.

The process ESDC established for soliciting the views of the public in this matter succeeded in securing an intensive level of public participation in the planning process. Over the course of the Public Hearing and the two additional community forums, a total of about 200 people expressed their views.<sup>5</sup> At the conclusion of the second community forum, the presiding officer asked whether anyone was present who had not yet had a chance to provide oral comments, who wished to speak. Only after no one responded, did he close the forum. AR 10266-10269 (transcript at 132-135).

Moreover, the 1,800 comments submitted during the written comment period included thousands of pages devoted to expressions of opinion, substantive technical criticism and recommendations, objections to the Project and statements of support. Among those comments was a nine-page submission made by Petitioners' counsel. That submission addressed

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<sup>5</sup> As Petitioners point out in their memorandum, several senior officials of ESDC were in attendance not only at the Public Hearing, but at the community forums as well. Those officials sat in the audience listening to the comments presented throughout each of the sessions. AR 9759, 10145, 10284-10285.

a wide variety of substantive issues. AR 19113-19121 (includes comments addressing Project's alternatives analysis, blight study and energy use). The chapter prepared for the FEIS in response to the avalanche of public comments received is some 555 pages in length. AR 11900-12454.

In addition, the comments did not stop on September 29, 2006. A number of additional submissions came in after that date, and those comments were considered by ESDC in its deliberations. *See, e.g.*, AR 17506-17548. Moreover, extensive comments were submitted by Petitioners' counsel, among others, during the ten-day period between the filing of the FEIS and the issuance of Project approvals on December 8, 2007. No indication was given either in this submission or the comments provided during the formal comment period that one or more matters were not raised due to inadequate time. Thus, Petitioners provide no reason to believe that additional substantive information would have been submitted if the formal comment period had been kept open for an additional 19 days. Consequently, even assuming that ESDC deviated from the required post-hearing comment procedures – which it did not – there is no indication that Petitioners suffered any harm or prejudice as a result.<sup>6</sup>

Petitioners' contention that, at this point, in May 2007, the Project approvals should be vacated so that we can turn back the clock to re-open the public comment period is nothing more than a ploy to stop the Project.

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<sup>6</sup> Petitioners engage in some sleight of hand to give the impression that Courts require strict compliance with UDCA procedures. Citing various cases decided under SEQRA, they assert that “by failing to provide the minimum 30-day comment period ... ESDC violated Section 16 of the UDCA, and its ... decision to approve the project must be annulled.” *See* Pet. Mem. at 21-22. Although it is true that some courts have required strict and literal compliance with the procedural requirements of SEQRA, there is no authority whatsoever to support shifting that principle over to a procedural challenge under the UDCA. On the contrary, the courts have consistently held that strict compliance with the UDCA's procedures is not required. *See Leichter v. NYS UDC*, 154 A.D.2d 258, 260 (1<sup>st</sup> Dep't 1989) (denying challenge to UDC's refusal to hold further hearings where petitioners “have not demonstrated prejudice resulting from [UDC's] alleged failure to strictly comply with the filing provision.”); *Flynn v. NYS UDC*, 154 A.D.2d 263, 263 (1<sup>st</sup> Dep't 1989) (notice and public hearing found adequate where UDC “substantially complied” with the disclosure requirements.).

**B. Petitioners' Contention That ESDC Failed To "Allow Meaningful Advice" From The Community Advisory Committee Has No Basis In Law Or Fact.**

The record demonstrates that ESDC complied with the UDCA's requirements regarding CACs. The UDCA requires that ESDC "establish one or more community advisory committees to consider and advise the corporation upon matters submitted to them by the corporation concerning the development of any area or any project." UDCA § 4(7), Unconsol. L. § 6254(7). Petitioners aptly describe the statute when they say in their pleading that "the [CAC] requirement is not spelled out with any specificity and ESDC obviously has discretion as to how it fulfills the obligation." Petition ¶ 377. Similarly, Petitioners correctly concede in their memorandum of law that "[a]dmittedly, the requirements in the UDCA grants [sic] ESDC discretion regarding the means of [CAC] consultation." Pet. Mem. at 22.

Notwithstanding these concessions, Petitioners contend that ESDC abused its discretion by (a) creating a CAC that allegedly was not "of the community" based on its composition; (b) forming the CAC in 2006, rather than earlier in the planning process; and (c) allegedly "failing to undertake any meaningful consultation with the CAC."<sup>7</sup>

**1. ESDC Acted Reasonably in Organizing the CAC.**

The CAC that ESDC established was comprised of six members, including the Chair of Community Board 2, the Chair of Community Board 6, the Chair of Community Board 8, a member of Brooklyn Borough President Markowitz's staff, a member of the New York City Economic Development Fund, and a representative of ESDC.<sup>8</sup>

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<sup>7</sup> It is worth noting that none of the CAC members are named Petitioners in this action.

<sup>8</sup> The two governmental agency members of the CAC were directly involved in community relations for their respective agencies. Doug Jones was a Senior Associate in Government and Community Relationship at the New York City Economic Development Corporation. Dr. Una Clarke was the Director of the ESDC Community Network Office, which helps local businesses and community organizations take advantage of government resources. She is a former NYC Council member from Brooklyn's 40<sup>th</sup> District.

Petitioners acknowledge that the three Community Board members are “truly representative” of the communities affected by the Project, and do not object to their appointment. However, Petitioners do object to the inclusion of the three other members as an abuse of ESDC’s discretion. By Petitioners’ account, adding to the CAC the representatives from the Brooklyn Borough President’s Office, NYCEDC and ESDC “stacked” the committee with “uncritical supporters of the Project,” and caused it to be unrepresentative of the affected community.<sup>9</sup> This argument should be rejected for several reasons.

First, the unspoken premise of this argument – that because the community was unified in its opposition to the Project, a representative committee could not include members with differing views – is not supported by the facts. As amply illustrated by the distribution of the written and oral comments provided during the public review process, the Project enjoys the strong support of a substantial segment of the community. AR 14236-14836. Thus, even assuming Petitioners are correct that the three CAC members were in favor of the Project, it is entirely appropriate that the composition of the CAC should reflect that balance.

Second, the CAC’s function is to consult with and advise ESDC, rather than engage in decision-making of the sort that would be influenced by the composition of its membership. It is not a voting body. Petitioners have offered nothing to support the notion that including governmental members transformed the CAC from an effective advisory group into a rubber stamp. On the contrary, the record demonstrates that even officials like the Borough

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<sup>9</sup> Ignoring the fact that nothing in the UDCA dictates how ESDC is to interact with a CAC, Petitioners argue that the inclusion of an ESDC staff member on the committee somehow violated the statute. In making this puzzling argument, Petitioners fail to explain how ESDC could possibly have abused its discretion by assigning an official responsible for community relations to participate in the work of the CAC. The statute explicitly contemplates that state officers and employees might serve on CACs: “[N]o officer or employee of the state or of any civil division thereof, shall be deemed to have forfeited or shall forfeit his office or employment by reason of his acceptance of membership” on a CAC. UDCA § 4(7), Unconsol. L. § 6254(7).

President who favored the Project had material concerns with respect to some of its aspects, and believed that it should be modified to address those concerns, and he voiced those concerns in no uncertain terms during the course of the public review. AR 15307-15323.

Petitioners voice other complaints with respect to the composition of the CAC, asserting, for example, that ESDC “restricted” its membership to six individuals. But the statute prescribes no magic number for a CAC – it leaves such details to ESDC’s discretion, to be exercised as it sees fit under the circumstances of each case. Here, ESDC determined that holding substantive discussions with a six-member body – three of whose members chaired a local Community Board and could be presumed to be familiar with community concerns – would be an effective means of obtaining useful community input, and that rational decision cannot be second-guessed by Petitioners. In addition, considerably more than six members of the community actually participated in the CAC’s meetings. *See Answer ¶¶ 113-115.*

There is nothing in the UDCA that constrains ESDC’s discretion as to how it structures a CAC. On the contrary, the statute confers broad discretion to ESDC on the subject of CAC membership, providing that CAC members “serve[] at the pleasure of” the corporation. UDCA § 4(7), Unconsol. L. § 6254(7). It is a basic principle of administrative law that a court will not interfere with an agency decision “unless there is no rational basis for the exercise of discretion or the action complained about is ‘arbitrary and capricious.’” *Pell v. Board of Education*, 34 N.Y.2d 222, 230-31 (1974) (internal citations omitted). Here, Petitioners acknowledge that there were at least three “truly representative[] community” members of the CAC (Pet. Mem. at 22), and make no case that appointing three additional members allowing for a cross-section of community views was anything other than the exercise of sound agency discretion.

**2. ESDC Acted Reasonably in Forming the CAC When It Did.**

Petitioners allege that ESDC abused its discretion by forming the CAC more than two years after the Project had been “first announced,” 16 months after the ESDC MOU had been signed, and at a point where the DEIS was allegedly “almost complete.” Petition ¶ 191; Pet. Mem. at 22. Petitioners’ argument fails as a matter of law.

The UDCA contains no provision establishing a particular point in the planning process at which a CAC must be formed. Thus, the Court of Appeals has observed that the statute “includes no prescription as to the time or stage” by which the CAC must be established. *Mets Parking, Inc. v. UDC*, 58 N.Y.2d 1094, 1096 (1983). In that case, the Court of Appeals rejected petitioners’ request for an additional hearing, even where the CAC was organized *after* project approvals had been granted and the petitioners had brought suit. *Id.* The CAC for this Project, in contrast, was formed more than two months *prior* to the close of the public comment period on the GPP and DEIS. Answer ¶¶ 98, 108.

**3. ESDC Submitted Project Issues To, and Received Advice From, the CAC.**

Petitioners further assert that ESDC “failed to allow meaningful advice” from the CAC. This claim is baseless. After an introductory meeting, ESDC arranged three separate meetings to discuss a variety of issues with the committee. Answer ¶¶ 113-115.

The CAC for the Project held the introductory meeting on June 29, 2006. Answer ¶ 108. Its next meeting was held on August 9, 2006. Answer ¶ 113. The CAC and other attendees made comments and asked questions of ESDC and its environmental consultants (AKRF and PHA). A vibrant exchange took place and the CAC advised ESDC of concerns relating to community facilities, cultural resources, urban design/visual resources, shadows, noise, traffic and parking, mass transit, pedestrians, construction impacts, schools, and issues

affecting the Police and Fire Departments. *Id.* Among other things, CAC members asked for clarification of proposed street directional changes, suggested that ESDC prioritize consideration of on-site co-generation plants, asked ESDC to consider sunlamps to mitigate any loss of sunlight, expressed concern regarding emergency response times due to construction, and voiced other construction-related concerns including air pollution and noise. *Id.* Further, CAC members suggested at the August 9 meeting that an additional subway access point be constructed on Site 5, and that the ESDC should work to gain an MTA commitment of increased post-game train frequency. *Id.* Many of these concerns were addressed in the FEIS which was later prepared for the Project. *Id.*

At the September 7, 2006 CAC meeting, ESDC made available to the CAC Charles Webb, Esq. of Berger Webb LLP, ESDC's special condemnation counsel, in order to provide additional information and to answer questions concerning the condemnation process, property value determination, and the relocation program described in the GPP. Answer ¶ 114. ESDC's Ann Hulka and ESDC senior counsel Steven Matlin and Joseph Petillo also attended the meeting to respond to questions about the GPP and condemnation processes and to hear the concerns of the CAC. *Id.* The bulk of the issues raised by CAC at the meeting involved traffic and mass transit. *Id.*

At the September 26, 2006 meeting, the attendees included three CB2 members, one of whom also served on the Atlantic Avenue Betterment Association, and two CB6 members (including CAC member Jerry Armer). Answer ¶ 115. ESDC provided the CAC with direct access again to consultants Dr. Philip Habib of PHA, Seth Wright of PHA, Linh Do of AKRF, and Chi K. Chan of AKRF. At this meeting, AKRF and PHA made presentations on construction practices and issues related to traffic, parking, and transit. As occurred at the earlier

meetings (and, in particular, the August 9th meeting), there was an active dialogue among ESDC, the community representatives, AKRF and PHA. Attendees voiced concerns and made suggestions concerning traffic issues, parking issues, additional trains, pedestrian safety, a potential pedestrian bridge, impact on businesses, and impacts on the City's electric grid. *Id.* Specific advice given to ESDC by CAC members included requests to consider a vehicular tunnel or bypass, a residential parking permit program, a pedestrian bridge, and co-generation. Other suggestions that CAC expressed to ESDC and the Project consultants at the meeting concerned logistics and enforcement of a computerized parking system and charter bus staging and layover problems. The CAC voiced concern over the loss of police parking spots at the 78<sup>th</sup> Precinct due to Project construction. *Id.* Many of these concerns were addressed in the FEIS and the mitigation measures that it imposed. *Id.*

The UDCA provides no detail as to the process to be followed by ESDC in arranging for the CAC to “consider and advise the corporation.” In the absence of any statutory strictures, ESDC enjoys wide discretion as to how it goes about gathering and utilizing advice from a CAC. *See American Chicle Co. v. State Tax Comm'n*, 11 A.D.2d 256, 258 (3<sup>rd</sup> Dep't 1960) (“courts should not interfere with details which administrative agencies employ in interpreting a broad statutory phrase unless the same are arbitrary and unreasonable”). The legislature intended that ESDC have substantial flexibility in its implementation of UDCA requirements. UDCA § 34, McK. Unconsol. L. § 6284 (“this act . . . shall be liberally construed so as to effectuate its purposes”).

For each of the reasons discussed above, the Petitioners' allegation that ESDC failed to “meaningfully consult with a CAC that was truly of the community” must be rejected.

## POINT II

### ESDC MADE A RATIONAL DECISION THAT THE PROJECT IS A LAND USE IMPROVEMENT PROJECT

To support its determination that the Project qualifies as a “Land Use Improvement Project,” ESDC was required to make certain findings under the UDCA that the Project area is “a substandard and insanitary area, or is in danger of becoming a substandard and insanitary area and tends to arrest the sound growth and development of the municipality.” UDCA § 10(c); Unconsol. L. § 6260(6)(c)(1). According to the UDCA, the term “substandard and insanitary area” is “interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area, whether residential, non-residential, commercial, industrial, vacant or land in highways, waterways, railway and subway tracks and yards, bridge and tunnel approaches and entrances, or other similar facilities. . . .” UDCA § 3; Unconsol. L. § 6253(12).

As explained below, ESDC’s determination that the project site is a “substandard and insanitary” area was rational and supported by the record. ESDC based its blight finding on a 378-page comprehensive Blight Study (AR 214-594) prepared by AKRF, an outside consultant with expertise in land use planning and other relevant issues. The objective facts established by the Blight Study cannot be subject to serious dispute. They provide overwhelming support for ESDC’s determination that the area of the project site is “substandard and insanitary.”

**A. ESDC’s Blight Determination Is Subject to A Highly Deferential Standard of Review.**

Petitioners’ reference to the “arbitrary and capricious” standard of review, *see* Pet. Mem. at 40, mischaracterizes the standard of review applicable here, because the courts are exceedingly deferential in reviewing agency blight determinations.

In *Kaskel v. Impellitteri*, 306 N.Y. 73 (1953), a case decided under the General Municipal Law,<sup>10</sup> the Court of Appeals addressed an allegation that the taking of certain land in Manhattan was for the purpose of obtaining Federal funds rather than to clear the area of blight. In upholding the taking, the Court ruled that the challengers were required to establish either actual fraud or illegality in order to succeed in their claim. 306 N.Y. at 79. *See also Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 218 (1<sup>st</sup> Dep't) (also citing the "fraud or illegality" standard), *aff'd* 76 N.Y.2d 962(1990). A blight finding will be upheld if the condemnor "presents to the court an adequate basis upon which it concluded that the land was substandard"; the condemnee must then "show that the agency's determination is without foundation." *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478, 486 (1975); *see also Keegan v. City of Hudson*, 23 A.D.3d 742 (3<sup>rd</sup> Dep't 2005).

Every case that has addressed a challenge to the designation of a land use improvement project has emphasized the limited scope of their review. Of those decisions, only one decision in New York State has overturned an agency determination. *See Yonkers Community Development Agency v. Morris, supra*. There, however, as Petitioners acknowledge, the agency had failed to provide "any substantial data at all as to the condition of the area it had declared substandard." Pet. Mem. at 44. That case is readily distinguishable, since here even Petitioners concede that "ESDC has provided a lengthy Blight Study to support its determination." Pet. Mem. at 45

Petitioners nevertheless contend that ESDC's "lengthy" study falls short with respect to the Non-ATURA Blocks. As discussed below, Petitioners are mistaken. The record in

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<sup>10</sup> Section 503 of the General Municipal Law empowers municipalities to undertake urban renewal projects. As under the UDC Act, urban renewal projects may be undertaken in areas that a municipality has found to be "substandard and insanitary." GML §§ 502(3), (4). The definition of "substandard and insanitary" is identical in the UDC Act and the General Municipal Law.

this case clearly establishes that ESDC thoroughly considered and justified its determination that the Project qualifies as a Land Use Improvement Project.

**B. ESDC's Blight Determination is Supported By the Record.**

The Blight Study contains a detailed description of every lot in the Project site. With respect to each parcel, it includes information about (i) location, use, zoning and ownership, (ii) unsanitary and unsafe conditions, (iii) structural damage, (iv) building code violations, (v) occupancy and vacancy status, (vi) underutilization and (vii) environmental concerns. AR 245-246. In addition, the study examines historical information (AR 223-228), crime rates (AR 484-489), Project benefits (AR 490-496), property ownership (AR 498-499) and engineering reports (AR 506-580).

Among the substandard and insanitary conditions documented in the Blight Study are vacant buildings, debris-filled lots, contamination and other environmental concerns, above average crime rates, and deteriorated buildings, building facades and other structures. The Blight Study concluded that of the 73 parcels on the project site, 70 percent (51 of 73) exhibit one or more blight characteristics, including buildings or lots that exhibit signs of significant physical deterioration, vacant lots, buildings that are at least 50% vacant, and lots that are underutilized in that they are built to 60% or less of their floor area ration under current zoning.<sup>11</sup> AR 217. In fact, eleven of the lots within the Project site were found to have buildings that were so deteriorated as to be structurally unsound and an immediate threat to public safety. AR 217. ESDC's determination of an emergency condition with respect to these buildings was sustained

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<sup>11</sup> Petitioners suggest in a footnote that ESDC should not have relied on underutilization as one of the several blight characteristics. ESDC's consideration of underutilization, along with other factors, was a permissible exercise of discretion. *See, e.g., G&A Books, Inc. v. Stern*, 770 F.2d 288, 292 (2d Cir. 1985) ("The FEIS treats the severe underuse of the land in the Project Area's 13 acres as further evidence of blight."). Such considerations properly contribute to the conclusion that the Project site is a neglected and blighted area.

by the courts, which allowed the buildings to be demolished notwithstanding the then ongoing environmental review process. *See Develop Don't Destroy Brooklyn v. ESDC*, 31 A.D.3d 144 (1<sup>st</sup> Dep't 2006).

The Blight Study contains at least one photograph of every lot on the project site. Collectively, they show a blighted urban area with many crumbling, vacant buildings, underutilized lots and poor conditions. Petitioners' description of the area as "thriving," Pet. Mem. at 46, is baseless.

**C. The ATURA and Non-ATURA Blocks Do Not Exhibit Materially Different Blight Characteristics.**

Petitioners concede that ESDC properly designated most of the project site – the 63% percent (AR 216) of the project site in ATURA – as a “substandard and insanitary area.” Pet. Mem. at 45. They limit their contentions to 2 blocks (blocks 1127 and 1129) and the small portion of block 1128 within the project site. *Id.* These 2½ blocks (the “Non-ATURA Blocks”) collectively comprise 37% of the site. AR 216. The Non-ATURA Blocks are south of Pacific Street, outside the boundaries of ATURA. Petitioners' contention that the Non-ATURA Blocks cannot be considered blighted is contradicted by the Blight Study and unsupported by caselaw or other legal authority.

Petitioners' primary argument is that the Blight Study is flawed because it supposedly failed to distinguish between the ATURA Blocks and the Non-ATURA Blocks. Pet. Mem. at 45 (“the study simply lumps the three non-ATURA, non-blighted blocks into the general discussion of the concededly blighted ATURA portion.”). Petitioners' argument is flawed for three reasons.

First, the Blight Study clearly indicated the ATURA boundaries and made clear which blocks were within ATURA and which blocks were not. AR 225. Since information was

presented lot-by-lot (AR 247-483), the Blight Study presented disaggregated data. Petitioners' contention that the project site was analyzed only on an aggregated basis is contradicted by the record.

Second, having based their argument on the supposed difference between the ATURA Blocks and Non-ATURA Blocks, Petitioners fail to establish any material difference between these blocks. Many of the lots exhibiting blight characteristics are within the Non-ATURA Blocks. On Block 1127, 14 of 25 lots have blight characteristics. AR 218. On Block 1128, 5 of 8 lots have such characteristics. *Id.* On Block 1129, 15 of 20 lots have such characteristics. *Id.*

Thus, of the Non-ATURA Blocks, 64% of the lots within the project site exhibit blight characteristics. As noted above, for the project site as a whole, 70% of the lots exhibit blight characteristics. AR 217. There is no material difference between these two statistics. Since Petitioners concede that the ATURA Blocks are blighted, and since the Blight Study shows that there are similar conditions in the ATURA Blocks and the Non-ATURA Blocks, there can be no basis for Petitioners' contention that ESDC erred in deeming the Non-ATURA Blocks blighted as well.

In the proceeding cited above (*Develop Don't Destroy Brooklyn v. ESDC*, 31 A.D.3d 144 (1<sup>st</sup> Dep't 2006)), five of the 11 properties determined to have been at risk of immediate collapse and a threat to public safety were located in the Non-ATURA Blocks (Block 1127, lots 19, 20, 55, 56; Block 1129, lot 81). Because of the dangers they posed, these buildings were demolished in the spring of 2006. The Blight Study further establishes that many properties on the Non-ATURA Blocks have serious structural problems and/or unsanitary and unsafe conditions (*e.g.*, Block 1127, lots 19, 20, 55, 56 and Block 1129, lots 25, 43, 45, 46, 49,

54, 81), and consist of vacant lots (e.g., Block 1127, lot 13; Block 1128, lots 1, 2; and Block 1129, lots 1, 3, 4, 5, 6) and vacant buildings (e.g., Block 1127, lot 55; and Block 1129, lot 45).

A review of just a few of the descriptions of several of the lots within the Non-ATURA Blocks illustrates the serious, longstanding, blighted conditions on these blocks. For example, 620 Pacific Street (Block 1127, Lot 19), which was demolished in the spring of 2006 as an imminent threat to public safety, had “active leaks throughout the building . . . [that] had left the building permanently exposed to the elements” and a structural engineer had concluded that “the structure was extremely dangerous and could have collapsed at any time.” AR 331. The Blight Study described 463 Dean Street (Block 1127, Lot 55), which was also demolished last spring, as in “a state of severe disrepair”: “parts of the ceiling had fallen, exposing the wooden beams and subfloor above,” a masonry wall “had collapsed and other portions appeared to be on the verge of collapse” and a structural engineer had determined that “the buildings was severely deteriorated and appeared on the verge of collapse.” AR 379. The lot at 818 Pacific Street (Block 1129, Lot 46) had three buildings in “states of disrepair” with sagging roofs, water damage, cracks in the façade, a chimney separated from its building, severely damaged ceilings and walls, and crumbling bricks among its problems. A structural engineer concluded that the buildings were “structurally unsound and unsafe.” AR 446.

Finally, Petitioners suggest that there is an inconsistency of some sort between ESDC’s blight finding with respect to the project site, and the City’s ATURA designation. Contrary to Petitioners’ assertions, the fact that the parcels south of Pacific Street were not included within ATURA does not preclude them from being included in a land use improvement project. Blight findings have consistently been upheld where the subject property(s) had not previously been included within an urban renewal area. *See, e.g., Tribeca Community Ass’n, Inc.*

v. *NYS UDC*, 200 A.D.2d 536 (1<sup>st</sup> Dep't 1994); *Kaskel*, 306 N.Y. at 78; *West 41<sup>st</sup> Street Realty LLC v. NYS UDC*, 298 A.D.2d 1, 4-5 (1<sup>st</sup> Dep't 2002). The basic boundaries of ATURA were established some 40 years ago when much of the Non-ATURA Blocks were characterized by active manufacturing and commercial uses. No inference can be drawn that the City subsequently made any determination – one way or another – with respect to the parcels simply because they were never added to the urban renewal area.

**D. A Project May Be Designated A Land Use Improvement Project Even Though Certain Parcels or Buildings Within the Project Area Are Not Blighted.**

Petitioners also argue that the blight finding with respect to the Non-ATURA Blocks is undermined by the fact that some buildings within these blocks do not exhibit blight characteristics. (The same is true, of course, for the ATURA Blocks, which Petitioners concede to have been properly designated as blighted.) Petitioners' argument on this score is erroneous as a matter of law.

Under well established New York and federal law, an area may be substandard and insanitary even if not every building or parcel in the area is in such condition. *Spadamuta v. Village of Rockville Centre*, 16 A.D.2d 966, 966 (2<sup>nd</sup> Dep't 1962) (“if necessary for effective rehabilitation of an area as a whole, land and improvements thereon, though not in themselves insanitary and substandard, could be included for condemnation as integral parts of the urban renewal project”), *aff'd* 12 N.Y.2d 895 (1963); *Kaskel v. Impellitteri*, 306 N.Y. 73, 79 (1953) (“such statutes would not be very useful if limited to areas where every single building is substandard”); *Rosenthal & Rosenthal Inc. v. NYS UDC*, 771 F.2d 44, 45 (2<sup>nd</sup> Cir. 1985) (inclusion of building less than a block from the core area of blight upheld as rational); *First Amended South Jamaica I, Urban Renewal Area, in Borough of Queens, City of New York*, 72 A.D.2d 582, 582 (2<sup>nd</sup> Dep't 1979) (“Land which is not itself substandard or insanitary may be

included in an urban renewal program where it is deemed necessary for the effective undertaking of the program.”).<sup>12</sup>

In *Kaskel v. Impellitteri*, the Court of Appeals addressed the assertion that a 6-acre area in midtown Manhattan could not be “considered a single ‘area,’ for clearance and redevelopment purposes.” 306 N.Y. at 78. In that case, project opponents contended that a number of buildings within the designated area were not substandard and insanitary. The court did not disagree with that assertion, but instead held that “the test is as to the area as a unit, and not as to any one or more particular structures. . . .” *Id.* at 81. The court was satisfied “that a substantial part of the area [was] substandard and insanitary by modern tests.” *Id.* at 78 (internal citations omitted); *see also Fix v. City of Rochester*, 50 Misc.2d 660, 664 (Sup. Ct. Monroe Co. 1966) (upholding condemnation of structure that was a “modern, wholesome one” where incidentally necessary to redevelop blighted area).

In *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court upheld a redevelopment plan targeting a blighted area of Washington, D.C. The plan provided for condemnation of the area and utilization of a part thereof for the construction of streets, schools, and other public facilities, with the remainder of the land being leased or sold to private parties for the purpose of redevelopment. The owner of a department store located in the area challenged the condemnation based on the fact that his store was not itself blighted. 348 U.S. at 31. The Supreme Court unanimously refused to consider that claim, “deferring instead to the legislative and agency judgment that the area ‘must be planned as a whole’ for the plan to be successful.” Thus, “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building.” *Kelo v. City of New London, Conn.*,

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<sup>12</sup> Although the issue is not disputed by Petitioners, it bears noting that the FEIS documents the importance of the parcels lying to the south of Pacific Street to the Project. For example, the lots within Block 1127 are integral to the construction of a properly designed arena. AR 10514, 10515.

545 U.S. 469, 480-81 (2005) (quoting *Berman*, 348 U.S. at 34-35). As the foregoing cases make clear, a blight determination is not based on the condition of individual buildings or parcels, but on the area as a whole. See *Kaskel*, 306 N.Y. at 79 (“It is not seriously contended by anyone that . . . every single building therein must be below civilized standards”).

In disputing ESDC’s analysis of the Non-ATURA Blocks, Petitioners offer little more than their unsupported opinion that these blocks are “thriving.” Pet. Mem. at 46. Petitioners rely on two articles published in 2002 in the *New York Times* and a local Brooklyn paper for this argument. Pet. Mem. at 42-43. Whatever the accuracy of those newspaper accounts may be, they are outweighed by the mountain of facts in the Blight Study that document numerous examples of unsanitary and unsafe conditions, indications of structural damage, building code violations, vacancies, underutilization, and environmental concerns in the area. It is the documented existing condition of the Project area – not sunny anecdotes of resurgence in the media – that should be considered in determining the issue of blight.

In support of their contention that the Project blocks south of Pacific Street are not blighted, Petitioners also point to the recent renovation of four buildings. Pet. Mem. at 43; Petition ¶ 262. Only two of these buildings, however, lie within the project site – both are in Block 1127. Petitioners claim that a third – 616-630 Dean Street, consisting of two former industrial buildings that were converted into 21 apartments – is on Block 1129 and thus “entirely within the Project footprint.” Pet. Mem. at 43. They are mistaken. 616-630 Dean Street is not on Block 1129 but rather on Block 1137, which lies to the south of the Project site. AR 235. Since Block 1137 is not within the Project area, these buildings were not included in the Blight Study. The fourth building discussed by Petitioners, known as Newswalk, occupies a portion of

Block 1128 that is also not within the boundaries of the Project. Accordingly, the Blight Study did not consider this building either.

By focusing on the condition of a mere two buildings in the area Petitioners contend is not blighted, Petitioners lose sight of two controlling legal principles discussed above. First, it is the overall condition of the area as a whole that counts in determining blight. Thus, the focus of the inquiry should be the entire Project area, rather than the blocks to the south of Pacific Street. Moreover, even if those blocks were viewed in isolation, the issue of blight cannot be determined on a lot-by-lot basis. The fact that two of the buildings on those blocks have been renovated is of no consequence to whether the area is blighted, since many of the other parcels within those blocks have been documented as showing evidence of blight.

**E. Petitioners' Predication That Substandard and Insanitary Conditions Might Improve in the Future Without ESDC Action Is Speculative and Irrelevant.**

Citing their newspaper articles, Petitioners confidently predict that the substandard and insanitary conditions at the project site would “undoubtedly” improve over time even if ESDC did not take any action under the UDCA. Pet. Mem. at 49. Petitioners present no competent evidence to support this claim, which is mere speculation. More importantly, perhaps, the issue is irrelevant to this Court’s review of ESDC’s statutory finding. ESDC has the statutory authority under the UDCA to proceed with a land use improvement project upon a finding that the area is blighted. The fact that at some point in the future it might become less so without ESDC involvement – even if true – does not provide a basis to overturn the statutory finding required for a land use improvement project.

Petitioners also claim that some of the blight is due to FCRC’s acquisition of various parcels for development. As with their other arguments, they fail to present any evidence that this is so. Many of the conditions documented in detail in the Blight Study are

