SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Develop Don't Destroy Brooklyn, Et Al.

-v-

Urban Development Corporation, Et Al.

INDEX NO. 104597/07

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this ~~motion~~ Article 78 proceeding are determined in accordance with annexed decision, order and judgment.

UNSIGNED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 11, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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

INDEX NO. 104597/2007

Petitioner-Plaintiffs.

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

-against-

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

Respondents-Defendants.

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JOAN A. MADDEN, J.:

This combined Article 78 proceeding and declaratory judgment action, involving the New York State Environmental Quality Review Act ("SEQRA"), the Urban Development Corporation Act ("UDCA") and the Public Authorities Law ("PAL"), challenges the determinations by respondent agencies approving a $4 billion project to redevelop the Atlantic Terminal area in the Prospect Heights neighborhood of Brooklyn.[1] The Atlantic Yards Arena and Redevelopment Project (the "Project") encompasses 22 acres[2] that include several blocks of occupied residential and commercial structures, and eight acres of the Metropolitan Transportation Authority's Vanderbilt Rail Yard ("Vanderbilt Yard"), a below-grade, open-air storage area for Long Island Railroad cars and New York City Transit buses. See Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 AD3d 144, 146 (1st Dept 2006), lv app den 8 NY3d 802 (2007).[3]

Designed by the architect Frank Gehry, the centerpiece of the Project is a sports arena that is approximately 150 feet tall, has a seating capacity of 18,000 and will serve as the home of the Nets professional basketball team. The balance of the project consists of 16 high-rise apartment and office buildings, ranging in height from 184 feet to 620 feet and containing approximately 4,500 residential rental units of which 2,250 are affordable housing, 1,930 condominium units, office and commercial space, a 180-room hotel, as well as eight acres of publically accessible open space. The Project will also reconfigure, upgrade and partially relocate the Vanderbilt

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[1]As explained in footnote 8, infra, the State's financial participation is limited to $100 million.

[2]The 22 acre area is roughly bounded by Flatbush and 4th Avenues to the west, Vanderbilt Avenue to the east, Atlantic Avenue to the north, and Dean and Pacific Streets to the south.

[3]The Project has been described as the "largest single-design development project in the history of New York City." NYLJ, "Local Lawyers Fight Atlantic Yards Project as Town Law Firm," June 8, 2007, p 20, col 2.

Yard, and a permanent platform will be built over the upgraded rail yard with some of the high-rise buildings constructed on top of the platform. See id.

Petitioners allege that they will be "harmed by the substantial adverse environmental impacts of a project of such enormous scale," and that the proposed Project violates the substantive and procedural requirements of SEQRA and the UDCA. Specifically, petitioners contend that the Public Authorities Control Board ("PACB") resolution approving the Project was governed by SEQRA and required SEQRA findings, and that the Metropolitan Transportation Authority ("MTA") neither adopted a SEQRA findings statement nor took the requisite "hard look" at the environmental impacts of the Project. As to the Urban Development Corporation d/b/a Empire State Development Corporation (hereinafter "ESDC"), petitioners assert that the ESDC violated the UDCA by not providing the required 30-day public comment period, by not consulting in a meaningful way with the community advisory board, by designating the sports arena portion of the Project as a "civic project," and by blighting a certain portion of the Project site and designating it as a "land use improvement project." Petitioners also assert that the ESDC violated SEQRA by improperly delegating its SEQRA lead agency responsibilities, by selecting inaccurate completion dates for the Project, by not preparing a supplemental environmental impact statement, and by not taking a "hard look" at the following areas of environmental concern: terrorism, open space, traffic, transit, alternatives to the Project, wind, schools, fire and police protection, and the Brooklyn Bear's Community Garden.

Judicial review of administrative proceedings, including an agency's compliance with SEQRA and the UDCA, is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law

or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3); see Akpan v. Koch, 75 NY2d 561, 570 (1990); Matter of Jackson v. New York State Urban Development Corp., 67 NY2d 400, 416 (1986). Particularly with respect to SEQRA, which implicates a "statutory scheme whose purpose is that the *agency decisionmakers* focus attention on, and mitigate environmental consequences, it is the role of the court not to weigh the desirability of proposed action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively." Matter of Neville v. Koch, 79 NY2d 416, 424 (1992); accord Matter of Jackson v. New York State Urban Development Corp., supra at 416. In other words, since SEQRA leaves an agency with "considerable latitude in evaluating environmental effects and choosing among alternatives," the agency is not required to reach a particular result on any issue, and the court is not permitted to second-guess the agency or substitute its judgment for that of the agency. Akpan v. Koch, supra at 570-571; Matter of Jackson v. New York State Urban Development Corp., supra at 417.

Applying this circumscribed standard of review, the court concludes, for the reasons delineated below, that respondents' determinations approving the Project were neither arbitrary, capricious nor an abuse of discretion, and that respondents violated neither the procedural nor substantive requirements of SEQRA or the UDCA.

I. BACKGROUND

Petitioners allege that they are individuals and organizations whose members reside in or operate businesses adjacent or in very close proximity to the proposed Project area, and that they are all "directly affected by the failure to properly consider the adverse environmental impacts of

the Project, the failure to minimize or avoid adverse environmental effects to the maximum extent practicable, and the failure to consider reasonable alternatives."

The developer, respondent Forest City Ratner Companies, LLC ("Forest City") conceived of the Project in or before the summer of 2002 and announced it publically at a press conference on December 9, 2003. In the interim, Forest City's principal, Bruce Ratner, purchased the New Jersey Nets basketball franchise and solicited the support of former Governor George Pataki, New York City Mayor Michael Bloomberg and Brooklyn Borough President Marty Markowitz.

Respondent ESDC is the "lead agency" for the Project under SEQRA.[4] ESDC is a New York State public benefit corporation that encourages investment throughout the state by, in part, promoting large-scale real estate projects that create and retain jobs, and reinvigorate distressed areas. Id. In furtherance of this mission, the ESDC has powers of condemnation and to override local zoning ordinances. See East Thirteen Street Community Ass'n v. New York State Urban Development Corp., 84 NY2d 287, 292 (1994); Develop Don't Destroy Brooklyn v. Empire State Development Corporation, supra. For example, the ESDC is authorized to approve a project that would otherwise not be permitted due to its scale, density and uses, without reference to or compliance with New York City's Uniform Law Use Review Procedure. See Matter of Waybro Corp. v. Board of Estimate, 67 NY2d 349, 350 (1986). Prior to approving a project, however, the ESDC must comply with SEQRA.

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[4]The SEQR regulations define "lead agency" as "an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required." 6 NYCRR §617.2 (u).

Respondent PACB is governed by sections 50 and 51 of the Public Authorities Law ("PAL") and has the power and duty to approve the "financing and construction of any project proposed" by enumerated public benefit corporations, including the UDC. PAL §51(1). Any determination of the PACB must be by unanimous vote of the three voting members who are appointed by the Governor, the Senate Majority Leader and the Assembly Speaker. PAL § 50(2).

As noted above, respondent MTA owns the Vanderbilt Yard and is an "involved agency" for the purposes of SEQRA.[5]

On February 18, 2005, Forest City entered into a Memorandum of Understanding ("MOU") with the City and the ESDC establishing the terms and parameters of the Project. The MOU stated that subject to review and acceptance by the ESDC, the City and the New York City Economic Development Corporation of Forest City's draft development plan, and in accordance with all statutory requirements, the ESDC intended to seek certain approvals regarding the proposed project, including a determination that the ESDC should act as the "lead agency" under SEQRA.

Also on February 18, 2005, Forest City entered into an agreement with the MTA for Forest City to gain the right to develop over the Vanderbilt Yard.[6] Subsequently, on or about

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[5]The SEQRA regulations define "involved agency" as "an agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an 'involved agency' notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced. The lead agency is also an 'involved agency.'" 6 NYCRR §617.2(s).

[6]Prior to September 2003, the MTA stated that it had "sold" Forest City the right to develop the Vanderbilt Yards, but retracted those statements in September 2003.

May 24, 2005, the MTA issued a request for proposals ("RFP") to purchase the right to develop the Vanderbilt Yard. In response to the RFP, the MTA received two proposals. The one proposal from Forest City for the 22-acre project as previously announced, included a $50 million cash payment, in addition to the following items, the cost of which would be borne by Forest City: 1) the construction of a new Vanderbilt Yard estimated at $182 million; 2) the construction of mass transit improvements estimated at $29 million; 3) environmental remediation and clean-up estimated at $20 million; 4) compensating the MTA for operating increases estimated at $25.4 million; and 5) sharing with the MTA estimated sales tax revenues valued at $23 million. The second proposal was submitted by Extell Development Corporation and provided for a cash payment of $150 million and the construction of a mixed-income housing development limited to the eight-acre parcel occupied by the Vanderbilt Yard.

On July 27, 2005, the MTA Board passed a resolution authorizing the MTA's Chairman and Executive Director to negotiate exclusively with Forest City during a 45-day period, the terms and conditions of any agreements "to sell or lease air space and related real property interests above and real property interests in" the Vanderbilt Yard. At a September 14, 2005 special MTA board meeting, it was reported that Forest City had increased the cash payment component of its proposal from $50 million to $100 million; the MTA Board passed a resolution that no further action would be taken with respect to the Extell proposal, and that negotiations would continue with Forest City "in an effort to consummate a transaction satisfactory to MTA."

In accordance with the requirements of SEQRA, the ESDC developed a Draft Scope of

Analysis for an Environmental Impact Statement ("Draft Scope"),[7] and initiated a coordinated review of the proposed project. On September 16, 2005, the ESDC issued a Notice of Public Scoping and Intent to Prepare a Draft Environmental Impact Statement, and a Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement. Pursuant to these notices, the ESDC announced its determination that the proposed project was a "Type I" action within the meaning of SEQRA, and that the ESDC would serve as "lead agency" under SEQRA, finding that the project could have the potential to result in significant adverse environmental impacts. The ESDC issued a Positive Declaration, which constituted its determination that it would prepare a draft environmental impact statement ("DEIS"). The Draft Scope was posted on the ESDC's web site, and distributed to public officials, agencies and other interested parties. The notices also advised that a public hearing on the Draft Scope was scheduled for October 18, 2005, and that written comments would be accepted until October 18, 2005.

After reviewing and considering the public comments, the ESDC revised the Draft Scope, and on March 31, 2006, it issued a Final Scope of Analysis for an Environmental Impact

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[7]The SEQRA regulations permit a lead agency to engage in "scoping," which is defined as "the process by which the lead agency identifies the potentially significant adverse impacts related to the proposed action that are to be addressed in the draft EIS including the content and level of detail of the analysis, the range of alternatives, the mitigation measures needed and the identification of nonrelevant issues. Scoping provides a project sponsor with guidance on matters which must be considered and provides an opportunity for early participation by involved agencies and the public in the review of the proposal." 6 NYCRR §617.2 (af).

The regulations specify that "[t]he primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant. Scoping is not required. Scoping may be initiated by the lead agency or the project sponsor." 6 NYCRR §617.8(a). The regulations provide that if scoping is conducted, the project sponsor must provide the lead agency with a "draft scope," that contains certain required information. 6 NYCRR §617.8(b).

Statement, which set forth the issues and the methodologies for analyzing those issues, to be addressed in the environmental impact statement ("EIS"). The ESDC also prepared a General Project Plan ("GPP"), which included the proposed design guidelines for the Project and a Blight Study. On July 18, 2006, the ESDC's Directors accepted the DEIS for the project, and adopted proposed Land Use Improvement Project Findings and Civic Project Findings, and the GPP for the Project, which included the Blight Study.

On July 24, 2006, the ESDC released its 3,000 page DEIS and GPP to the public, and noticed a combined public hearing for August 23, 2006, a "community forum" for September 12, 2006, and a public comment period until September 22, 2006. In addition to the August 23, 2006 hearing, the ESDC conducted two "community forums" on September 12 and September 18, 2006, and subsequently extended the written comment period for one week until September 29, 2006.

On November 15, 2006, the ESDC's Directors accepted a final EIS ("FEIS"), consisting of three volumes, containing a total of more than 3,500 pages, including 1,500 pages of technical appendices, and a 550-page chapter addressed to the 200 public comments and the more than 1,800 written comments. Shortly thereafter, when the ESDC became aware that a number of comments on the DEIS had been omitted from the FEIS, it prepared a corrected and amended FEIS. On November 27, 2006, the ESDC's Directors accepted the corrected and amended FEIS, and issued a Notice of Completion.

On December 8, 2006, the ESDC's Directors approved the Project by enacting a resolution which: 1) adopted the Findings Statement required by SEQRA; 2) adopted the Determination and Findings pursuant to Article 2 of the Eminent Domain Procedure Law

("EDPL"); and 3) made several determinations required by the UDCA, including affirmation of the modified GPP which described the Project and its funding sources, and set forth the bases for the "land use improvement" and "civic project" findings required by Section 10 of the UDCA. The resolution also authorized the ESDC to enter into a funding agreement with Forest City with respect to certain costs, in an amount not to exceed $100 million.

Thereafter, on December 13, 2006, the MTA's Board of Directors, as an "involved agency" for SEQRA purposes, unanimously approved and adopted the MTA Findings Statement for the Project, made the findings required under SEQRA, and authorized its Chairman and Executive Director to proceed with the MTA's portion of the Project. On December 20, 2006, the PACB adopted a resolution approving the ESDC's financial participation in the Project.

On April 5, 2007, petitioners commenced the instant joint Article 78 proceeding and declaratory judgment action seeking to annul the determinations by the ESDC, the PACB and the MTA, approving the Project. As noted above, petitioners challenge the ESDC's findings that the Project qualifies as a "civic project" and a "land use improvement project" under the UDCA, and assert that the ESDC violated the UDCA's requirements for community participation, and that the ESDC's environmental impact statement violated the procedural and substantive requirements of SEQRA. Petitioners further assert that both the PACB and the MTA violated SEQRA.

Each of the four named respondents/defendants the ESDC, Forest City, the MTA and the PACB has answered and opposes the relief sought by petitioners. As part of its answer, the ESDC has provided the administrative record containing 22,754 pages in 38 volumes. Forest

City has submitted a cross-motion to dismiss petitioners' third cause of action for declaratory relief.

II. SEQRA

At the outset, the history and background as to the purpose and procedures of SEQRA will be briefly summarized. SEQRA was enacted in 1975, with the intent as stated in the statute "to declare a state policy which will encourage productive and enjoyable harmony between man and his environment . . . [and] to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources." Environmental Conservation Law ("ECL") §8-0101. In contrast to the federal statute, the National Environmental Policy Act ("NEPA"), 42 USC § 4321-4361, SEQRA is not simply a disclosure statute, but "imposes far more 'action-forcing' or 'substantive' requirements on state and local decision makers than NEPA imposes on their federal counterparts." Matter of Jackson v. New York State Urban Development Corp., supra at 415 (quoting Gitlen, "Substantive Impact of the SEQRA," 46 Alb. L. Rev. 1241, 1248).

"SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making; thus the statute mandates that '[s]ocial, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.'" Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 NY2d 674, 679 (1988) (quoting ECL §8-0103[7]). "SEQRA insures that agency decision-makers – enlightened by public comment where appropriate – will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and

then articulate the bases for their choices." Matter of Jackson v. New York State Urban Development Corp., supra at 414.

The environmental impact statement process is the "heart of SEQRA," with the statute and its implementing regulations prescribing both the procedure for formulating an EIS and its content, regarding any action that "may have a significant effect on the environment." Id (quoting ECL § 8-0109[2]; 6 NYCRR §§ 617.11-617.13). Substantively, SEQRA and the applicable regulations list general categories of information that the EIS must analyze, which include a description of the proposed action, its environmental impacts and any unavoidable adverse environmental effects; alternatives to the proposed action, including a "no-action alternative"; and mitigation measures proposed to minimize the environmental impact. ECL §§ 8-0109(2)(a)-(c), 8-0109(2)(f); 6 NYCRR §§ 617.14 (f)(1)-(5), (7); Matter of Jackson v. New York State Urban Development Corp., supra at 416.

Initially, an agency prepares a draft EIS ("DEIS") which is filed with the Commissioner of Environmental Conservation and made available to the public. Id. If the agency finds that sufficient interest exists and that it would assist the decision-making or provide an efficient forum for public comment, the agency should hold a public hearing on notice; even if a hearing is not held, an agency must provide for a minimum 30-day comment period on the DEIS. Id. The agency then prepares a FEIS, with filing and distribution in the same manner as the DEIS, and provides at least 10 days for public consideration. Id. Finally, in approving an action, the agency must make an explicit written finding that SEQRA requirements have been satisfied and "that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement

process will be minimized or avoided." Id [quoting ECL § 8-0109(8); 6 NYCRR § 617.9(c)(2)(I)].

As previously indicated, an agency's SEQRA determination is subject to limited judicial review by way of an Article 78 proceeding. The court's role is to assure that the agency satisfied SEQRA, procedurally and substantively; the court is neither permitted to weigh the desirability of a proposed action nor to choose among alternatives. See Matter of Neville v. Koch, supra at 424; Matter of Jackson v. New York State Urban Development Corp., supra at 416. Where, as here, procedural issues are raised, the agency's procedures must be examined to determine whether they were lawful. See id at 417. As to substantive compliance, the court must review the record to assure that the agency identified the relevant areas of environmental concern, took a "hard look" at each one, and "made a reasoned elaboration of the basis for its determination." Id; accord Matter of Eadie v. Town Board of the Town of North Greenbush, 7 NY3d 306, 318 (2006); Matter of Neville v. Koch, supra at 424-425. An agency's substantive responsibilities under SEQRA must be viewed in light of a rule of reason, and not every conceivable environmental impact, mitigating measure or alternative need be identified and addressed to satisfy the substantive requirements of SEQRA. See Matter of Eadie v. Town Board of the Town of North Greenbush, supra at 317; Matter of Neville v. Koch, supra at 425; Matter of Jackson v. New York State Urban Development Corp., supra at 417.

The Court of Appeals explains that under this rule of reason, the degree of detail with which each factor must be discussed depends largely on the circumstances and nature of the proposed action. See Matter of Eadie v. Town Board of the Town of North Greenbush, supra at 318; Akpan v. Koch, supra at 570; Matter of Neville v. Koch, supra at 425; Matter of Jackson v.

New York State Urban Development Corp., supra at 417. As a rational decision maker, the agency "must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to effect of a proposed action on a particular environmental concern." Akpan v. Koch, supra at 571. However, while nothing in the law requires an agency to reach a particular a result on any issue and the court is not free to substitute its judgment for the agency's, judicial review nevertheless must be "meaningful" by ensuring that "in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors." Id at 570-571.

III. PACB & SEQRA

Petitioners assert that the PACB resolution approving the Project is unlawful as the PACB made none of the findings required under SEQRA. The PACB argues that its resolution approving the ESDC's financial participation in the Project is not an "action" subject to SEQRA review and therefore, SEQRA findings are not necessary.

In December 2006, the Urban Development Corporation ("UDC") d/b/a the ESDC submitted an application to the PACB pursuant to PAL §50(a), "to enable UDC to implement the Project" and "to enable UDC to issue bonds to assist in financing the development of the Project." See PACB Resolution No. 06-UD-953. Specifically, the UDC sought the PACB's approval to issue $100 million of Personal Income Tax Revenue Bonds to pay for State-financed infrastructure improvements.[8] On December 20, 2006, the PACB issued Resolution No. 06-UD-

[8]According to Todd L. Scheuermann, Assistant Chief Budget Examiner in the New York State Department of Budget, who also serves as the designated representative of the Chairman of the PACB, in April 2006, the New York State Legislature appropriated $100 million to the ESDC to assist in financing new infrastructure relating to the Project, including streets and sewers, garages, transit connections, improvement to the LIRR, and publicly accessible open

953, approving the ESDC's "participation in the Project described in accordance with section 51 of the Public Authorities Law."

SEQRA applies to "any action . . . which may have a significant effect on the environment," ECL §8-0109(2), and broadly defines the term "action" as projects or activities that an agency directly undertakes or funds, policy and procedure-making, and the issuance of permits, licenses or leases. ECL §8-0105(4); see Incorporated Village of Atlantic Beach v. Gavalas, 81 NY2d 322, 325 (1993). The statute expressly exempts from its application "official acts of a ministerial nature, involving no exercise of discretion." ECL §8-0105 (5)(ii); 6 NYCRR §617.5(c)(19).

"In determining whether an agency decision falls within SEQRA's purview, however, the courts cannot rely on a mechanical distinction between ministerial and discretionary acts alone." Incorporated Village of Atlantic Beach v. Gavalas, supra at 326. "Rather the pivotal inquiry . . . is whether the information contained in an EIS may 'form the basis for a decision whether or not to undertake or approve such action.'" Id (quoting Filmways Communications v. Douglas, 106 AD2d 185, 187 [4th Dept], aff'd 65 NY2d 878 [1985]). "In other words, when an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for the purposes of SEQRA's EIS requirements." Id.

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space. At the same time, the Legislature authorized the ESDC to issue $100 million of bonds to fund the appropriation. Governor Pataki ultimately approved both bills. However, since the ESDC is the doing-business-as name of the UDC and the UDC is one of the public authorities listed in PAL §51(a), the ESDC had to obtain approval from the PACB before spending the appropriation and issuing the bonds.

Here, the question whether the PACB's approval qualifies as an exempt ministerial act or is agency "action" subject to SEQRA, must be answered by examining the underlying statutory scheme authorizing the PACB to act. See id at 325; Matter of Ziemba v. City of Troy, 37 AD3d 68 (3rd Dept 2006), lv app den 8 NY3d 806 (2007). The legislature created the PACB in 1976 by enacting section 50 of the Public Authorities Law, in response to the credit crisis that had resulted from dramatic growth in the amount of debt incurred by certain public benefit corporations "without effective or comprehensive monitoring by the State government." McKinney's Book 42, PAL §50, Historical and Statutory Notes, Section 1, Legislative Findings and Intent. After the UDC defaulted in 1975 on more than $100 million in bond anticipation notes, Governor Hugh Carey appointed a Moreland Act Commission. The Commission recommended the enactment of legislation creating a public authorities control board that would impose immediate and effective controls on public benefit corporations whose activities had already adversely impacted New York's credit and fiscal soundness. See id; "Restoring Credit and Confidence," Report to the Governor by the New York State Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies, March 31, 1976.

Pursuant to section 51(1) of the Public Authorities Law, the PACB "shall have the power and it shall be its duty to receive applications for approval of the financing and construction of any project proposed by [certain specified] public benefit corporations," including the UDC. Section 51(1) further provides that "[n]o public benefit corporation subject to the provisions of this section shall make any commitment, enter into any agreement or incur any indebtedness for the purpose of acquiring, constructing, or financing any project unless prior approval has been received from the board by such public benefit corporation as provided herein." Under Section

51(3), the PACB is authorized to "approve applications only upon its determination that, with relation to any proposed project, there are commitments of funds sufficient to finance the acquisition and construction of such project," and in "determining the sufficiency of commitments of funds, the board may consider commitments of funds, projections of fees or other revenues and security, which may, in the discretion of the board, include collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken."

Based upon the foregoing statutory provisions, PACB's authority in approving a proposed project is limited to financial considerations. When a public benefit corporation, such as the UDC, submits an application to the PACB, the PACB may approve the proposed project only if it determines that the commitment of funds is sufficient to finance the project. See 87 NY Jur2d Public Authorities §2; 87 NY Jur2d Public Funds §73. To that effect, the PACB has been characterized as a "watch-dog agency" that provides external oversight as to the soundness of proposed projects from a financial point of view. 369 Practicing Law Institute, Tax Law & Practice, §501(C)(3) (1995). While the PACB undoubtedly has certain discretion, that discretion is confined to reviewing the financial feasibility and impact of proposed debt-incurring projects, which bear no relationship to the environmental concerns that may be raised in an EIS. See Incorporated Village of Atlantic Beach v. Gavalas, supra at 326. Thus, since the PACB's role is prescribed by statute to considering the financial aspects of the Project, its December 20, 2006 resolution approving UDC's "participation in the Project described in accordance with section 51 of the Public Authorities Law," is not an "action" subject to SEQRA, and as such, no SEQRA findings were required. Id.

IV. MTA'S COMPLIANCE WITH SEQRA

Petitioners contend that the MTA failed to comply with SEQRA by not adopting a findings statement and not taking a "hard look" at the environmental impacts of the Project. Specifically, petitioners assert that the only SEQRA-related document that the MTA, its staff or committees reviewed prior to approving the project is a "summary" which identified six significant adverse environmental impacts of the Project, but did not discuss or quantify these "unmitigated impacts."

Petitioners' contentions lack merit. The record reveals that the MTA, as an "involved agency," conducted an adequate environmental review in adopting its own SEQRA Findings Statement and relying on the FEIS prepared by the ESDC, the lead agency.[9] See Matter of the Village of Pelham v. City of Mount Vernon Industrial Development Agency, 302 AD2d 397, 400 (2nd Dept), lv app den 100 NY2d 505 (2003). While petitioners are correct that the MTA produced a seven-page "Summary of MTA Environmental Findings for Atlantic Yards Arena and Redevelopment Project," they overlook the fact that the summary was simply that, a summary of the MTA's own environmental Findings Statement. The record establishes that the MTA also prepared a 91-page environmental Findings Statement that was adopted by resolution approved by the MTA Board on December 13, 2006.[10]

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[9]Under SEQRA where more than one agency is required to participate in the EIS process, one agency will designate itself as the "lead agency," and the other remains as an "involved agency." Here, petitioners do not dispute that the ESDC properly served as the "lead agency" and that the MTA was a "involved agency."

[10]The Introduction to the MTA Statement of Findings states that it is issued pursuant to SEQRA and sets forth the findings of the MTA, the LIRR and New York City Transit as involved agencies with respect to the environmental impacts of the Project as "summarized" in the ESDC's Modified General Project Plan dated December 6, 2006 and as "analyzed" in the

The MTA's Findings Statement not only described the Project and its procedural history, purposes and benefits, but also addressed the technical methodology employed in the FEIS and considered 16 separate areas of environmental concern as disclosed in the FEIS, along with proposed mitigation measures, unmitigated significant impacts and alternatives.[11] The Findings Statement also weighed the benefits of the Project against its significant adverse environmental impacts, and the impacts and benefits of the alternatives, as disclosed in the FEIS, concluding "[o]n balance . . . that the density at the project site is appropriate and that the social, economic and environmental benefits of its density outweigh the reduction in traffic and other environmental impacts that could be achieved through a further reduction in density."

Under these circumstances, where the MTA, as an involved agency, prepared and adopted its own SEQRA Findings Statement and relied on the FEIS prepared by the ESDC, the MTA made the appropriate environmental findings required under SEQRA. Id.

FEIS approved by the ESDC on November 27, 2006, as lead agency under SEQRA.

[11]The MTA's Findings Statement is divided into 13 parts: Part I is an introduction and summary of the Project; Part II discusses the Project's procedural history; Part III describes the framework for the environmental impact analysis; Part IV provides a overview of the Project, detailing the Project's mixed uses and goals; Part V describes the benefits of the Project; Part VI considers the environmental impacts, facts and conclusions as set forth in the ESDC's FEIS, and addresses 16 separate areas including land use, socioeconomic conditions, community facilities, open space, cultural resources, urban design, shadows, hazardous materials, infrastructure, traffic and parking, transit and pedestrians, air quality, noise, neighborhood character, construction and public health; Parts VII and VIII discuss the mitigation measures to be implemented and the alternatives considered; Part IX summarizes the unmitigated significant adverse impacts; Part X addresses the growth-inducing aspects of the Project; Part XI discusses the irretrievable commitments of resources; Part XII is a summary evaluation of the Project and its alternatives; and Part XIII is the certification of findings required by SEQRA.

V. ESDC'S COMPLIANCE WITH THE UDCA

Petitioners contend that the ESDC violated the UDCA by: 1) not providing the minimum 30-day written comment period required under the UDCA; 2) not allowing meaningful advice from the community advisory committee; 3) designating the sports arena portion of the Project as a "civic project" within the meaning of the UDCA; and 4) designating a certain portion of the Project area as a "land use improvement project" within the meaning of the UDCA.

A. Public Comment Period

In adopting the General Project Plan ("GPP"), the ESDC exercised its powers under the UDCA to override local land use and zoning laws. Under these circumstances, the UDCA required that "a public hearing must be held on thirty days notice" and "any person shall have the opportunity to present written comments on the plan within thirty days after the public hearing." McKinney's Uncons Laws of NY, § 6266(3).

As noted above, on July 18, 2006, the ESDC accepted the DEIS for the Project, and adopted the proposed Land Use Improvement Project Findings and Civic Project Findings, and the GPP, which included the Blight Study. On July 24, 2006, the ESDC issued a notice that a combined public hearing would be held on August 23, 2006, for the purpose of, *inter alia*, "informing the public about the General Project Plan" and "giving all interested persons an opportunity to provide comments on the General Project Plan, pursuant to section 16 of the UDC Act."[12] The notice provided that "[c]omments must be received within thirty days of the date of

[12]As a "combined hearing," it was intended to satisfy the requirements of not only the UDCA, but also the EDPL and SEQRA. Petitioners concede that SEQRA requires only a 10-day comment period following a public hearing , 6 NYCRR § 617.9(a)(4)(ii), and that neither SEQRA nor the EDPL "presented the same scheduling problem as did the UDCA." Thus, the only issue as to the timing of the public hearing or comment period, is whether the ESDC

the public hearing (i.e. on or before 5:30 p.m. on September 22, 2006)." The notice explained that "[c]omments may also be made verbally at the public hearing or at a community forum" that will be held on September 12, 2006, and that "[a]ll verbal comments made at the public hearing or at the community forum, and all written comments received by ESDC prior to 5:30 p.m. on September 22, 2006, will be considered by ESDC prior to final consideration of the General Project Plan and issuance of the FEIS."

It is not disputed that a public hearing was held on August 23, 2006, two so-called "community forums" were held on September 12 and 18, and the comment period was extended to September 29, 2006.[13] According to the ESDC, 99 people spoke at the August 23 public hearing, another 104 spoke at the September 12 and 18 community forums, and more than 1,800 written comments were received by the end of the comment period on September 29.[14]

Petitioners assert that the September 29 deadline did not provide the mandated 30-day minimum comment period, because the September 12 and 18 "community forums" were actually "continuations" of the August 23 public hearing. Specifically, petitioners argue that neither the UDCA nor SEQRA provides for a community forum, and that ESDC's July 24 notice

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complied with the notice and comment requirements of the UDCA.

[13]On August 28, 2006 ESDC issued a notice that a "second community forum, open to all persons . . . to receive comments" would be held on Monday, September 18, 2006, and that the "public comment period" was being extended from September 22, 2006 to September 29, 2006. The notice explained that "[a]s a result of the significant turn-out at the August 23rd public hearing and requests from the public, ESDC has elected to schedule the additional community forum and has extended the public comment period." The notice specified that "verbal comments" could be made at the September 12 and 18 community forums, and that "written comments" could be submitted by e-mail or mail, on or before September 29, 2006.

[14]Chapter 24 of the FEIS, which takes up the entire Volume 2 of the FEIS and is 555 pages in length, summarized and responded to the comments on the DEIS.

drew no substantive distinction between the two events. According to petitioners, since the public hearing continued and was not concluded until September 18, the 30-day minimum comment period should have been measured from that date and would not have closed until October 18, 2006.

In view of the statute and the circumstances presented, petitioners' arguments are not persuasive. Petitioners concede that if the ESDC had held only the August 23, 2006 hearing and never provided for the September 12 and 18 community forums, no issue would exist as to the timing of the comment period, since the original September 22, 2006 deadline satisfied the statutory requirement for a minimum 30-day comment period "after the public hearing."

Moreover, even if no precedent exists for holding a community forum, nothing in the statute precludes the ESDC from giving the public additional time or opportunities to comment on a project, either in writing or in person. The Appellate Division First Department has held that the hearing requirement set forth in the UDCA is "designed to solicit community involvement in the planning process." Matter of Leichter v. New York State Urban Development Corp., 154 AD2d 258 (1st Dept 1989); see also Matter of Waybro Corp. v. Board of Estimate, supra at 357. The same must be said for the public's right to submit written comments.

The statute sets forth minimum requirements for the public to comment in writing by mandating an "opportunity to present written comments on the plan within 30 days after the public hearing." Here, the ESDC has essentially expanded the role of the written comment, by giving the public the extra option of submitting verbal, as opposed to written comments, at a community forum held at a set time and location during the 30-day public comment period. In

this regard, the "public hearing" and "community forum" are substantively distinguishable, as the community forum is an expansion of the public comment period, which is distinct and separate from the public hearing.

Notably, ESDC's notice plainly denominated only the August 23 event as a "public hearing," followed by a period for the public to submit written comments ending exactly 30 days later on September 22. The notice explained that the public would have an additional opportunity to submit verbal comments during a community forum, and that all verbal comments from both the public hearing and the community forum, as well as the written comments received by September 22, would be considered by the ESDC. Likewise, ESDC's second notice scheduling the additional community forum for September 18 and extending the "public comment period" to September 29, explicitly stated that the community forum would be "open to all persons . . . to receive comments," that "verbal comments" could be made on September 12 and 18, and that "written comments" could be sent by mail or e-mail to be received on or before September 29. Thus, the two notices made clear that just one public hearing would be held on August 23, and after that date as an alternative and in addition to submitting comments in writing by mail or e-mail, the public could submit comments verbally by appearing in person at the community forums on September 12 and 18.

For the foregoing reasons, the court concludes that the ESDC's September 29 cut-off date for the submission of public comments, satisfied the statutory requirement to provide a minimum 30-day public comment period "after the public hearing." McKinney's Uncons Law of NY, § 6266(3). Notwithstanding this conclusion, the court fully appreciates petitioners' position that in view of magnitude of the Atlantic Yards Project and the controversy it has engendered,

additional public hearings and an extended public comment period would have increased public scrutiny and participation in the process. However, where as here, the Legislature has specified that a single public hearing and a 30-day comment period suffices, the court is empowered to insure that the ESDC complies "with the letter and spirit of the legislative mandates, but [the court] may not edit such mandates or engraft additional requirements, even if it is believed that such additions would be beneficial to the public." Matter of New York Public Interest Research Group Straphangers Campaign, Inc. v. Metropolitan Transportation Authority, 309 AD2d 127, 136 (1st Dept), lv app den 100 NY2d 513 (2003).

B. Community Advisory Committee

Section 6254(7) of the UDCA provides that "[t]he corporation [UDC d/b/a ESDC] shall 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, and may establish rules and regulations with respect to such committees." McKinney's Uncons Laws of NY, § 6254(7).

While petitioners do not dispute that the ESDC established a community advisory committee, they challenge the ESDC's discretion in "failing to undertake any meaningful consultation" with the committee. Specifically, petitioners argue that only three of the six members of the committee were "truly representative of the community," as the ESDC "stacked" the committee with "three unabashed supporters of the Project," including its own representative.[15] Petitioners further argue that the three committee members from the

[15]The committee established by the ESDC was comprised of six members: 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

Community Boards affected by the Project, could not adequately participate in the process, since the committee did not have its first meeting until June 29, 2006 and was given "little insight" as to its role and the available resources.

The broad language of the statute as quoted above, mandates the creation of a community advisory committee to "consider and advise" the ESDC on the Project, and imposes no prescriptions as to the composition of the committee, or the time or stage in the planning process when the committee should be established. See Mets Parking Inc. v. New York State Urban Development Corp., 58 NY2d 1094, 1096 (1983). Significantly, in Mets Parking Inc. v. New York State Urban Development Corp., the Court of Appeals held that the UDC complied with the requirement to establish a community advisory committee where the committee was created after the project approvals had been granted and an appeal had been taken to the Appellate Division. Id. In contrast, the ESDC established the community advisory committee for the instant Project more than two months before the public hearing and three months before the close of the public comment period, which is earlier than the time period permitted in the Mets Parking case. Thus, while it may have been preferable to have established the community advisory committee at an earlier stage in the process, absent any statute or regulation supporting petitioners' position, the decision in Mets Parking Inc. v. New York State Urban Development Corp. is controlling.

Petitioners concede that half the committee, i.e. the three members from each of the community boards affected by the project, was "truly representative of the community," and presumably the member from the Brooklyn Borough President's office was also representative of

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Economic Development Fund, and a representative of the ESDC.

the community. Under these circumstances, the ESDC cannot be found to have abused its discretion by including as the two other members, representatives from the New York City Economic Development Corporation and the ESDC itself.

C. Designation of Sports Arena as a "Civic Project"

The UDCA empowers the ESDC to undertake certain enumerated "projects" including "a residential project, an industrial project, a land use improvement project, a civic project . . . or an economic development project, as defined herein." McKinney's Uncons Laws of NY, § 6253(6). In connection with the Atlantic Yards Project, the ESDC designated the sports arena portion as a "civic project." The statute defines "civic project" as a "project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes." McKinney's Uncons Laws of NY, § 6253(6)(d)[16]

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[16]In undertaking the construction of a "civic project," the statute requires the ESDC to make the following findings:

> 1) That there exists in the area in which the project is to be located, a need for the educational, cultural, recreational, municipal, public service or other civic facility to be included in the project; 2) That the project shall consist of a building or buildings or other facilities which are suitable to educational, cultural, recreational, community, municipal, public service or other civic purposes; (3) That such project will be leased to or owned by the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose, and that adequate provision has been, or will be made for the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project; 4) That the plans and specifications assure or will assure adequate light, air, sanitation and fire protection.

McKinney's Uncons Laws of NY, § 6260(d).

Petitioners argue that the sports arena portion of the Project does not fall within this statutory definition of a "civic project," since it will be a for-profit professional sports facility that is leased to a private entity and will have limited availability to civic or community groups.[17] In response, the ESDC asserts that its finding that the Project qualifies as a "civic project" was made not solely on the basis of the arena, "but upon a rational assessment of the many recreational, cultural, educational and other civic benefits the Project will offer." Specifically, the ESDC points to the "Civic Project Findings" in the GPP and the "civic benefits" identified in the FEIS, which are summarized in its SEQRA Findings:

> The arena will not only serve as a new home for the Nets, but will also provide a venue for other entertainment and cultural events including cultural gatherings, collegiate competitions, and graduations. The project sponsors [Forest City] have made a commitment to make available a minimum of ten events at the arena for use by community groups at a reasonable cost (generally the cost of operation).

In determining the "civic project" issue, the court will focus on the question as presented by petitioners, i.e. whether an arena primarily intended for use by a professional basketball team and operated by a private profit-making entity, qualifies as a "civic project" within the meaning of the UDCA. As to the civic benefits alleged by the ESDC and quoted above, the commitment as to those uses for ten events a year is *de minimus* when compared with the primary use of the arena by the Nets, and thus, does not impact on the determination of this issue.

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[17]According to ESDC's General Project Plan ("GPP"), the arena will be owned by ESDC or a state-created local development corporation, and leased to Forest City. The GPP further states that the "ESDC will retain ownership of the land under the Arena through the initial term of its lease to the LDC [local development corporation], and ESDC or the LDC will retain ownership of the Arena during the initial term. The initial term would equal the term of the tax-exempt bonds issued by the LDC and is expected to be 30 to 40 years."

In any case of statutory interpretation, the starting point must be the language itself which is the clearest indicator of legislative intent, and if the language is unambiguous, the court must give effect to its plain meaning. See Matter of DaimlerChrysler Corp. v. Spitzer, 7 NY3d 653, 660 (2006); Majewski v. Broadalbin-Perth Centennial School District, 91 NY2d 577, 583 (1998). As the Court of Appeals has consistently emphasized, "[i]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." Matter of Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 93 NY2d 729, 737 (1999)(quoting Tompkins v. Hunter, 149 NY 117, 122-123 [1896]); see also Majewski v. Broadalbin-Perth Centennial School District, supra. Where as here, the term at issue does not have a controlling statutory definition, courts "construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase." Rosner v. Metropolitan Property & Liability Insurance Co., 96 NY2d 475, 479-480 (2001)(quoting Matter of Village of Chestnut Ridge v. Howard, 92 NY2d 718, 823 [1999]); see also Orens v. Novello, 99 NY2d 180, 185-186 (2002); McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 232, 234, at 392, 398.

The court must determine the meaning of the word "recreational" as used in the UDCA's definition of "civic project," which includes a project "designed and intended for the purpose of providing facilities for . . . recreational . . . purposes." McKinney's Uncons Laws of NY, § 6253(6)(d). Although the UDCA does not define "recreational," it cannot be reasonably disputed that this is a word of "ordinary import" which must be construed in accordance with its

usual and commonly understood meaning. See Rosner v. Metropolitan Property & Liability Insurance Co., supra. Turning to the dictionary for guidance, the word "recreational" is the adjectival form of "recreation," which the American Heritage College Dictionary defines as "refreshment of one's mind or body through activity that amuses or stimulates; play." American Heritage Dictionary of the English Language (4th ed 2000). Webster's New World Dictionary of the American Language defines "recreation" as "1. refreshment in body or mind, as after work, by some form of play, amusement, or relaxation 2. any form of play, amusement, or relaxation used for this purpose, as games, sports, hobbies, etc."

Applying this definition, the sports arena portion of the Project, which is primarily intended to serve as the home of the Nets basketball franchise, is a facility designed and intended for recreational purposes, as when sports fans attend a professional basketball game, like any other sporting event, they are engaged in a form of amusement, and the fact they enjoy the amusement offered by these events as spectators does not alter their recreational character. See Diamond v. Springfield Metropolitan Exposition Auditorium Authority, 44 F3d 599, 603 (7th Cir 1995); Frazier v. City of Norfolk, 234 Va. 388, 392, 362 SE2d 688, 690 (1987); see also Murphy v. County of Erie, 28 NY2d 80, 88 (1971). Thus, as a venue for professional sports events, the arena qualifies as a facility designed and intended for "recreational purposes," and as such constitutes a "civic project" as defined under the UDCA.

Petitioners argue that the arena does meet the UDCA definition of "civic project" since it will be leased to and operated by a private for-profit entity and will have limited availability to civic or community groups. Petitioners, however, acknowledge one of the UDCA's purposes is, as discussed below, to encourage private participation in civic and other projects, and identify no

language in the statute either restricting the type or amount of such private participation, or mandating a certain measure of community access to a privately operated facility. While petitioners rely on a separate law enacted in 1993, which created a "sports facilities assistance program," NY Session Laws 1993, ch. 258, they point to no language in that law indicating an intent to narrow or amend the broad terms of the UDCA.

As determined above, the arena is a facility designed and intended for "recreational purposes," which falls squarely within the UDCA definition of "civic project." McKinney's Uncons Laws of NY, §6253(6)(d). Neither the definition nor any other provision in the statute draws a distinction between a facility operated by or leased to a not-for-profit as opposed to a commercial entity, or a facility for "recreational purposes" like the arena here, which is intended for use by a *professional* sports team as opposed to a college or high school sports team.[18]

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[18]Similarly, when the legislature enacted a 2005 law authorizing the leasing of public parkland in connection with the construction of the new Yankee Stadium, it made specific findings that "the development, financing, operation and maintenance of a *new stadium for professional baseball* and associated facilities . . . in the borough of the Bronx . . . will provide, for the benefit of the people of the city of New York, *recreational use and activities including entertainment, amusement,* education, enlightenment, cultural development and betterment and improvement of trade and commerce, including *professional sports and athletic events*, cultural and entertainment events, tourism meeting and assemblages, and other events of a civic, community and general public interest" (emphasis added). NY Session Laws of 2005, ch. 238, §1.

Likewise, in 1968, the State legislature enacted a law empowering Erie County to enter into contracts and incur indebtedness in connection with the building of a stadium. See Murphy v. Erie County, supra at 84. Pursuant to that legislation, the County adopted a resolution authorizing the issuance of $50,000,000 in bonds to finance the construction of a domed stadium, and entered into an agreement for a private entity to operate and control the stadium under a 40 year lease, or manage the stadium under a 20 year contract. Id. In Murphy, plaintiff acknowledged that the erection of the stadium served a "public purpose," but argued that by giving control to a private entity, the county converted the stadium into a private use for the private entity's benefit. In rejecting this argument, the Court of Appeals quoted the enabling legislation declaring that the law was designed to "furnish to, or foster or promote among, or provide for the benefit of, the people of the county of Erie, recreation, entertainment, amusement,

Moreover, the lease to and operation of the arena by a profit-making entity is consistent with the UDCA's overall purpose to maximize private participation. In enacting the UDCA, the legislature expressly declared that "the policy of the state [is] to promote the safety, health, morals and welfare of the people of the state and to promote the sound growth and development of our municipalities through . . . the undertaking of public and private improvement programs . . . including the provision of educational, recreational and cultural facilities, and the encouragement of participation in these programs by private enterprise." McKinney's Uncon Laws of NY, §6252. Id.

To achieve these and other purposes, the legislature created the UDC with the express mandate to "encourag[e] maximum participation by the private sector of the economy, including the sale or lease of the corporation's interest in projects at the earliest time deemed feasible, and through participation in programs . . . to acquire, construct, reconstruct, rehabilitate or improve . . . commercial, educational, recreational and cultural facilities." Id. To effectuate this legislative intent, the statute expressly authorizes the UDC to "sell or lease . . . any civic project to the state or . . . to any municipality . . . or to *any other entity* which is carrying out a community, municipal, public service or other civic purpose" (emphasis added). McKinney's Uncon Laws of NY, §6259(1).

In view of the broad terms of these provisions which impose no restrictions on the amount or type of private participation, it is clear that the legislature intended to give the ESDC

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education, enlightenment, cultural enrichment." Id at 87 (quoting L. 1968, ch. 252, §2). Relying on that language, the Court of Appeals concluded as follows: "That the county may not itself be using the stadium seems irrelevant to these purposes, for it is evident that the county's residents will be obtaining the full benefit for which the stadium is intended, the ability to view sporting events and cultural activities, regardless of the identity of the party operating the stadium." Id.

wide discretion in undertaking projects involving the private sector.

For the reasons stated above, the ESDC was not irrational or unreasonable in designating the professional sports arena portion of the Project as a "civic project," as such interpretation comports with the plain meaning of the UDCA. Notwithstanding this conclusion, the parties acknowledge that throughout this process, Forest City has emphasized its clear commitment to make the arena available, albeit on a limited basis, for community and cultural events. The court recognizes the importance of this commitment and that Forest City is bound to provide meaningful access to the community for use of the arena.[19]

D. Designation of Non-ATURA Blocks as a Land Use Improvement Project

As explained above, one of the enumerated "projects" the ESDC is authorized to undertake is a "land use improvement project." McKinney's Uncons Laws of NY, § 6253(6). The UDCA defines "land use improvement project" as follows:

> A plan or undertaking for the clearance, replanning, reconstruction and rehabilitation or a combination of these and other methods, of a substandard and insanitary area, and for recreational or other facilities incidental or appurtenant thereto, pursuant to and in accordance with article eighteen of the constitution and this act. The terms "clearance, replanning, reconstruction and rehabilitation" shall include renewal, redevelopment, conservation, restoration or improvement of any

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[19]Petitioners contend that the ESDC has not explained the extent to which or on what terms the arena will be made available to community groups. Citing to a report prepared by an outside accounting firm, KPMG, LLP, petitioners assert that the cost of using the arena will exceed $100,000, which includes a base rental of $62,000 and expenses of $41,000. Although not argued by petitioner, the court notes that the report states that this estimate appears to be "high." Furthermore, it is unclear whether this is the rate that would be applicable to community groups. As indicated above, the "civic benefits" identified in the FEIS explicitly state the arena will be available for use by community groups "at a reasonable cost (generally the cost of operation)." While at this stage of the Project nothing definitive exists as to rental cost to community groups, respondents have made a clear commitment to make the arena available to community groups at a "reasonable cost."

combination thereof as well as the testing and reporting of methods and techniques for the arrest, prevention and elimination of slums and blight.

McKinney's Uncons Laws of NY, §6253(6)(c).

In its GPP, the ESDC designated the Project as a "land use improvement project," by determining that the Project site is a "substandard and insanitary area," based on a 378-page Blight Study prepared by an outside consultant, AKRF. It is uncontroverted that the majority of the Project site including the Vanderbilt Yards, is located within the Atlantic Terminal Urban Renewal Area ("ATURA"), which New York City has designated as blighted ten times, first in 1968 and most recently in 2004, to facilitate redevelopment. See Goldstein v. Pataki, 488 FSupp2d 254, 256 and 287, fn 11 (EDNY 2007). Of the eight City blocks comprising the Project site in its entirety, five are located within ATURA and constitute 63% of the total square footage of the site.[20] The three remaining blocks in the Project site, Blocks 1127, 1128 and 1129, are not included within ATURA and were not previously designated by the City or the State as blighted.[21]

Petitioners do not dispute the blight determination as to the majority of Project site that falls within ATURA. Limiting their objections to the non-ATURA portion of the Project, petitioners argue that the ESDC lacked a sufficient rational basis for finding the non-ATURA

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[20]The ATURA portion of the Project consists of Blocks 927, 1118, 1119, 1120 and 1121. According to the Blight Study, these blocks are in the southernmost part of ATURA and "have yet to be improved over the conditions that led the City to designate the area as blighted approximately 40 years ago."

[21]The non-ATURA portion of the Project site consists of all of Blocks 1127 and 1129, and approximately one-third of Block 1128. These three contiguous blocks are immediately adjacent to the southern boundary of ATURA on Pacific Street, and are directly across from the Vanderbilt Yards.

blocks blighted, because the Blight Study analyzed the Project site as whole without distinguishing between the ATURA and non-ATURA portions.

In determining that an area is a fit subject for a land use improvement project under the UDCA, the ESDC need only find that it "is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth of the municipality." McKinney's Uncons Laws of NY, § 6260(c)(1). The statute defines the phrase "substandard and insanitary area" to "mean and be interchangeable with a slum, *blighted*, deteriorated or deteriorating areas, or an area which has a *blighting influence* on the surrounding area, whether residential, non-residential, commercial, industrial, vacant or land in highways, waterways, railway and subway tracks and yards, bridge and tunnel approaches and entrances or other similar facilities" (emphasis added). McKinney's Uncons Laws of NY, § 6253(12).

The Court of Appeals instructs that the term "blight" is to be given a "liberal rather than literal definition." Yonkers Community Development Agency v. Morris, 37 NY2d 478, 483, app dism 423 US 1010 (1975); accord Jo & Wo Realty Corp. v. City of New York, 157 AD2d 205, 218 (1st Dept), aff'd 76 NY2d 962 (1990).[22] In defining blight liberally, "[m]any factors and interrelationship of factors may be significant," including "such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property

[22]Although these and the other cases cited herein deal with the blight issue in the context of an eminent domain determination, no case directly on point analyzes blight for the purposes of designating a "land use improvement project" under the UDCA. However, in Tribecca Community Association, Inc. v. New York State Urban Development Corp., 200 AD2d 536 (1st Dept), lv app den 84 NY2d 805 (1994), the Appellate Division First Department upheld without analysis, the UDC's "land use improvement" findings under section 6260(c) of the UDCA, that the "parcel was blighted" and cited the Court of Appeals decision in Yonkers Community Development Agency v. Morris, supra, which is an eminent domain case.

difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution." Yonkers Community Development Agency v. Morris, supra at 483.

Moreover, blight can "encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an important purpose." Id. Likewise, the Constitution and laws similar to the UDCA governing urban development projects and public takings, contemplate that "clearing and redevelopment will be of an entire area, not of a separate parcel, and, surely, such statutes would not be very useful if limited to areas where every single building is substandard." Kaskel v. Impellitteri, 306 NY 73, 79 (1953), cert den 347 US 934 (1954). Thus, once it is established that the surrounding area is blighted, unblighted parcels may be designated part of an overall plan to improve a blighted area. See Berman v. Parker, 348 US 26, 34-36 (1954); Hawaii Housing Authority v. Midkiff, 467 US 229 (1984); Kaskel v. Impellitteri, supra; Spadanuta v. Incorporated Village of Rockville Centre, 16 AD2d 966 (2nd Dept 1962), aff'd 12 NY2d 895 (1963); Matter of G. & A. Books, Inc. v. Stern, 770 F2d 288, 297 (2nd Cir 1985), cert den 475 US 1015 (1986); Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp., 771 F2d 44, 46 (2nd Cir 1985), cert den 475 US 1018 (1986); Goldstein v. Pataki, supra at 287.

Examining the record in light of the case law cited above, the Court finds no basis for disturbing the ESDC's determination that the Project site is blighted. See Tribecca Community Association, Inc. v. New York State Urban Development Corp., supra. Significantly, petitioners concede that the majority of the Project area is blighted, as they are not challenging the blight

designation under ATURA as to 63% of the site, which has stood for nearly 40 years. Thus, since it is undisputed that the majority of the surrounding area is blighted, any unblighted portions of the Project within the non-ATURA blocks, which are immediately adjacent to the southern boundary of ATURA, could be properly designated as part of the overall plan to improve the blighted area. See Berman v. Parker, supra; Hawaii Housing Authority v. Midkiff, supra; Kaskel v. Impellitteri, supra; Spadanuta v. Incorporated Village of Rockville Centre, supra; Matter of G. & A. Books, Inc. v. Stern, supra; Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp., supra; Goldstein v. Pataki, supra.

Additionally, the Blight Study evaluated the 73 lots comprising the entire Project Site, by presenting a detailed profile for every lot, as well as one or more photographs of the exteriors and some interiors of the properties. Each profile begins with a description of the lot's location, zoning classification, current use and ownership, and then evaluates the lot in terms of the following characteristics of blight: unsanitary and unsafe conditions, indications of structural damage, building code violations, occupancy and vacancy status, underutilization, and environmental concerns. The Blight Study concluded that 51 of the 73 parcels in the Project site, or 70%, "exhibit one or more blight characteristics, including: buildings or lots that exhibit signs of significant physical deterioration, buildings that are at least 50 percent vacant, lots that are built to 60 percent or less of their allowable Floor Area Ratio (FAR) under current zoning, and vacant lots. These 51 lots comprise approximately 86 percent of the land area on the project site."

Petitioners object that the Blight Study failed to distinguish between the ATURA and the non-ATURA portions of the Project, and failed to provide a sufficient basis for finding the non-

ATURA portion blighted. Petitioners suggest that a separate blight determination should have been made as to the non-ATURA portion alone, since it is "distinct and separate from the blighted portion," i.e. the ATURA portion. These arguments are without merit.

The Blight Study not only explained the history of ATURA, but also indicated the AUTRA boundaries and the non-ATURA portion of the Project site. Profiling the 52 lots in the non-ATURA portion, the Blight Study analyzed each lot in terms of the blight characteristic noted above, finding one or more such characteristics in at least 30 lots. Among the specific blight characteristics identified were serious structural problems, unsanitary and unsafe conditions, underutilization, vacant lots and vacant buildings.[23] Thus, contrary to petitioners' assertion, the Blight Study documented well more than a "handful" of blight characteristics on well more than a "few" properties in the non-ATURA portion of the project.

While petitioners suggest that the ESDC should have made a separate blight determination as to the non-ATURA portion alone, the UDCA simply requires a finding of "substandard and insanitary conditions" as to the Project site as a whole. Moreover, petitioners' suggestion is inconsistent with the legal authorities cited above holding that the focus of any

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[23]Citing to a recent case decided by the Supreme Court of New Jersey, Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 NJ 344 (2007), petitioners argue that a blight determination cannot be made on the basis of underutilization alone. That case is inapplicable to the instant proceeding, as it is based on an interpretation of New Jersey constitutional and statutory law. In contrast, under New York law, underutilization is one factor that has been considered in determining whether an urban area is "substandard and insanitary." See e.g., Yonkers Community Development Agency v. Morris, supra at 481 (areas eligible for urban renewal not limited to "slums," as "economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose"); Jo & Wo Realty Corp., supra at 218 (blight determination based on finding that Javits Convention Center rendered Coliseum "outmoded, underbuilt and unutilized"); Matter of G. & A. Books, Inc. v. Stern, supra at 293 ("severe underuse" evidence of blight).

blight determination should be directed at the entire area of a redevelopment project as a unit, rather than individual parcels. See Berman v. Parker, supra; Hawaii Housing Authority v. Midkiff, supra; Kaskel v. Impellitteri, supra; Spadanuta v. Incorporated Village of Rockville Centre, supra; Matter of G. & A. Books, Inc. v. Stern, supra; Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp., supra.

Petitioners further assert that non-ATURA blocks were "in the midst of a residential real estate boom" and " would have continued to experience rapid residential redevelopment but for the announcement of the Project in December 2003." To support this assertion, petitioners point to the fact that several industrial buildings have been recently converted to residential use in the non-ATURA portion of the Project and the surrounding area. That fact alone, however, is insufficient to outweigh the ample evidence of blight conditions documented in the Blight Study. Notably, the Blight Study acknowledged the presence of such "market rate condominium buildings," and concluded that their "proximity . . . to the blighted properties profiled in this study indicates that although some isolated redevelopment has occurred on blocks just south of the ATURA boundary, most of the residents in the area continue to live among conditions that are unsanitary and unsafe."[24]

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[24]It must be noted that in Goldstein v. Pataki, supra at 287, the plaintiffs, as owners or occupiers of property included in the Atlantic Yards Project, challenged the ESDC's eminent domain determination and likewise argued that the "takings area" was not blighted or whatever blight existed was caused by Forest City. Rejecting those arguments, Judge Garaufis found that plaintiffs "seem to concede" that the "majority of the Project Area – which encompasses the Takings Area – is blighted," and that "the blight study conducted by the ESDC, which is incorporated by reference into Plaintiffs' allegations, indicates that the Takings Area is blighted." Judge Garaufis held that the "Project is therefore permissible even if Plaintiffs' own properties are not blighted because 'property may of course be taken for redevelopment which standing by itself, is innocuous and unoffending' if the redevelopment is intended to cure and prevent reversion to blight in some larger area that includes the property." Id (quoting Berman v. Parker,

Petitioners also argue that the Blight Study should have addressed the extent to which Forest City's acquisition of properties contributed to a higher incidence of vacancies and physical deterioration. Petitioners submit no legal or factual support for this argument. They identify no specific properties that purportedly became blighted only after Forest City acquired them. The record arguably indicates otherwise, as many of the conditions documented in the Blight Study appear to be longstanding.

Finally, petitioners argue that the ESDC's blight designation was made "after-the-fact" to justify inclusion of the non-ATURA blocks in Forest City's development project, and that the non-ATURA blocks were included "only because FCRC [Forest City] wanted them included in the Project area, and not because of any consideration of what the actual conditions on those blocks are." Petitioners submit no legal authority holding that such actions on the part of the ESDC are beyond the scope of its powers under the UDCA. While it may have been preferable from an urban planning point of view, for the ESDC to have designated the entire area of the Project as a "land use improvement project" prior to Forest City's involvement, the legislature has pointedly left such choices for the agency, not the courts. In any event, as determined herein above, the Blight Study adequately documented the blight conditions present on the non-ATURA blocks.

Based on the foregoing, the Court concludes that the Blight Study provided a sufficient rational basis for the ESDC's determination that the Project constitutes a land use improvement

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supra at 35).

project under the UDCA.[25]

VI. ESDC'S COMPLIANCE WITH SEQRA

The balance of petitioners' objections are addressed to the ESDC's procedural and substantive compliance with SEQRA. As noted above, petitioners assert that the ESDC improperly delegated its SEQRA lead agency responsibilities, selected inaccurate completion dates for the Project, failed to prepare a supplemental EIS, and failed to take a "hard look" at the following areas of environmental concern: terrorism, open space, traffic, transit, alternatives to the Project, wind, schools, fire and police protection, and the Brooklyn Bear's Community Garden. The court will address these issues in the order presented in petitioners' Memorandum of Law.

A. Terrorism

Petitioners contend that the ESDC violated SEQRA by failing to consider the potential security issues and impacts from a terrorist attack.[26] Specifically, petitioners argue that "[i]n

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[25]This determination is made without regard to the crime rate findings in the Blight Study. Since the incidence of crime is just one of the factors that may be considered in determining blight, see Yonkers Community Development Agency v. Morris, supra at 483, petitioners' arguments as to the accuracy of the crime statistics need not be addressed.

[26]The "Public Safety" portion of the FEIS states in its entirety as follows:

> The proposed project would implement its own site security plan, which includes measures such as the deployment of security staff and monitoring and screening procedures. Private security staff and security systems would be provided for the project: additional security personnel at arena events, screening of office tenants and visitors, and private security for the residential and open space components of the proposed project.
> The project sponsors have consulted with the FDNY regarding access needs of emergency vehicles and other safety considerations, such as evacuation plans for places of public gathering and fire protection and security measures. The project sponsors also met with the NYPD to review the overall project and public safety

post-9/11 New York, one would expect the responsible governmental agency to address the threat of terrorism and the need to incorporate appropriate security measures into the design and planning of the Project." While this argument raises genuine issues of public concern, neither SEQRA nor any SEQRA regulation requires that an EIS evaluate the potential adverse impacts of terrorist acts.

Under section 617.9(b)(6) of the SEQRA regulations,

> if information about reasonably foreseeable catastrophic impacts to the environment is unavailable because the cost to obtain it is exorbitant, or the means to obtain it are unknown, or there is uncertainty about its validity, and such information is essential to an agency's SEQR findings, the EIS must . . . assess the likelihood of occurrence, even if the probability of occurrence is low, and the consequences of the potential impact, using theoretical approaches or research methods generally accepted in the scientific community. This analysis would likely occur in the review of such actions as an oil supertanker port, a liquid propane gas/liquid natural gas facility, or the siting of a hazardous waste treatment facility. It does not apply in the review of such actions as shopping malls, residential subdivisions or office facilities.

6 NYCRR § 617.9 (b)(6). Citing to this provision, petitioners concede that when the SEQRA regulations were last amended in 1995, "terrorism was not considered as significant and recurring a threat as it has been since 9/11," so the regulations "contemplate only catastrophic impacts involving facilities that in and of themselves could be prone to explosions or catastrophic failure." Petitioners assert, however, that since "the scope of reasonably foreseeable catastrophic impacts has increased" as a result of 9/11, "an agency reviewing a proposed project must consider not just the inherent instability of a facility such as an oil supertanker port; it must also consider the attractiveness of a project as a terrorist target." This assertion is fatally flawed, in light of petitioners' concession that the SEQRA regulations were never intended to

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and security measures.

address the issue of terrorism, and the proscription against the court's rewriting and expanding the scope of a regulation beyond its plan and express terms. See Shah v. DeBuono, 257 AD2d 256, 260 (2nd Dept 1999), aff'd 95 NY2d 148 (2000).[27]

Petitioners' reliance on recent federal court decisions construing NEPA, the federal counterpart of SEQRA, is misplaced, as those cases are based solely on an interpretation of federal law. See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F3d 1016 (9th Cir 2006), cert denied, 127 SCt 1124 (2007); Tri-Valley Cares v. Department of Energy, 203 Fed Appx 105 (9th Cir 2006); State of Washington v. Bodman, 2005 WL 1130294 (US Dist Ct., ED Wash 2005)(n.o.r.). In any event, those federal cases all involve the types of inherently dangerous facilities or activities that are already intended to fall within the scope of the SEQRA regulation quoted above, 6 NYCRR § 617.9(b)(6), which requires the EIS to assess the likelihood of the occurrence of "reasonably foreseeable catastrophic impacts." See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, supra (application to construct and operate a facility at a nuclear power plant to store spent fuel from nuclear reactors); Tri-Valley Cares v. Department of Energy, supra (proposed construction of a biological weapons

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[27]At oral argument, petitioners clarified their position on the issue of terrorism, stating that they are "asking for the same level of detail" provided in the EISs prepared for four other projects in New York City, namely the World Trade Center Memorial and Redevelopment Plan, the Fulton Street Transit Center, the reconstruction of the World Trade Center PATH Terminal, and the MTA/LIRR East Side Access project. A review of the EISs prepared for these projects reveals that they basically provide a generalized overview of what was considered for safety and security purposes. One commentator notes that these EISs may acknowledge the possibility of terrorist attacks and to some extent describe measures being taken to protect against such attacks and minimize the loss of life, but none has "attempted to describe, even qualitatively, the consequences of a terrorist attack." Michael Gerrard, NEPA and SEQRA Review of Terrorism Risks, Environmental Law in New York, Vol 17, No 11 (Nov 2006).

research laboratory); State of Washington v. Bodman, supra (shipment of radioactive and hazardous waste).[28]

The SEQRA regulations cite facilities with some degree of dangerousness such as an oil supertanker port, a gas storage facility or a hazardous waste facility, and explicitly exclude "shopping malls, residential subdivisions or office facilities." The instant Project is more akin to the latter category of excluded facilities. While the court recognizes the importance of these security concerns, given the nature of the Project and absent precedent or amendment of the statute or regulations, the court concludes that SEQRA did not require the ESDC to consider in its EIS for the Project, the potential security issues and impacts of a terrorist attack.[29]

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[28]Of note, one attorney with expertise in environmental law has considered the effect of these federal cases on New York law, and commented that "[n]o procedures or protocols have been adopted in New York for consideration of terrorism risks in the SEQRA process. . . . It remains to be seen whether, in the wake of San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, new [SEQRA] rules will emerge for more explicit discussion of the possible consequences of terrorist attacks." Michael Gerrard, NEPA and SEQRA Review of Terrorism Risks, Environmental Law in New York, supra.

[29]Addressing security issues in general, Forest City submits an affidavit from Jeffrey D. Venter, a principal of Ducibella Venter & Santore, a security consulting firm, stating that in spring 2005, Forest City retained his firm to develop a "Threat and Risk Assessment" or "TARA" for Phase I of the Project, which includes the arena and surrounding buildings. Venter states that based on "extensive analyses of the potential design specifications and materials for the arena and the other buildings on the Arena Block, and public transportation connections . . . the specifications for building materials and glazing that are to be used, were refined and upgraded to enhance the buildings' security to a very high standard." According to Venter, from December 2005 through January 2007, he participated in five meetings with the NYPD's Counterterrorism Bureau to review the TARA and the design, to discuss potential threats and risks, and to obtain input and recommendations from the NYPD. He explains that the TARA "has been developed with the intention of providing recommendations for architectural and engineering designs and enhancements to address design-based threats, and to develop appropriate operational security measures and electronic security systems." Venter concludes that the information developed and contained in a threat and risk assessment for a major development project is "of a highly sensitive and inherently confidential nature . . . [and must] be

B. Improper Delegation

In support of its contention that the ESDC improperly delegated its SEQRA lead agency decision-making responsibility to either its staff or a private consultant, petitioners allege that the certain "errors and inaccuracies" in the FEIS were "never brought to the attention of the ESDC Board" and that the Board "blindly relied on its staff's incomplete SEQRA review." This contention is without merit.

It is well settled that a lead agency may rely upon information or advice received from others, including consultants and other agencies, if such reliance is reasonable under the circumstances. See Matter of Jackson v. New York State Urban Development Corp., supra at 427; Matter of Halperin v. City of New Rochelle, 24 AD3d 768, 774 (2nd Dept 2005), lv app dism 7 NY3d 708 (2006); Sun Co., Inc. (R & M) v. City of Syracuse Industrial Development Agency, 209 AD2d 34, 51 (4th Dept), app dism 86 NY2d 776 (1995); Matter of Stewart Park & Reserve Coalition v. New York State Department of Transportation, 157 AD2d 1, 7 [3rd Dept 1990], aff'd 77 NY2d 970 [1991]). Notably, SEQRA and its regulations "strongly encourage" lead agencies to rely on the expertise of consultants and other agencies, as they are "likely to be nonexpert in environmental matters, and will often need to draw on others." Matter of Coca-Cola Bottling Co. of New York, Inc. v. Board of Estimate of City of New York, supra at 682; see Matter of Halperin v. City of New Rochelle, supra 774-775; Matter of Riverkeeper v. Planning Board of Town of Southeast, ___ NY3d ___, 2007 WL 4048520; 6 NYCRR § 617.14(c) (lead

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maintained in strictest confidence and not be disclosed to anyone other than the owner, the design professionals involved in the development of the Project and appropriate law enforcement agencies."

agency "may find it helpful to seek the advice and assistance of other agencies, groups and persons on SEQR matters"). "Nevertheless, the final determination on this issue must remain with the lead agency principally responsible for approving the project." Matter of Coca-Cola Bottling Co. of New York, Inc. v. Board of Estimate of City of New York, supra at 682-683.

Here, the ESDC, as the lead agency, retained a private consulting firm, AKRF, to study the environmental effects of the Project and then adopted the firm's environmental assessment. Nothing in the record calls into doubt the reliability of the ESDC's consultant, nor suggests that the ESDC failed to exercise its own decision-making responsibility and improperly delegated such responsibility to its staff or AKRF.

As to their claim of improper delegation, petitioners assert that the alleged "errors and inaccuracies" in the FEIS were not brought to the attention of the ESDC Board at the time of its final approval. These alleged "errors and inaccuracies" were raised by petitioners in their comments on the FEIS and pertain to issues of blight, terrorism and open space. Specifically, petitioners point to their comment objecting to the designation of certain areas as blighted, their comment that SEQRA required consideration of the potential impact of a terrorist attack, and their comment as to ESDC's mathematical error relating to open space. As petitioners acknowledge, these are the identical issues raised in this action and addressed herein.

Petitioners' comments on the FEIS were submitted in a letter to the ESDC during the 10-day waiting period required by SEQRA between the ESDC's acceptance of the FEIS and its final action on the Project.[30] Although the SEQRA regulations did not require the ESDC to respond

[30]SEQRA regulations provide for a minimum10-day waiting period between a lead agency's issuance of a FEIS and its final decision on a project when it adopts a SEQRA findings statement. 6 NYCRR § 617.11. While the regulation states that the purpose of the waiting period

to these comments on the FEIS, AKRF prepared a 28-page response evaluating the comments in petitioners' letters, as well as other letters received. 6 NYCRR § 617.11. Copies of those letters were provided to the ESDC Board, together with a "Status Briefing Memorandum" explaining that "ESDC staff and consultants have reviewed in detail the comments submitted on the FEIS" and "[o]ur conclusion is that none of the comments received on the FEIS requires any additional analysis or raises issues not previously addressed in the FEIS." While the AKRF and ESDC memos are both dated December 8, 2006, the day of EDSC's final approval, the ESDC explains that the letters and the briefing memorandum were distributed to the Board members prior to the meeting. Thus, the record does not support petitioners' assertion that the Board was unaware of the alleged "error and inaccuracies" at the time of its final action. Furthermore, nothing in petitioners' comments undermines ARKF's reliability nor raises significant issues so as to question whether the ESDC's reliance on its staff and ARKF's expertise was unreasonable. See Matter of Stewart Park & Reserve Coalition v. New York State Department of Transportation, supra at 7. Significantly, as determined herein, petitioners' objections regarding blight, terrorism and open space are lacking in merit

Under these circumstances, where the ESDC and ARKF, while not required to do so, responded to the comments, and where the information as to those comments and responses was before the ESDC Board when it made its final decision approving the Project, it cannot be said that the ESDC abdicated its SEQRA responsibilities as the lead agency. Rather, the record establishes that even though the ESDC's own staff and AKRF were undeniably involved in the

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is "to afford agencies and the public a reasonable time period (not less than 10 calendar days) in which to consider the final EIS," the lead agency is not required to respond in any way to comments submitted on an FEIS. 6 NYCRR § 617.11(a).

SEQRA review process, the ESDC Board properly relied on their expertise, while retaining and exercising its role as the ultimate decision maker. See Akpan v. Koch, supra at 575.

C. Project Completion Dates

Petitioners contend that the timetable selected in the FEIS for completion of the Project is inaccurate, thus negating the accuracy of the analyses of its potential impacts in the FEIS. As discussed more fully below, petitioners do not identify any specific inaccuracies in the construction schedule, but rather rely on vague generalities and isolated statements made outside the environmental review process. Most significant, however, is petitioners' failure to submit legal support suggesting that an agency's SEQRA findings, under the circumstances herein, can be called into question on the basis of the build year (i.e. the year the Project is expected to be operational) selected by the agency in analyzing the environmental impacts of a proposed project.

The one reported case to have addressed this issue, characterized the "build year" concept as a "nonstatutory baseline used by CEQR agencies as a device to provide assumptions derived from relevant environmental studies."[31] Committee to Preserve Brighton Beach v. Council of

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[31]CEQR (City Environmental Quality Review) implements SEQRA in New York City. The build year concept is defined in Chapter 2 of the CEQR Technical Manual:

> CEQR requires analysis of the action's effects on its environmental setting. Because the proposed action, if approved, typically would take place in the future, the action's environmental setting is not the current environment, but the environment, as it would exist at project completion, in the future. Therefore, future conditions must be projected. This prediction is made for a particular year, generally known as the "build year." The build year is the year when the action would be substantially operational, since this is when the action's effects would begin to be felt, and when mitigation of project impacts would have to be in place.
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> It may be that the build year for a given action is uncertain. This could be the case for some generic actions or for small rezonings, where the build-out depends on market conditions or other variables. In this case, it is prudent to

the City of New York, 214 AD2d 335, 337 (1st Dept), lv app den 87 NY2d 802 (1995). For that reason, the First Department rejected "petitioners' theory that the data utilized in the environmental impact statement is invalidated because of the reliance on a particular build year." Id.

Regarding the construction schedule itself, petitioners have not made an adequate showing as to any alleged inaccuracies. It is not disputed that the Project is intended to be built in two phases, with Phase I consisting of construction of the arena and five residential and/or commercial buildings immediately surrounding the arena, reconstruction of the Vanderbilt Yard, transit improvements, infrastructure upgrades, demolition and environmental remediation; Phase II involves construction of the remaining eleven residential and commercial buildings, and the open space areas. Assuming that construction would have begun as proposed at the end of 2006, the FEIS expected it to be completed over a 10-year period, with Phase I completed in 2010 and Phase II in 2016.

The selection of these build years for analysis in the FEIS was based on a quarter-by-quarter schedule prepared by Turner Construction Company, which the ESDC describes as one of the largest construction contractors in the United States. The schedule identified the

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> select, from the range of reasonable timing scenarios, the one that represents the worst case environmentally.
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> * * *
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> For phased projects, in additional to the final build year when the entire project is completed, interim build years are also assessed – the first full year after each phase is completed. Large-scale projects to be constructed over a long period, with operation or occupancy of the different elements as they are completed, are also assessed with interim build years.

CEQR Technical Manual at 2-4 to 2-5 (October 2001).

anticipated sequence and timing for the major activities required to complete the Project, including construction sequence, equipment and labor requirements, deliveries, locations of equipment and work activity. According to the ESDC, the schedule was not only reviewed by the ESDC, ESDC's environmental consultant and an independent construction company on behalf of the ESDC, but was also created with the input of other interested agencies, including the New York City Department of Environmental Projection, the Mayor's Office of Transportation Coordination and the Long Island Railroad.

Petitioners identify no specific inaccuracies in any portion of the construction schedule as analyzed in the FEIS. Objecting solely to the ultimate 2016 completion date, petitioners submit that the "ESDC knew when it issued the FEIS that the projected build-out date of 2016 was extremely unlikely, and that the Project will almost certainly require five to ten years beyond 2016 to be completed." The only support petitioners provide for this assertion are remarks made by a Forest City executive at an investors meeting that the Project may take 15 years, and remarks by the landscape architect for the Project quoted in a newspaper article that the "time calendar . . . is probably 20 years." Such vague and inconclusive statements are insufficient to discredit the detailed analysis of the construction schedule contained the FEIS.

D. Open Space

Petitioners assert that the ESDC "egregiously miscalculated" the amount of open space created by the Project. Petitioners do not challenge any aspect of the ESDC's quantitative analysis of open space impacts as set forth in Chapter 6 of the FEIS, but object to a single miscalculation in ESDC's response to Comment 6-6.

Comment 6-6 basically questioned ESDC's statement in the DEIS that New York City's open space goal of a ratio of 2.5 acres of open space per 1,000 residents, was not feasible for most City neighborhoods, when that goal was expected to met in Battery Park City. In its response, ESDC stated that overall the "percentage of open space in Battery Park City (approximately 33 percent) is comparable to the Atlantic Yards project site (approximately 36 percent – 8 of the project site's 22 acres)." However, the ESDC also stated in its response that the Atlantic Yards Project "would provide approximately 1.7 acres of open space per 1,000 residents." That 1.7 figure was incorrect, and the ESDC acknowledged and corrected the error when it responded to petitioners' comments on the FEIS.[32] Specifically, the ESDC 's response to petitioners' comments on the FEIS explained that while the Project would provide approximately 0.6 acres per 1,000 residents, as opposed to 1.7 acres per 1,000 residents, the error in computation "is not relevant to the open space analysis in Chapter 6 of the FEIS, which was conducted pursuant to the methodologies outlined in the CEQR Technical Manual." As further explained by the ESDC, the methodology of the FEIS's analysis compared open space ratios both with and without the Project in the relevant study areas, which extended one-quarter mile and one-half mile from the site. The FEIS also addressed a number of factors not considered in the quantitative analysis of open space ratios, notably the 585-acre Prospect Park and the 30-acre Fort Greene Park, which are "located just outside the residential study area."

Petitioners' reliance on the single mathematical miscalculation is misplaced. As discussed above, neither the 1.7 incorrect figure nor the corrected 0.6 figure is explicitly

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[32]The miscalculation was identified in a December 8, 2006 letter from petitioners' counsel, Jeffrey Baker, commenting on the FEIS.

mentioned in the analysis of open space impacts in Chapter 6 of the FEIS, and the record is devoid of any indication that the miscalculation materially effected the accuracy of the FEIS's open space impact analysis. Furthermore, the amount of open space, 8 of the 22 acres, remained unchanged. Petitioners' assertion that the miscalculated ratio "led ESDC's Board to believe that this project provided a sufficient amount of open space similar to the ratio at Battery Park City," is not persuasive, as the record establishes that ESDC's responses to the comments on the FEIS which had corrected the error, were submitted to Board before it voted on the Project. Under these circumstances, it cannot be said that the miscalculation which was corrected and appeared only in the response to comments chapter of the FEIS, had any material effect on the ESDC's open space analysis and findings.

E. Traffic

Petitioners' objections to the ESDC's traffic findings are limited to two specific issues, namely that the FEIS did not consider the impacts on the Brooklyn Queens Expressway ("BQE") and the Brooklyn and Manhattan Bridges, and the FEIS disregarded public comments concerning peak traffic hours. Petitioners submit no competent proof from a traffic expert to support their objections. Rather, petitioners rely solely on generalized comments to the DEIS, which are insufficient to invalidate the ESDC's findings based on comprehensive analyses prepared by its traffic engineering consultant. See e.g. Matter of WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd, 79 NY2d 373 (1992)(generalized community objections without factual evidence, expert or otherwise, insufficient to counter petitioner's comprehensive data); River Center, LLC v. Dormitory Authority of the State of New York, 275 AD2d 683 (1st Dept 2000), lv app den 96 NY2d 703 (2001) (petitioner's disagreement with agency's assessment of project's

impact on traffic conditions "is based on nothing more than its own selective evaluation of the public hearing testimony of several persons, hardly an adequate basis for challenging the reasonableness of respondent's assessment"); Chatham Towers, Inc. v. Bloomberg, 6 Misc3d 814 (Sup Ct, NY Co 2004), aff'd as modified 18 AD3d 395 (1st Dept 2005), lv app den 6 NY3d 704 (2006)(petitioner submitted traffic expert's analysis supporting their arguments as to the dramatic changes to pedestrian and vehicular traffic patterns on surrounding streets).

The FEIS described the methodology used to analyze potential impacts on traffic conditions in 2010 and 2016, and noted that such methodology was consistent with both national standards and the CEQR Technical Manual guidelines. The FEIS explained that the traffic study area extended upwards of 1.2 miles from the Project and analyzed 93 individual intersections "along local streets proximate to the project site or that would be affected by Project-related changes to the street network, as well as along arterials that would provide access to or from the site." For the 93 intersections analyzed, traffic conditions were examined during five weekday peak hour periods, and two Saturday peak hour periods.[33]

The FEIS also explained that the traffic analysis was based on actual traffic data colleted by the ESDC's traffic engineering consultant, and that the analysis methodologies, planning assumptions and traffic assignments were developed in consultation with the City's Department of Transportation ("DOT"). The record includes a memorandum from the DOT to the ESDC, stating that the DOT reviewed the FEIS and "concurs with its traffic . . . findings and the

[33]The weekday peaks hours were 8 to 9 a.m., noon to 1 p.m., 5 to 6 p.m., 7 to 8 p.m. pre-game, and 10 to 11 p.m. post game; Saturday peak hours were 1 to 2 p.m. pre-game, and 4 to 5 p.m. post game. The FEIS concluded that while the Saturday pre-game and post-game peak hours would have the highest number of unmitigated impacts, those conditions would occur fewer than four times per year when a Nets game would be scheduled for a Saturday afternoon.

feasibility of its proposed traffic mitigation measures." The DOT makes clear, however, that during the first year the arena is in operation, Forest City "shall be responsible for undertaking a program to monitor and advise DOT of traffic and pedestrian conditions at the locations identified in the FEIS as having unmitigated significant impacts" and that a similar monitoring program would be put in place after final completion of the Project. The memorandum also states the exact scope of the monitoring program will be developed in coordination with and approval by the DOT.

Petitioners submit no expert affidavit or other competent evidence challenging the methodologies and assumptions utilized in the FEIS to analyze traffic impacts. While petitioners assert that the FEIS did not respond to comments concerning the Brooklyn and Manhattan Bridges and the BQE, the ESDC's Response 12-19, which is included in Chapter 24 of the FEIS, explained that the DEIS included a screening analysis of the potential impacts on the Brooklyn and Manhattan Bridges, which found that no significant impacts to traffic flow on those bridges were anticipated to result from the proposed Project, "although some future queuing would likely occur (as is presently the case) due to congestion at the metering intersections during peak periods, such as Flatbush Avenue and Tillary Street, and Adams and Tillary Streets." Response 12-19 further explained that the traffic impact analysis focused "on locations where new traffic is expected to be most concentrated, and does not include more distant locations such as Manhattan . . . or regional access corridors such as the BQE. The analysis does, however, assess conditions at intersections along corridors connecting regional access routes and the project site . . . [which] include seven intersections along 4th Avenue,

intersections along Carlton and Vanderbilt Avenues as far north as Park Avenue which would provide access to the BQE."

Petitioners' only other objection to the traffic analysis and findings concerns the use of the 5:00 to 6:00 p.m. evening peak traffic hour for measuring general traffic impacts. Petitioners assert that the FEIS disregarded public comments from "area residents" that "heavy congestion" begins at 3:00 p.m. and lasts past 6:00 p.m. Those comments, however, were expressly addressed in the Response 12-21 in the FEIS, which explained that "[a]lthough the AM and PM commuter peak periods are spread over more than one hour, traffic impact analyses typically examine the peak one hour within each period." Respondents explain that the peak one hour within each period is used "because it represents a reasonable worst case scenario and fully discloses the significant adverse traffic impacts."

Based on the foregoing, the FEIS did respond to the issues raised in the comments concerning the impacts on the BQE and the Manhattan and Brooklyn Bridges, and peak traffic hours.[34] Although petitioners may not be satisfied with those responses, they have not produced any competent evidence to controvert the analyses prepared by ESDC's traffic expert, and thus, have not established that the ESDC failed to take a "hard look" at the traffic impacts or lacked "reasoned elaboration" for its traffic analyses and findings. See Matter of Eadie v. Town Board of the Town of North Greenbush, supra at 318; Matter of Jackson v. New York State Urban Development Corp., supra at 417.

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[34]Petitioners submit no legal or factual support for any additional allegations in the petition challenging the FEIS's traffic analysis.

F. Transit

Petitioners argue that in assessing the adverse impact on public transit, the ESDC relied on a "faulty assumption" as to an annual subway ridership growth rate of 0.5%, which is suggested in the CEQR Technical Manual. To support this argument, petitioners point to a single generalized comment on the DEIS, Comment 13-6, which stated that "NYC Transit Subway and Bus Rider Surveys report average weekday subway entries has grown in the last five (pre-boom) years at close to 2% a year from Brooklyn outside Downtown, and in 2004 to 2005 began an upward trajectory of 3.3%, which averages 3% for all Brooklyn." Petitioners' reliance on this single reference to "surveys," without supporting documentation, such as copies of actual surveys or an expert's affidavit, is insufficient to raise a material issue as to the ESDC's reliance on the CEQR Manual's 0.5% annual growth rate.

Moreover, the ESDC directly responded to Comment 13-6, as Response 13-6 explained that in estimating future travel demand, the transportation analysis not only applied a 0.5% background growth rate for travel demand, but also took into account the demand anticipated to result from "a total of 33 discrete No Build developments in Brooklyn, comprising approximately 6,281 dwelling units, 5.19 million sf of office space, 1.14 million sf of retail space and 2.43 million sf of other space (community facility, academic, hotel, court, etc.)." The FEIS response further explained that such developments were selected based on their size, completion date and proximity to the Project site; that three recent developments, not included in the DEIS, were added to the FEIS; and that several developments were included at the request of the DOT, "which was consulted in developing the list of No Build sites."

In light of the foregoing, petitioners have failed to make a sufficient showing that the underlying basis for the ESDC's transit analysis and findings was inaccurate or unreasonable.

G. Alternatives

Petitioners contend that the ESDC failed to take a "hard look" at alternative sites for the Project because it did not give rationally based consideration to Coney Island as an alternative location for the sports arena. Petitioners also contend that in addressing alternatives, the ESDC "purposefully relied on the false assumption that publically subsidized development is necessary to cure the purported 'blight' which ESDC identified in [the Project] area, and that without centrally planned development, no significant residential development will occur [in the Project area]."

As previously noted, SEQRA gives agencies "considerable latitude" in choosing between alternative measures, and while "judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role 'to weigh the desirability of any action or choose among alternatives.'" Akpan v. Koch, supra at 570 (quoting Matter of Jackson v. New York State Urban Development Corp., supra at 416.) The statute mandates that agencies "act and choose alternatives which consistent with social, economic and other essential considerations to the maximum extent practicable, minimize or avoid adverse environmental effects," and prepare an EIS which "shall include a detailed statement setting forth the . . . alternatives to the proposed action." ECL §§ 8-0109(1), 8-0109(2)(d); Matter of Town of Dryden v. Tompkins County Board of Representatives, 78 NY2d 331, 333 (1991). The applicable regulations require the DEIS to include "a description and evaluation of the range of reasonable alternatives to the action, that are feasible, considering the objectives and capabilities

of the project sponsor." 6 NYCRR §617.9(b)(5)(v). The regulations direct that "[t]he description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed." Id.

Contrary to petitioners' contentions, the record demonstrates that the ESDC sufficiently considered Coney Island as an alternative site for the sports arena. Initially, Chapter I of the DEIS, entitled "Project Description," indicated that before focusing on the Project site, the sponsors considered other locations in Brooklyn, "because the sponsor-team owner is committed to Brooklyn as the home for the Nets." The DEIS explained that alternative sites were analyzed according to specified criteria,[35] and that the analysis began with the eleven alternatives previously proposed in the 1974 Brooklyn Sports Complex Report. The DEIS reported that four of the eleven sites considered in that 1974 report "were too small for the arena, let alone related development" and "others are no longer available," such as the Coney Island site where KeySpan Park is located.

In response to comments on the DEIS proposing other Coney Island locations, the "Project Description" chapter of the FEIS added a detailed explanation as to why the available sites in Coney Island were "inferior to the project site as locations for the arena."

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[35]The siting criteria consisted of: 1) a site large enough to accommodate an arena with a minimum footprint of 240,000 square feet, which also allows for other mixed-use development, as "[r]ecent experience with new arenas such as the MCI Arena in Washington, D.C., and San Diego's PETCO Park (the signature component of its 'Ballpark District') has shown that these facilities thrive in combination with a strong mix of urban land uses, e.g. office, shops, restaurants, and housing"; 2) a site readily accessible to mass transit; 3) a site close to or within a central business district; 3) a site accessible to appropriate infrastructure to support mixed-use development, such as transportation, roads, sewer and water; 4) a site large enough and close enough to major arterial roadways; and 5) a site shape and size adequate to provide security and access control around and beneath the arena and related development.

Acknowledging two subsequent studies published in 1984 and 1994 which also identified Coney Island as a recommended location for Brooklyn sports facilities,[36] the FEIS noted that one Coney Island site "identified for potential sport use has been occupied since 2001 by KeySpan Park, home to the Brooklyn Cyclones minor league baseball team, and that while "it is conceivable that an arena could be built at another location on Coney Island (e.g., immediately west of KeySpan Park or on a site designated in the 1984 study as the Gateway site, located between Coney Island Creek and the Belt Parkway), these locations are deficient for a variety of reasons." The FEIS then discussed those reasons as follows:

> In general, Coney Island is less transit-accessible and more remote than the proposed project site. The proposed project's arena would be centrally located for Brooklyn and the region and would be accessible via 12 subway lines, 11 bus routes, and the LIRR. The convergence of multiple transit lines would make it easy for visitors to reach the arena from a variety of origin points without having to transfer lines or transportation modes. In contrast, Coney Island is located at the southernmost tip of Brooklyn, and there are only 4 subways lines and 6 bus routes located in the vicinity of the potential arena sites identified in prior planning studies. It is likely that a majority of visitors to Coney Island – particularly those traveling from the northern and eastern portions of Brooklyn, the west side of Manhattan, and Nassau County – would be required to make one or more transit transfers to reach the arena. This inconvenience would likely result in a higher share of automobile trips through the area's limited number of access corridors. Travel time would be expected to be greater to the Coney Island site by both auto and transit for most arena patrons.
>
> The anticipated programming of the proposed arena makes geographic centrality and transit accessibility vitally important. As described in the 1994 plan, the Brooklyn Sportsplex previously envisioned for Coney Island would have promoted primarily amateur sports activities, with a small number of commercial events interspersed in order to generate revenue. The maximum capacity of the Sportsplex was described as 12,300 and the commercial events were anticipated to

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[36]In 1984, the Pratt Institute for Community and Environmental Development authored a study entitled "The Brooklyn Sports Study: Phase 1 Locational Analysis." In 1994, the Brooklyn Sports Foundation and Temporary State Commission on Brooklyn Recreational Facilities commissioned a study entitled "Brooklyn Sportsplex Development Plan."

> draw approximately 8,000 spectators. In contrast, the proposed project's arena would host the Nets professional basketball team as well as a variety of commercial and community events. The proposed arena would seat 18,000 for basketball games. In total, the arena is anticipated to host approximately 225 events per year. The number and variety of events and the capacity of the proposed arena make it likely that the proposed arena would draw visitors from a wider geographic area that the Sportsplex proposed for Coney Island. Therefore, it is important that the proposed arena be located on a site that is readily accessible to a broad visitor population.
>
> Finally, the Coney Island sites identified in prior planning studies are not large enough in size or central enough in their location to successfully support a comprehensive mixed-used development. As described above, recent experience with new arenas has shown that these facilities thrive in combination with a strong mix of urban land uses, including offices, shops, restaurants, and housing. The Coney Island sites do not presently offer such a varied mix of uses, nor do they present enough space for construction of new uses that would be synergistic with the arena.

The Comment and Response chapter of the FEIS also addressed the Coney Island alternative. Responding to comments that arena should be in Coney Island and that the DEIS had "ignored" the results of the 1984 and 1994 studies, Response 1-9 reiterated the reasons quoted above as to why the Coney Island locations were "deficient" when compared to the proposed Project site. Response 1-9 further noted that the "1974 study remains relevant as it is the most comprehensive study and the physical configurations of the candidate sites have not changed (although some are no longer available for arena use). This report, as well as subsequent reports, indicate the City's continued interest in the siting of an arena use within Brooklyn. All of these waterfront sites were removed from consideration as either too small for the arena and related development or no longer available." In explaining that Coney Island is "less transit accessible," Response 1-9 added that "[a]s discussed in Chapter 13, 'Transit and Pedestrians,' there would be adequate capacity at the Atlantic Terminal transit hub to accommodate demand

from the proposed project." Providing an additional reason for rejecting Coney Island, Response 1-9 stated that "construction below grade level on waterfront sites poses challenges because of the very shallow water table. Thus, if the proposed project's arena were constructed in one of the Coney Island sites, its enclosed, below-grade loading and serving areas and the arena parking facilities would likely need to be located above grade, possible on multi-levels, which would require an expansion of the arena footprint."

Given all the above, it is clear that the ESDC adequately evaluated the Coney Island alternative sites for the arena, and provided rationally based reasons to support its conclusion that such sites were "inferior" or "deficient" to the proposed Project site.

Petitioners' assertion that the ESDC "purposefully excluded material information pertaining to the Coney Island site from its analysis, in order to avoid being compelled to arrive at the rational conclusion dictated by the 1984 and 1994 studies," is unsupported by the record. As evidenced by the FEIS as quoted herein, the ESDC explicitly acknowledged the results of all three studies, not just the 1974 study, and reasonably concluded that the Coney Island sites were either no longer available or too small, and were less transit accessible. While petitioners question the ESDC's finding that the proposed Project site is more transit accessible, the record establishes that the ESDC considered the Coney Island transit options and had a rational basis for its determination that the availability of multiple subway and bus lines, as well as the LIRR, renders the Atlantic Yards site readily accessible to visitors traveling from a wide geographic area.

Petitioners also argue that in evaluating alternatives, such as Extell's proposal which would have limited development to the site of the Vanderbilt Yards, and the No-Action

Alternative, the ESDC relied on the allegedly "false assumption" that "significant new development is considered unlikely given the blighting influence of the rail yard and the predominance of low-density manufacturing zoning on the project site."[37] Petitioners fail to provide a factual basis to support their bare and conclusory allegation that the foregoing statement was "false" or "demonstrably untrue." Rather, petitioners simply assert, as they did in challenging the ESDC's blight determination, that when the Project was announced in 2003, the area in and around the Project site "was already undergoing significant private redevelopment," and point to the fact that several industrial buildings in the Project area have been converted to residential use. However, as previously determined herein, that fact alone is insufficient to outweigh the ample evidence of blight conditions documented in the Blight Study, which provided a rational basis for the ESDC's conclusion that continued new development in the area of the Project site was unlikely.

Petitioners, therefore, have not made a sufficient showing that the ESDC failed to satisfy the "hard look" standard by failing to give reasoned consideration to the Coney Island or any other alternative to the Project.[38]

H. Wind Study

Petitioners object that the ESDC failed to include the report of its wind study or a summary of the report's findings in the FEIS, and that a supplemental EIS (SEIS) was required to

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[37]The statement appeared in Chapter 20 of the DEIS and the FEIS, entitled "Alternatives."

[38]Petitioners further argue that a supplemental EIS (SEIS) was required to evaluate the Coney Island Alternative. In light of the determination above that FEIS adequately considered the Coney Island alternative, no basis exists for requiring a SEIS. 6 NYCRR §617.9(a)(7)(I); see Matter of Coalition Against Lincoln West, Inc. v. Weinshall, 21 AD3d 215, 222-223 (1st Dept), lv app den, 5 NY3d 715 (2005).

evaluate the wind impacts of the Project. These objections are without merit.[39]

In its Answer to the Petition, respondent ESDC admits that a wind study was not included in the DEIS, and explains that at the time the DEIS was prepared, ESDC's consultant concluded "through a qualitative evaluation, that the Project would not result in significant wind impacts because it is not located on the shoreline, would not create a 'canyon effect' and because buildings of the size and character of the Project buildings are commonplace in New York City." Then, after receiving comments on the DEIS noting the absence of and requesting a wind analysis, the ESDC directed its consultant to prepare a wind study in the fall of 2006. The report of that study is dated November 16, 2006 and concluded generally that "while ground-level wind speeds in the area are projected to increase with the addition of the proposed Atlantic Yards Arena project for all locations identified, these increases would not cause significant hardship to pedestrians."

Although the wind study report was not annexed to the FEIS,[40] the record establishes that the FEIS sufficiently addressed the wind impact issue in Chapter 24, Response to Comments. Comment G-8 stated that a wind analysis or a wind effects study should be conducted, that a SEIS was required because the DEIS "ignored" wind impacts, and that the Brooklyn Bears Community Garden would be affected by the wind.[41] The FEIS's Response G-8 provided as

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[39]The court notes that the CEQR Technical Manual does not list wind among the areas to be analyzed in the CEQR process. CEQR Technical Manual at 3A-1.

[40] Petitioners obtained the wind study report in response to a request under the Freedom of Information Law.

[41]With respect to the Brooklyn Bears Community Garden, Comment G-8 specifically stated that the garden "will definitely feel the effects of winter and summer blasts of air and

follows:

> In response to comments, an evaluation of wind conditions was conducted, and indicated that although some increase in wind speed at pedestrian levels would be expected, the proposed project would not result in adverse wind conditions in or around the project site. At the Brooklyn Bear's Community Garden, the wind conditions would be suitable for the type of activity expected in such a space, i.e., sitting, standing, gardening, and leisurely walking. In the area of the garden as a whole, the evaporative capability of the winds above the vegetation would increase somewhat, but since plants draw the needed amount of water from the surrounding soil, and the soil, when irrigated, usually contains more water than actually used by the plants, additional irrigation may not be necessary. In any case, for a small garden, this small increase would not represent a significant amount of water.

In stating that "an *evaluation* of wind conditions was conducted," this response indicated implicitly that a wind study and analysis had been conducted. In summarizing the results of that evaluation, this response satisfied SEQRA. The SEQRA regulations provide that a FEIS "should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts. *Highly technical material should be summarized* and, if it must be included in its entirety, should be referenced in the statement and included in an appendix" (emphasis added). 6 NYCRR § 617.9(b)(2).

Pursuant to this regulation, the ESDC was not required to include the wind study report in the FEIS, since the material contained in the report was "highly technical." Id. The report's executive summary explained that the wind study predicted future pedestrian-level wind speeds by using computer fluid dynamics modeling, which included the local meteorological conditions

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everything else that entails: dust, garbage, damage to trees and plants . . . Increased wind speeds at the ground level created by the proposed towers will produce significantly dryer conditions for the garden, damaging plants and requiring increased irrigation."

combined with the effect of the buildings.[42] Thus, as the wind analysis in the report constituted "highly technical material," the FEIS's summary in Response G-8 was sufficient to satisfy SEQRA. Id.

Petitioners further argue that a SEIS was required to consider the wind impacts of the Project. The SEQRA regulations provide that a SEIS "is limited to the specific *significant* adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project" (emphasis added). 6 NYCRR 617.9(a)(7)(I); see Matter of Coalition Against Lincoln West, Inc. v. Weinshall, supra at 222-223. Under this regulation, even assuming that the wind study constituted "newly discovered information," a SEIS was not warranted, as the study identified no environmentally *significant* impacts. Id.[43]

I. Schools, Fire Protection and Police Protection

Petitioners' contentions that the EDSC failed to give adequate consideration to the impacts on schools, fire protection and police protection, are without merit.

First, as to schools, petitioners challenge the feasibility of the proposed mitigation measure of building a new school on the Project site. Specifically, petitioners contend that while

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[42]The executive summary further explained that "[s]ix wind directions representing the dominant wind directions were analyzed at pedestrian locations along Flatbush Avenue, Atlantic Avenue, Sixth Avenue, and several other locations that could potentially experience high winds. The results for all wind directions were then aggregated to produce the annual probability of various wind speeds at each location." The report included numerous computer-generated technical illustrations, and technical charts and graphs.

[43]As to petitioners' additional arguments that the wind study did not address the impacts on the Brooklyn Bears Community Garden, and that the ESDC had no basis for concluding that the adverse impacts from wind would not be significant, those arguments are belied by the analysis and results of the wind study as indicated in the wind study report.

Forest City has offered to make available up to 100,000 square feet for a new school on the Project site, the FEIS failed to indicate the cost at which such space would be provided or to assess the additional cost to the New York City budget of operating a new school. The consideration of such cost and financial feasibility issues, however, would require the ESDC to engage in an economic analysis, which "absent compelling evidence of a sham transaction or that financial sponsors are unwilling or unable to fulfill their obligations," is outside the scope of SEQRA review. Coalition Against Lincoln West, Inc. v. City of New York, 208 AD2d 472, 473 (1st Dept 1994), aff'd 86 NY2d 123 (1995); accord Matter of Tudor City Association, Inc. v. City of New York, 225 AD2d 367, 368 (1st Dept 1996); Matter of Nixbot Realty Associates v. New York State Urban Development Corp., 193 AD2d 381 (1st Dept), lv app den 82 NY2d 659 (1993).

Also with respect to schools, petitioners object that the ESDC has provided no assurances that the City would undertake to construct and operate a new school on the Project site. In response, the ESDC represents that it has obtained a commitment from Forest City to provide space for a school upon the request of the New York City Department of Education (DOE), and that it "has done what it can to lay the groundwork for the implementation of this mitigation measure."[44] Forest City confirms that it "has entered into an agreement with the New

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[44]Addressing the mitigation measure of building a new school on the Project site, the FEIS specifically stated the following:

> Since the issuance of the DEIS, the project sponsors have reached an agreement with the New York City Department of Education (DOE) that upon DOE's request, the project sponsors would provide adequate space for the construction and operation of an approximately 100,000-square-foot elementary and intermediate school in the base of one of the Phase II residential buildings. At this time, the lower floors of Building 5, located on the east side of 6th Avenue

York City Department of Education to this effect."

While petitioners seek "assurances" from the City, they cite no statute, regulation or case law suggesting that such "agreement" and "commitment" are insufficient to satisfy the mitigation requirements of SEQRA. Rather, the Court of Appeals has explicitly held that "nothing in the act [SEQRA] bars an agency from relying on mitigation measures it cannot itself guarantee in the future." Matter of Jackson v. New York State Urban Development Corp., supra at 422.

Second, as to fire protection, petitioners contend that the FEIS failed to respond to the FDNY's concerns, raised in a March 2, 2006 letter from FDNY Chief of Operations Salvatore J. Cassano to the ESDC's environmental consultant AKRF, that planned street closures would affect its access routes and response times. It is not disputed, however, that the FDNY's March 2006 letter predated the DEIS and that after the ESDC issued the DEIS in July 2006, making it available to all other agencies and the public, the FDNY remained silent, submitting no comments or objections as to the ESDC's conclusions regarding fire protection services.

Contrary to petitioners' contention, the ESDC explicitly acknowledged the FDNY's March 2006 letter, as the letter was referenced in both the DEIS and the FEIS, and included in the Appendix to both documents. Moreover, the FEIS adequately addressed the FDNY access route and response time issues. Assessing how street closures would affect the FDNY response

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between Atlantic Avenue and Pacific Street, have been identified as a possible site. The school space would be made available at a time that would allow the school to be constructed and open at the beginning of the school year in which the significant adverse impact would be projected to occur, i.e., when the projected enrollment in either the elementary or intermediate schools within ½ mile of the project site would exceed their program capacities. This could occur as early as 2013.

times, the FEIS determined that access to the project site was not expected to be significantly affected by the closing of local streets or increased traffic, "as the project site is accessible by three of the borough's major thoroughfares and service to surrounding areas is from FDNY facilities that have a broad geographic distribution, including seven firehouses, and a special operations facility (one squad company), and one emergency response unit." The FEIS also noted that FDNY vehicles "would be able to access the project site and would maneuver around and through congested areas, and are not bound by standard traffic control."

The FEIS further acknowledged that the increase in population from the Project could increase demand for fire protection services, but determined that the adverse impact on fire protection would not be significant. Citing the FDNY's March 2006 letter, the FEIS indicated that fire protection throughout the City is normally provided by multiple fire companies, and that the FDNY would not only continue to provide such services in the Project area "as per [those] established standard FDNY operating procedures," but also continue to monitor and evaluate its fire protection capabilities.

Third, as to police protection, petitioners argue that the FEIS lacks any "actual analysis by ESDC regarding the likely demand for additional police services."[45] The record, however, establishes that the FEIS evaluated each of the four police precincts serving the Project site and the surrounding area, and explicitly acknowledged that "the new worker, residential and visitor population associated with the proposed project could increase the demand for police protection." The FEIS determined that the Project site "is well-served by NYPD services as

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[45]Petitioners incorrectly describe the FEIS as stating that the NYPD "reviewed" the DEIS. The FEIS merely noted that the "NYPD has been consulted as part of the assessment of police protection."

precincts servicing the project site and the surrounding area are located on all sides and access to the project site is provided by the major thoroughfares of Atlantic, Flatbush, and 4th Avenues. It is expected that this potential increase in demand for police services as a result of the proposed project would be spread over these four precincts, minimizing demand on any one precinct."

Citing to the minutes of a meeting of the Borough Board Atlantic Yards Committee and the Commanding Officer of the NYPD Office of Management, Analysis and Planning (OMAP), the FEIS explained that

> the allocation of NYPD staff citywide is routinely evaluated, accounting for changes in population and transportation. The proposed project would be taken into consideration in such routine evaluations of service adjustment, and adequate coverage would continue to be provided by the NYPD. Furthermore the NYPD would investigate altering the precinct lines within Brooklyn if deemed necessary for the continued provision of adequate service.

The FEIS also explained that according to OMAP, "NYPD has protocols to successfully police large venues, such as Madison Square Garden and Yankee Stadium, which have similar events to those that would take place at the proposed arena," and "[f]or large events, officers are brought in from throughout the city and do not detract from local precincts," so there would be no resulting impact to police services in the surrounding area during arena events.

Based on the foregoing, the ESDC adequately analyzed the impact on police protection, and had a rational basis for concluding in the FEIS that "[w]ith continued adjustments in deployment and equipment by NYPD, there would be no significant adverse impacts on NYPD operations from increased area population or the introduction of the proposed arena."[46]

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[46]While this quoted conclusion was given as to Phase I of the Project, the FEIS reached the identical conclusion as to Phase II, that "there would be no significant adverse impacts on NYPD operations."

J. Brooklyn Bear's Community Garden

The Brooklyn Bear's Community Garden (the "Bear's Garden") is 0.12 acre community garden, which is located on Site 5 of the Project and will sit directly across from the tallest of the buildings planned for the Project. Petitioners contend the FEIS "virtually ignored the Garden and the significant impacts it will endure." Specifically, petitioners argue that as a result of the ESDC's failure to recognize the Bear's Garden as "public open space" for the purposes of SEQRA analysis, the FEIS did not consider the significant impacts to the Bear's Garden from shadows, noise, traffic, crowds, glare and nighttime lighting.[47]

While ESDC concedes that the Bear's Garden was not included in its quantitative analysis of open spaces,[48] the FEIS's analyses of construction impacts and shadows both addressed impacts on several existing open spaces, and the Bear's Garden was one of the open spaces specifically considered.

In evaluating construction impacts, the FEIS analyzed the impact on three existing open spaces, including the Bear's Garden. The FEIS found that "[c]onstruction activities would not displace any existing open space resources," and that "[w]hile three existing open spaces may be temporarily affected by noise from construction activities, access to these open spaces would not be impeded at any point during the construction period." The FEIS concluded that the Bear's

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[47]The issues petitioners raise regarding the wind study and the impacts of wind on the Bear's Garden are discussed above in the "Wind Study" section of this opinion.

[48]Respondents explain that as a "conservative measure" to avoid distortion, the Bear's Garden was not included in the FEIS's quantitative analysis of open space. Respondents assert this was proper, since the inclusion of the Bear's Garden in the calculation of existing open space would have "misleadingly minimized the appearance of the Project's potentially adverse impact on open space."

Garden would experience temporary significant adverse impacts from noise created by construction during the years 2008 and 2009 at Site 5. Identifying the Bear's Garden as a "sensitive location," the FEIS required the placement of a 16-foot noise barrier adjacent to the Garden during construction. The FEIS acknowledged that the Project will have unmitigated construction-related noise impacts on the Bear's Garden, but found that full mitigation was not feasible for safety and aesthetic reasons. Based on the foregoing, the ESDC clearly did not "ignore" the impacts of noise on the Bear's Garden.

Likewise, the FEIS's shadow analysis of the 15 separate open space areas falling within the Project's "shadow sweep" specifically included the Bear's Garden as one of the open spaces considered. The FEIS identified the precise times for four analysis periods during the year at which Project-related shadows would fall on the Bear's Garden.[49] Based on this data, the FEIS concluded that Bear's Garden "would be in full sun during most of the day" and "[g]iven the amount of sun this open space receives throughout the day, especially in the afternoon, the morning and evening shadow increments would not be considered a significant adverse impact."

Petitioners do not dispute the accuracy of the shadow data. Although they dispute the conclusion as to no significant adverse impact and submit an affidavit from the General Coordinator of the Bear's Garden, Jon Crow, they fail to establish that the ESDC's conclusion lacked a rational basis. Under these circumstances, petitioners' challenge to the conclusion

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[49]The FEIS explains that computer generated simulations of the shadows caused by the project were prepared for four representative days of the year. According to Tables 9-3 and 9-5 in the FEIS, the Bear's Garden would be in incremental shadow for the following periods: March 21, from 7:36 a.m. to 9:45 a.m.; May 6, from 7:27 a.m. to 11:00 a.m.; June 21, from 7:15 a.m. to 11:30 a.m., and from 6:15 p.m. to 7:01 p.m.; and December 21, from 8:51 a.m. to 9:15 a.m.

drawn from the data would require an impermissible substitution of the court's judgment for that of the agency. See Akpan v. Koch, supra at 571; Roosevelt Islanders for Responsible Southtown Development v. Roosevelt Island Operating Corp., 291 AD2d 40, 55 (1st Dept 2001), lv app den 98 NY2d 608 (2002).

Finally, even though the FEIS did not consider the impacts of traffic, crowds, glare and nighttime lighting on the Bear's Garden, not every conceivable environmental impact need be addressed to satisfy the substantive requirements of SEQRA. See Matter of Neville v. Koch, supra at 425; Matter of Jackson v. New York State Urban Development Corp., supra at 417. Rather, SEQRA contemplates that an "agency will employ a rule of reason in identifying and discussing the essential issues to be decided." Id. Here, nothing in the record suggests that the ESDC failed to reasonably exercise its discretion in not discussing the impacts noted above. Id at 428.[50]

VII. CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and dismissed; and it is further

ORDERED AND ADJUDGED that petitioners' applications for injunctive and declaratory relief are denied in their entirety; and it is further

ORDERED that Forest City's cross-motion to dismiss is denied as moot.

DATED: January 11, 2008

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.

[50]The remaining issues as discerned from the allegations in the petition and those issues summarily listed on page 76 of petitioners' Memorandum of Law, are without merit.