

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

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| _____   | x |                                 |
| In the Matter of  | : | Index No. 104597/07             |
|   | : | IAS Part 11                     |
|   | : | Justice Madden                  |
| DEVELOP DON'T DESTROY (BROOKLYN),<br>INC., et al.,                                      | : |                                 |
|   | : |                                 |
| Petitioners-Plaintiffs,   | : | <b>VERIFIED ANSWER</b>          |
|   | : | <b>OF RESPONDENT-DEFENDANT</b>  |
| For a Judgment Pursuant to Article 78 of the CPLR<br>and Declaratory Judgment           | : | <b>NEW YORK STATE</b>           |
|   | : | <b>URBAN DEVELOPMENT</b>        |
|   | : | <b>CORPORATION d/b/a</b>        |
| - against -   | : | <b>EMPIRE STATE DEVELOPMENT</b> |
|   | : | <b>CORPORATION</b>              |
| URBAN DEVELOPMENT CORPORATION<br>d/b/a EMPIRE STATE DEVELOPMENT<br>CORPORATION, et al., | : |                                 |
|   | : |                                 |
| Respondents-Defendants.   | : |                                 |
|   | : |                                 |
| _____   | x |                                 |

Respondent-Defendant New York State Urban Development Corporation d/b/a  
 Empire State Development Corporation (“ESDC”), by its undersigned attorneys, in answer to the  
 Verified Petition and Complaint (“Petition”), sets forth its Affirmative Statement of Facts  
 pursuant to CPLR § 7804(d) and, thereafter, its Answer to the Petition as follows:

**AFFIRMATIVE STATEMENT OF FACTS**

1. ESDC is the state’s economic development agency.
2. ESDC is charged with furthering, among other things, the State’s policy:  
  
 to promote a vigorous and growing economy, to prevent economic stagnation and to encourage the creation of new job opportunities in order to protect against the hazards of unemployment, ... [to] increase revenues to the state and to its municipalities[,] ... to achieve stable and diversified local economies[,] .... to promote the sound growth and development of our municipalities through the correction of such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics

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

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

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

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

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

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

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

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

### **Initiation of Preliminary Planning**

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

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

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

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

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

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

**Letter dated February 18, 2004**

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

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

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

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

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

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

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

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

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

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

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

AR 20310 (Arena Development Project MOU at 8).

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

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

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

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

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

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

26. The ATURA Development Project MOU provided that:

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

AR 20299 (ATURA Development Project MOU at 4).

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

specific proposals that had been identified during the scoping period (*i.e.*, the UNITY plan, the Extell Proposal and the Pacific Plan). AR 22657–706 (Final Scope).

43. Between fall 2005 and spring 2006, ESDC also participated in efforts to inform the public about the project and the review process, including the participation of and attendance by its staff and consultants at meetings of the Borough Board Atlantic Yards Committee established by the Brooklyn Borough President’s Office.

44. As a result of an ultimately unsuccessful lawsuit commenced by certain groups opposed to the Project (*Develop Don’t Destroy Brooklyn v. ESDC*, Index No. 100686/06 (Sup. Ct. N.Y. Co.)) on January 17, 2006, ESDC was forced to retain new environmental counsel for its review of the Project. ESDC’s new environmental counsel worked with ESDC and its consultants to become familiar with the proposed Project, the Draft Scope and the public comments on the Draft Scope.

45. The final scope of analysis, reflecting consideration of comments made during scoping, was issued on March 31, 2006 (the “Final Scope”). AR 22657–706. The Final Scope described the analysis to be included in the EIS for the Project.

#### **Preparation of the Draft Environmental Impact Statement**

46. In accordance with the Final Scope and in close consultation with involved and interested agencies, ESDC and its consultants prepared the draft EIS (the “DEIS”). AR 20386.

47. The DEIS examined sixteen environmental areas in great detail: land use, zoning and public policy; socioeconomic conditions; community facilities; open space and recreational facilities; historic and cultural resources; urban design and visual resources; shadows; hazardous materials; infrastructure; traffic and parking; transit and pedestrians; air

quality; noise; neighborhood character; construction; and public health. *See* AR 20387–397. Significant adverse impacts were identified in the following areas: community facilities (schools), historic and cultural resources, visual resources, shadows, traffic, pedestrians, noise and construction. AR 20443–69 (DEIS, Executive Summary, S-13 to S-39). The DEIS also identified a temporary significant adverse open space impact in a ¼-mile study area at the end of the first phase of construction until the open space is constructed over the course of the Project’s second phase. *Id.* Even after implementation of a comprehensive package of mitigation measures, the DEIS identified unmitigated impacts in the areas of historic and cultural resources, visual resources, shadows, traffic, noise and construction. *See* AR 21557, 21725 (DEIS at 19-1, 21–1).

48. ESDC studied a reasonable range of alternatives in detail, comparing their impacts in the sixteen environmental areas to those of the proposed project. The DEIS analyzed in detail the following alternatives: a No Action Alternative, a No Unmitigated Impact Alternative, an As-of-Right Alternative, a Reduced Density – No Arena Alternative and a Reduced Density – Arena Alternative. AR 21631–724 (DEIS, Chapter 20).

49. Under the No Action Alternative, the MTA would not dispose of the air rights for the rail yard and, therefore, the rail yard (Blocks 1119, 1120, and 1121) would remain in its current condition. For the No Action Alternative, the DEIS conservatively assumed, where appropriate, that the conditions currently present on the project site would remain the same in the future without the proposed project because this would result in a greater difference in development between the future with and without the proposed project. AR 20532 (DEIS at 2-7; *see also* AR 11966, 12415 (FEIS at 24-67, 24-516)).

50. Because no practical alternative could be developed that would fully mitigate all of the unmitigated effects of the Project, the No Unmitigated Impacts Alternative of the DEIS explored program modifications for each of the areas in which the Project was determined to cause unmitigated impacts in order to identify whether there were feasible changes in the Project to avoid these unmitigated effects. AR 21645–47 (DEIS at 20-15 to 20-17); *see also* AR 12416 (FEIS at 24-517).

51. The Reduced Density – No Arena Alternative was based on the proposal submitted by the Extell Development Company (“Extell”) in response to the MTA’s RFP for Vanderbilt Yard. AR 21648 (DEIS at 20-18). The Reduced Density – Arena Alternative was derived from the “Pacific Plan,” an alternative proposal that was submitted during the scoping process. AR 21685 (DEIS at 20-48). ESDC and its consultants obtained details of the Extell plan from Extell and the Pacific Plan from its creator so that the two alternatives could be accurately described and thoroughly analyzed.

52. The DEIS also contained a qualitative discussion of the “Unity Plan Alternative,” which was based on a plan developed in a workshop by local political leaders, residents and business owners. Extell reviewed the Unity Plan and incorporated the plan’s major concepts into its proposal, which, as noted above, was analyzed as the Reduced Density—No Arena Alternative. AR 21647–48 (DEIS at 20-17 to 20-18).

53. In addition, the DEIS discussed alternative sites in Brooklyn for an arena based on previous studies and reports, including Coney Island, the Brooklyn Navy Yard, the Brooklyn Army Terminal and Broadway Junction. AR 20480–83 (DEIS at 1-9 to 1-12). ESDC determined that “only the project site would be large enough to accommodate a cohesive, comprehensive development containing the arena and a mix of synergistic uses, while offering

extraordinary transportation access, proximity to a Central Business District, and substantial publicly accessible open space designed to foster pedestrian activity and promote connections with the surrounding neighborhoods.” AR 20483 (DEIS at 1-12).

54. Since the Project would involve the development of several elements over an extended period of time, two analysis years, 2010 and 2016, were considered in the DEIS. The 2010 analysis year (“Phase I”) was selected because a key component of the Project, the arena, was expected to be completed by fall 2009, with the remaining development on the western portion of the project site (Blocks 1118, 1119 and 1127 (the “arena block”) and on part of Block 927 (“Site 5”)) completed by the next year. AR 20530 (DEIS at 2-5). In addition to the arena, Phase I development includes office space, retail space, residential units, parking, possible hotel space, a publicly accessible Urban Room, the new subway entrance and related circulation improvements on the southeast corner of Atlantic and Flatbush Avenues, the reconstruction of the LIRR rail yard, interim parking on Blocks 1120 and 1129, upgrades to infrastructure, and the reconstruction of the 6th Avenue and Carlton Avenue bridges over the rail yard between Atlantic Avenue and Pacific Street. *Id.*

55. The remainder of the development program (“Phase II”) was anticipated to be complete by 2016 and would be built on the eastern portion of the project site (Blocks 1120, 1121, and 1129 and part of Block 1128). *Id.* A platform would be built over the upgraded rail yard (Blocks 1120 and 1121) to support six of the 11 buildings constructed during Phase II. *Id.* Phase II development includes residential units, retail space, community facilities, publicly accessible open space, and permanent parking. *Id.*

56. A construction schedule for both phases was submitted to ESDC. AR 22167 (DEIS App. F). The construction schedule provided a level of detail far greater than what

is typically used for analysis during environmental review, providing detailed construction phasing, along with associated equipment requirements, truck deliveries, labor requirements and location of equipment/work activity on the project site. ESDC's environmental consultant – AKRF, Inc. (“AKRF”) – examined the schedule for its general sensibility, questioned the project sponsor's construction team regarding various elements and assumptions of the construction phasing, and concluded that a ten-year construction period, while ambitious, was feasible.

57. The detailed nature of the construction schedule provided a sound basis for the workability of the timeline and also laid the foundation for a detailed analysis of construction impacts. The construction analysis identified the peak periods of activity and examined the impacts during those periods. Because it used specific information regarding the use and location of equipment and numbers of trucks and other vehicles entering and leaving the project site, the DEIS analysis was able not only to analyze potential impacts but also to identify numerous opportunities for the avoidance and minimization of construction impacts, including implementation of a state-of-the-art emissions reduction program that would minimize use of diesel engines, require exclusive use of ultra-low sulfur diesel, and make use of best available tailpipe reduction technologies. AR 21487–48 (DEIS at 17-62 to 17-63).

58. The DEIS also contained detailed analyses of traffic and transit. The traffic analyses considered five weekday and two weekend peak hours, based on the times when the Project's various components would be expected to generate their highest demand, and focused on locations where new traffic was expected to be most concentrated. AR 21124–25 (DEIS at 12-5 to 12-6). The analysis methodologies, planning assumptions, traffic study area, the intersections to be analyzed, and the traffic assignments utilized in the analysis were all developed in consultation with DOT.



59. The transit analyses focused on the 8-9 AM and 5-6 PM peak commuter hours, the 7-8 PM pre-game peak hour when the Project would generate its highest level of subway demand, and the 10-11 PM weekday and 4-5 PM Saturday post-game periods. AR 21223–26 (DEIS at 13-5 to 13-8). ESDC consulted with MTA-NYCT in the development of its planning assumptions.

60. Under SEQRA, ESDC is not required to analyze every conceivable impact, and the agency made reasoned and well-considered decisions not to include in the DEIS certain issues that had been suggested in comments on the Draft Scope.

61. For example, ESDC and its consultants determined that the Project's layout and massing would not create canyon-like designs that would result in significant wind issues. Nor would the Project's location indicate the potential for significant wind impacts since the Project would not be located near the ocean or in an area already characterized by narrow, canyon-like streets.

62. In addition, ESDC considered whether the issue of terrorism should be discussed in the DEIS. (The agency had received requests during the scoping process to incorporate terrorism implications into the final scope.) The agency considered whether such a discussion would improve the quality of the environmental review and serve the purposes of SEQRA. FCRC informed ESDC that it was involved in ongoing consultations with the NYPD's Antiterrorism Bureau and that it had retained a leading security consultant specializing in terrorism. FCRC also informed ESDC that the design of the Project was incorporating elements, such as screening areas, bollards, blast-proof building materials and security surveillance systems, to address certain risks. Ultimately, ESDC determined that the type of information that would be made public in a review of terrorism risks would not be information appropriate for

public disclosure and that publication of the information would be counterproductive from a SEQRA and public safety standpoint. ESDC also determined that, from a SEQRA perspective, the risk of a terrorist attack was speculative because there have been few such attacks in U.S. history and that, in addition, the risks and impacts would be very difficult, if not impossible, to analyze given the range of scenarios that could be hypothesized.

63. In reaching its conclusion that the EIS for the Project should not include an analysis of terrorism-related impacts, ESDC was also aware that recent EISs for other large projects in New York City did not specifically address the issue. In particular, ESDC was aware that the World Trade Center Memorial and Redevelopment Plan GEIS (April 2004), the Fulton Street Transit Center FEIS (October 2004) and MTA East Side Access-50th Street Facility EAS (January 2006)/East Side Access FEIS (March 2001) did not include any analysis of the environmental impact of a terrorist attack. ESDC knew, for example, that for obvious reasons, none of these documents disclosed with any specificity the details of the surveillance systems, blast proofing and other security elements incorporated into the design of these projects. Thus, after giving the issue careful thought, ESDC reasonably reached the conclusion that the issue of terrorism was not appropriate for review under SEQRA under the facts and circumstances presented by the proposed Project.

#### **Preparation of Other Project-Related Documents**

64. Design Guidelines for the Project were developed in close consultation with FCRC, the New York City Department of City Planning (“DCP”) and ESDC. The proposed and final Design Guidelines are in the record (AR 104–208 and 20099–207). They prescribe building envelopes and other elements to guide the development of the Project during the ten-year build out. DCP had advocated for the development of the Design Guidelines to set forth urban design goals and principles establishing an overall framework for the design and

development of the project site. As explained below, the Design Guidelines are an attachment to the GPP.

65. Prior to the release of the General Project Plan under the UDC Act, ESDC and its consultant AKRF also prepared, for eventual attachment to the GPP, the Blight Study. This report presented “an evaluation of conditions in the area proposed for the Atlantic Yards Arena and Redevelopment Project which themselves are evidence of blight or which may retard the sound growth and development of surrounding areas.” AR 221 (Blight Study at A-1).

#### **ESDC Directors’ Meeting July 18, 2006 and Post-Meeting Notices**

66. At its meeting on July 18, 2006, the ESDC Directors (the “Directors”) accepted the DEIS for the Project. AR 60. At the same meeting, the Directors adopted proposed Land Use Improvement Project Findings and Civic Project Findings and the GPP for the Project. AR 59. The Blight Study and proposed Design Guidelines were attached to the GPP so that they would be subject to public comment. AR 214–594, 104–208. The Directors authorized a public hearing as required under SEQRA, EDPL and the UDC Act. AR 57–60.

67. The Notice of Completion for the DEIS was issued on July 18, 2006, and copies of the DEIS, along with the Notice of Completion, were sent to public agencies, the Mayor of the City of New York, the Brooklyn Borough President’s Office, and the three community boards in the vicinity of the project site, as well as local members of the New York City Council, New York State Senate, New York State Assembly, and United States House of Representatives. AR 22455–56. Copies of the Executive Summary were sent to New York’s two Senators.

68. The DEIS was made available to the public on the ESDC web site, and hard copies were provided to the Central Library, Bedford Branch, Clinton Hill Branch, Pacific

Branch, and Walt Whitman Branch of the Brooklyn Public Library. Hard copies of the DEIS were also made available to the public at the Brooklyn Borough President's Office and the offices of Brooklyn Community Boards 2, 6, and 8. AR 22469.

69. In addition, the DEIS was available for inspection by the general public at the office of ESDC between 9:30 AM and 5:00 PM, Monday through Friday, public holidays excluded, and was also available for inspection at the public hearing and community forums. The executive summary of the DEIS and a CD-ROM including the entire DEIS were made available at no charge from ESDC upon request, and hard copies of the entire DEIS were available for purchase (at a price set to cover the costs of copying the document). *Id.*

70. Additional documents related to the DEIS were made available either in hard copy or on CD-ROM at the libraries where the DEIS had been made available, to Community Boards 2, 6 and 8 and the Brooklyn Borough President's Office, and at ESDC's office. These documents included a report prepared by HydroQual Environmental Engineers and Scientists, P.C. regarding "Impact of the Atlantic Yards Project on Local Sewer Infrastructure: Summary Report" and Phase 2 environmental site assessment reports prepared by Roux Associates Inc.

71. The GPP and its exhibits were also made available to the public on the ESDC web site, and hard copies of the GPP were available upon request from ESDC. The GPP and its exhibits were available for inspection by the general public at the office of ESDC between 9:30 AM and 5:00 PM, Monday through Friday, public holidays excluded and were also available for inspection at the public hearing and community forums. *Id.*

72. Pursuant to Section 16(2) of the UDC Act, ESDC filed a copy of the General Project Plan, and the findings required under Section 10 of the UDC Act, in the office of

the Clerk of Kings County and the office of the Clerk of the City of New York, and provided copies to the Mayor of the City of New York, the Borough President of Kings County, the Chair of the City Planning Commission, and the Chairs of Brooklyn Community Boards 2, 6 and 8. *Id.*

73. From July 24 to July 28, 2006, a notice (the "Hearing Notice") for a public hearing pursuant to Sections 6 and 16 of the UDC Act, Article 2 of the EDPL and SEQRA was published each day in the *New York Post* and *City Record*. AR 22471, 22474, 22477, 22504-06. The Hearing Notice announced that the hearing would take place on August 23, 2006 at the New York City College of Technology (Klitgord Auditorium), 285 Jay Street, Brooklyn, New York, from 4:30 to 8:30 PM. In addition, notice of the public hearing was published in the *Environmental Notice Bulletin* on July 26, 2006, and provided in the DEIS Notice of Completion. The Hearing Notice invited written comments and established a comment period extending to September 22, 2006. It also provided that comments could be made verbally at a community forum to be held from 4:30 to 8:00 PM on September 12, 2006 at which ESDC representatives would be present. The community forum would take place at the same location as the public hearing. AR 22470.

#### **Public Hearing August 23, 2006**

74. On August 23, 2006, ESDC held the public hearing pursuant to SEQRA, the EDPL and the UDC Act in the Klitgord Auditorium at the New York City College of Technology at 285 Jay Street, Brooklyn, New York. AR 9741-10134 (Public Hearing Transcript).

75. The location was selected because it could accommodate a large audience (the capacity is 850) and because of its proximity to the project site. AR 22615.

76. ESDC arranged for security guards to assist in maintaining order at the hearing, both inside and outside the facility, and also notified the NYPD of the event. ESDC

provided the security staff with a list of names of ESDC personnel, ESDC consultants, elected officials and FCRC employees who were to be allowed early entry into the auditorium. No other persons were sanctioned by ESDC to bypass the line. *Id.*

77. The hearing was scheduled to begin at 4:30 P.M. AR 22458. Due to a booking earlier in the day, ESDC was not allowed access to the facility to prepare for the hearing until 3:30 P.M. All information posted and released with respect to the hearing informed attendees that they would be allowed to enter the building at 4:00 P.M. AR 22615.

78. When the doors to the building were opened to the public, ESDC and AKRF staff members signed in speakers, manned the materials inspection desk (where the DEIS, GPP, Blight Study and other materials were made available for public inspection), ran speaker cards to the hearing officer, provided copies of project materials such as the Executive Summary of the DEIS and the GPP to the members of the public, and listened to the public presentations. *Id.*

79. The public hearing began shortly after 4:30 with an introduction by the independent hearing officer retained by ESDC to conduct the hearing, Edward Kramer, an attorney practicing in New York City. AR 9754.

80. The hearing officer's introduction was followed by presentations by Ann Hulka, Senior Vice President, Real Estate Development, ESDC, and two consultants representing the firms that assisted ESDC with the preparation of the EIS, Linh Do of AKRF and Philip A. Habib, P.E., Ph.D. of Philip Habib & Associates ("PHA"). Ms. Hulka provided a description of the Project. AR 9760–63. Ms. Do and Dr. Habib provided an overview of the DEIS and the significant adverse impacts it had identified. AR 9764–85.

81. Other ESDC officials in attendance included Eileen Mildenberger (Executive Vice President & Chief Operating Officer), Rachel Shatz (Director of Planning & Environmental Review), Steve Matlin (Senior Counsel), and Joe Petillo (Senior Counsel). AR 9742.

82. At the conclusion of the presentations, the hearing officer set forth guidelines that would be followed. In particular, he stated that public officials would be allowed to speak as soon as possible after their entrance into the hearing room, AR 9786, and asked that all speakers limit their remarks to three minutes. AR 9787–88. He also emphasized that “that there are no limitations on your submission of written statements, comments or materials at today's hearing, or at any time prior to close of the written comment period on September 22, 2006.” AR 9789.

83. After setting forth guidelines for the hearing, the hearing officer then proceeded to call elected officials who had signed in to provide oral testimony. AR 9793. After all elected officials had spoken, the hearing officer called on members of the public to provide their oral testimony. AR 9839.

84. Because ESDC staff members had noticed that project supporters were positioned at the front of the line and that there would therefore be a predominance of early speakers testifying in favor of the Project if speakers were called solely based on the order in which they signed up, ESDC took steps to provide some balance to the order of the presentations. In particular, as speakers signed in, ESDC staff members and consultants inquired as to speakers' positions with respect to the Project and attempted to order the speaker cards in a balanced manner. AR 22615–16.

