

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

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In the Matter of  
:  
DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., : Index No. 104597/07  
:  
IAS Part 11  
:  
Petitioners-Plaintiffs, : Justice Joan A.Madden  
:  
- against - :  
:  
URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE  
STATE DEVELOPMENT CORPORATION, et al.,  
:  
Respondents-Defendants.  
----- X

**MEMORANDUM OF LAW OF NEW YORK STATE PUBLIC  
AUTHORITIES CONTROL BOARD IN OPPOSITION TO THE PETITION**

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Respondent New York State Public Authorities Control Board (PACB) submits this memorandum of law in opposition to the petition,<sup>1</sup> and in support of PACB's verified answer and its objections in point of law.

### **PRELIMINARY STATEMENT**

The Legislature created the Public Authorities Control Board in 1976, the very same year that the State's new Environmental Quality Review Act (SEQRA) took effect. In the 31 years since, the PACB has reviewed hundreds of project financing applications from public authorities and approved billions of dollars of bond issuances. Yet neither the PACB—nor anyone else—has ever thought that the PACB was subject to SEQRA. The PACB has never acted as a “lead agency,” prepared an environmental impact statement, or held public hearings under SEQRA. Nor has it ever acted as an “involved agency” and thus has never made written findings statement. In all that time, no court has ever held that the PACB was subject to SEQRA.<sup>2</sup>

Seeking to delay or stop the Atlantic Yards Project, petitioners have fashioned this literally unprecedented claim—unsupported by any authority—that the PACB violated SEQRA when it adopted a resolution on December 20, 2006 (the Resolution) approving the Empire State Development Corporation's financial participation in the Atlantic Yards Project without first making a “written findings statement” that SEQRA requires of “involved agencies” that “approve”

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<sup>1</sup>Develop Don't Destroy (Brooklyn), Inc. and its co-petitioners call their pleading a “joint Article 78 proceeding and declaratory judgment action” (Pet. ¶ 1.) Against the PACB. however, they seek relief only under Article 78—a judgment “annulling and vacating the PACB's determination to approve” the Atlantic Yards Project. We therefore call them “petitioners,” and their pleading the “petition.”

<sup>2</sup>To our knowledge, this issue has never been litigated. Indeed, we have found only one decided case (unreported) in which the PACB was even a party, *Schulz v. New York State Public Authorities Control Board*, 1998 U.S. Dist. LEXIS 8265 (N.D.N.Y. May 27, 1998), and that case had nothing to do with SEQRA, but with standing. As we assert in our answer, petitioners here also lack standing.

projects subject to SEQRA. (Pet. ¶¶ 361-64; Pet. Mem. at 11-12.)<sup>3</sup> They ask this Court to “annul[] and vacat[]” the PACB’s Resolution, which they contend is “null and void as a matter of law.” (Pet. ¶ 365.)

But the PACB’s adoption of its Resolution approving ESDC’s financial participation in the Atlantic Yards Project was not subject to SEQRA—and so the PACB was not an “involved agency” required to make a written findings statement—for three reasons.

**First:** The PACB properly confined its review of ESDC’s financial participation in the Atlantic Yards Project—consistent with its purpose and statutory mandate—solely to the sufficiency of the commitments of funds, and so its adoption of the Resolution was not subject to SEQRA.

**Second:** By adopting its Resolution, the PACB authorized ESDC to issue and sell bonds, backed by State personal income tax revenue, to help finance its participation in the Atlantic Yards Project, and the Legislature has expressly declared in the State Finance Law that such bond authorizations are exempt from SEQRA.

**Third:** Before the PACB adopted its Resolution, the Legislature and the Governor, acting within the scope of their respective legislative and executive spheres, had already approved ESDC’s financial participation in the Atlantic Yards Project with appropriations and bonding authority, which the PACB ratified after its limited funds-sufficiency review of the Atlantic Yards Project. Under these circumstances, taken together, those actions of the Legislature and Governor are not subject to SEQRA.

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<sup>3</sup>References to “Pet. Mem. at \_\_\_” are to Petitioners’ Memorandum of Law in Support of their Petition-Complaint, April 4, 2007.

## STATEMENT OF FACTS

### **A. Petitioners**

Petitioners are 26 organizations opposed to a land use development and civic project in Brooklyn (the Atlantic Yards Project), sponsored by respondent Urban Development Corporation (UDC) d/b/a/ Empire State Development Corporation (hereinafter ESDC), and first announced in December 2003. (Pet. ¶¶ 2, 15-53.)

### **B. New York State Public Authorities Control Board**

The Legislature in 1976, at the urging of the Governor, created the New York State Public Authorities Control Board in response to a credit crisis caused by the profligate and uncontrolled issuance of bonds by UDC and other public authorities. (Scheuermann Aff. ¶¶ 3-4, 18.)<sup>4</sup> For years, New York public authorities had been issuing billions of dollars of so-called moral obligation bonds, without adequate coordination, supervision, or control by the Executive and Legislative branches of government. (*Id.* ¶¶ 6-9, 11-12.) But when the UDC in February 1975 defaulted on some bond anticipation notes, it made it clear that the debts of so-called moral obligation agencies were debts of the State, and exposed a large burden on the State's credit for which no provision had been made. After the UDC's default, financial markets were closed to the State and its public authorities, or else demanded premium interest rates for all government-sponsored capital projects, even those for financially sound communities. The State was forced to rely on emergency fiscal measures. (*Id.* ¶¶ 3-9.)

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<sup>4</sup>References to "Scheuermann Aff." are to the affidavit of Todd L. Scheuermann, sworn to April 25, 2007, and to "Ex. \_\_\_" are to the exhibits annexed to it. We summarize here some facts about the PACB, drawn from the affidavit, but respectfully refer the Court to it for a fuller statement of the facts. Because the PACB did not adopt the Resolution after an adjudicatory hearing, the Scheuermann affidavit and the annexed exhibits constitute the transcript of the record of the proceedings for purposes of CPLR § 7804(e).

Seeking a permanent solution to this credit crisis, instead of stopgap emergency measures, Governor Hugh Carey appointed a commission under New York's Moreland Act, which recommended major reforms. (*Id.* ¶¶ 4, 6-17.) See New York State Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies, *Restoring Credit and Confidence: A Reform Program for New York State and Its Public Authorities*, March 31, 1976. (Pertinent portions of the Moreland Act Commission's report are annexed to the Scheuermann affidavit as Exhibit A.)

Chief among the Moreland Act Commission's proposed reforms was the creation of a "control mechanism" to control the issuance of debt by public authorities and thereby restore investor confidence. (*Id.* ¶¶ 13-17.)

The Governor and the Legislature swiftly endorsed the Moreland Act Commission's call for a "control mechanism" by creating the PACB. In the legislation creating the PACB, the Legislature noted that debt issued by public authorities "has grown dramatically and without effective or comprehensive monitoring by the State government." L. 1976, c. 39, § 1 (setting forth "Legislative findings and intent."). As a result, the Legislature noted with concern, "the traditional markets for bonds and notes of the State" and its cities have been "adversely affected," and are "virtually closed" to public authorities. L. 1976, c. 39, § 1.

Under Public Authorities Law § 51(1), the PACB is directed to control the debt and other financial commitments of public authorities by receiving "applications for approval of the financing and construction" of projects proposed by ten public authorities, including ESDC. (Scheuermann Aff. ¶¶ 23-24.) Without the PACB's approval, the ESDC and other public authorities may not "make any commitment, enter into any agreement or incur any indebtedness



for the purpose of acquiring, constructing, or financing” a project. Pub. Auth. Law § 51(1). Before it can approve an application from a public authority, the PACB must first give the State Comptroller an opportunity to comment. Pub. Auth. Law § 51(2). The PACB may approve applications from public authorities “only upon its determination that . . . there are commitments of funds sufficient to finance the acquisition and construction” of a proposed project. Pub. Auth. Law § 51(3). This sole statutory criterion by which the PACB reviews project financing applications submitted by public authorities has become known as the funds-sufficiency test. (Scheuermann Aff. ¶ 26.)

The PACB has three voting members. Pub. Auth. Law §50. Though the Governor formally appoints all three, the Governor chooses just one (and also designates the chair). The Governor appoints the two others “upon recommendation” of the Majority Leader of the New York State Senate and of the Speaker of the New York State Assembly. *Id.* Besides the three voting members, the Governor appoints two other, non-voting members, upon the recommendation of the leaders of the legislative minorities. *Id.* Since the PACB was created, its chair, chosen by the Governor, has always been the Director of the Budget, the gubernatorial appointee who runs the Division of the Budget, which is part of the Executive Department. (Scheuermann Aff. ¶ 43-45.) Similarly, the members chosen by the legislative leaders have always been sitting legislators. (*Id.* ¶ 43.)

The PACB has no staff of its own, except a full-time employee of the Division of the Budget who acts as Secretary. (*Id.* ¶ 46-49.) It has no offices, but is housed within the Division of the Budget. (*Id.* ¶¶ 46-49.) The PACB receives no appropriation from the Legislature. (*Id.* ¶ 51.)

### C. The PACB's December 20, 2006, Resolution

ESDC in September 2005 announced that because Atlantic Yards Project might have a “significant effect” on the environment, it would act as lead agency in preparing an environmental impact statement under SEQRA.

In June 2006, the Legislature appropriated \$100 million to ESDC to help pay for new infrastructure improvements relating to the Atlantic Yards Project. (*Id.* ¶ 55.) The Legislature also authorized ESDC to issue \$100 million of bonds for the same purpose. (*Id.*) The Governor approved both bills. Before ESDC could spend the appropriation, or issue the bonds, however, the Legislature understood that ESDC first would have to ask the PACB to review in detail, and approve, the proposed financing relating to ESDC's financial participation in the Atlantic Yards Project. (*Id.* ¶ 56.)<sup>5</sup>

On December 8, 2006, ESDC adopted a final environmental impact statement and issued findings. ESDC also adopted a Modified General Project Plan for the Atlantic Yards Project. Soon after, ESDC submitted to the PACB an application pursuant to State Finance Law 51 seeking its approval to participate financially in the Atlantic Yards Project. (*Id.* ¶¶ 56-59.)

At its December 20, 2006, meeting, after giving the State Comptroller an opportunity to comment, and after asking for additional financial data relating to ESDC's financial participation in the proposed Atlantic Yards Project, PACB adopted a resolution approving ESDC's “participation in the [Atlantic Yards] Project . . . in accordance with section 51 of the Public Authorities Law” (the Resolution). (*Id.* ¶¶ 60-69.) Because the PACB considered neither its

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<sup>5</sup>As the Resolution shows, ESDC's financial participation—\$100 million of infrastructure improvements—is only a fraction of the overall cost of the Atlantic Yards Project's then-projected cost of nearly \$4 billion. (Ex. M, at 6.)

limited review of ESDC's proposed financial participation in the Atlantic Yards Project, nor adoption of its Resolution, subject to SEQRA, it did not make a written findings statement. (*Id.* ¶¶ 53-54.)

**D. This Article 78 Proceeding**

Petitioners assert that the PACB's adoption of its Resolution was an "action" subject to SEQRA. 6 N.Y.C.R.R. §617.2(b)(1)(iii). (Pet. ¶ 362.) Thus, petitioners assert, the PACB was an "involved agency," 6 N.Y.C.R.R. § 617.2(s), and before it could "approve ESDC's funding for the [Atlantic Yards] Project," the PACB was required by 6 N.Y.C.R.R. § 617.11(c) to make a written findings statement. (Pet. ¶¶ 363-64.)

**ARGUMENT**

**I. THE PACB WAS NOT SUBJECT TO SEQRA WHEN IT ADOPTED ITS RESOLUTION APPROVING ESDC'S FINANCIAL PARTICIPATION IN THE ATLANTIC YARDS PROJECT**

**A. The PACB's Narrow Review and Approval of ESDC'S Financial Participation in the Atlantic Yards Project Was Not an "Action" Subject to SEQRA**

The PACB's Resolution approving ESDC's financial participation was properly based on narrow, statutorily proscribed, financial criteria. The PACB's statutory directive was bounded; it was confined to assuring itself that "there [were] commitments of funds sufficient to finance the acquisition and construction" of the Atlantic Yards Project. Pub. Auth. Law § 51(3). Under that statutory directive, the PACB undertook a circumscribed review only of ESDC's financial

participation in the Atlantic Yards Project. Its Resolution was not an “action” for purposes of SEQRA.<sup>6</sup>

Compelling public decision makers to comply with SEQRA before they act makes sense when their decisions are based on the type of information contained in an environmental impact statement. *Vill. of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993). But where, as here, a decision 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,” it is not an “action” subject to SEQRA. *See Ziemba v. City of Troy*, 37 A.D.3d 68 (3d Dep’t 2006), *lv. denied*, 2007 N.Y. LEXIS 212 (Feb. 22, 2007) (issuance by city of demolition permit based on “statutory criteria” addressing safety, not environmental, concerns, not subject to SEQRA); *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Comm’n*, 306 A.D.2d 113, 114 (1st Dep’t 2003), *app. dismissed as moot*, 2 N.Y.3d 727 (2004) (issuance by city landmarks commission of certificate of appropriateness based on architectural, aesthetic, and historical concerns, not environmental ones, not subject to SEQRA).

Here, the “pivotal inquiry”—as framed by the Court of Appeals in *Village of Atlantic Beach*—is this: Could the information contained in an environmental impact statement have any bearing on the PACB’s narrow decision, based solely on financial concerns, to approve ESDC’s financial participation in the Atlantic Yards Project?

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<sup>6</sup>Nor did the PACB by adopting its Resolution “approve” the Atlantic Yards Project as a whole. petitioners’ assertion to the contrary notwithstanding. (Pet. ¶¶ 362, 364; Pet. Mem. at 11.) Under SEQRA, “approval” means a “discretionary decision . . . to authorize a proposed *project or activity*.” 6 N.Y.C.R.R. § 617.2(e). But the PACB’s resolution, as we have shown, focused solely on ESDC’s financial participation in the Atlantic Yards Project. While ESDC may not have participated financially in the Atlantic Yards Project without the PACB’s approval, it does not follow that the PACB’s Resolution amounted to an “approval” of the Atlantic Yards Project, for purposes of SEQRA, subjecting this restricted PACB action to SEQRA, or that the PACB was an “involved agency” under SEQRA required to make a written findings statement. 6 N.Y.C.R.R. § 617.11(c).

The answer is surely no. In deciding whether to approve ESDC's application to financially participate in the Atlantic Yards Project, the PACB had a circumscribed statutory duty to determine if "there [were] commitments of funds sufficient to finance the acquisition and construction" of the Atlantic Yards Project. Pub. Auth. Law § 51(3). In determining the "sufficiency of commitments of funds," the statute directs the PACB to consider "commitments of funds, projections of fees or other revenues and security," which may include "collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken." *Id.* In short, the PACB quite properly based its decision to adopt its Resolution solely on its review of the ESDC's financial participation in the Atlantic Yards Project under the criteria established by section 51 of the Public Authorities Law.<sup>7</sup>

The PACB's narrow funds-sufficiency review of public authorities' applications for project financing is consistent with the role the Public Authorities Law assigns to the State Comptroller, whose responsibilities generally include auditing the spending practices of state agencies, state

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<sup>7</sup>Relying on *Town of Henrietta v. Dep't of Envtl. Conservation*, 76 A.D.2d 215, 226 (4th Dep't 1980), petitioners may contend that despite its narrow, focused statutory duty to review only ESDC's financial participation in the Atlantic Yards Project, the PACB should nonetheless have considered significant adverse environmental impacts. But *Town of Henrietta* is inapposite. In *Town of Henrietta*, the Department of Environmental Conservation (DEC), after reviewing an EIS for a large regional shopping mall, granted the developer two wetlands-related permits, but imposed certain conditions to mitigate the mall's impact on wildlife habitat, and required the developer to prepare an energy conservation plan. Contending that the DEC had no authority to impose non-water related conditions on its wetlands-related permits, the mall developer sued. Upholding the DEC, the Appellate Division noted that the EIS was not limited only to the mall's impact on wetlands, but properly reviewed all its environmental impacts and possible mitigating measures. *Id.* at 223. And since the EIS revealed environmental impacts relating to wildlife habitat and energy usage, the court held that the DEC could use the specific pending wetlands permit applications to impose conditions to minimize or avoid those impacts. *Id.* at 223-24. That unremarkable holding has no application here. Unlike the PACB, the DEC had a specific statutory duty when it approved permits to take into account the cumulative impact of the proposal on water, land, fish, wildlife and air resources. *Id.* at 222. Moreover, the DEC, unlike the PACB, was the "lead agency" under SEQRA. Its decision whether to grant wetlands-permits, like the conditions it imposed, unlike the PACB's, was based on environmental concerns. See *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 372-73 (1988) (citing *Town of Henrietta* for the proposition that "the lead agency is empowered to consider the environmental impact of the entire project and is not limited to the consideration of the effects of the specific permit application before it).

authorities, and local governments. Under Public Authorities Law § 51(2), the PACB was required, before it could approve ESDC's application, first to allow the State Comptroller a timely opportunity to review and comment on it. Given the PACB's important, though narrow, financial review of proposed debt issues and commitments undertaken by public authorities, the Legislature wanted the PACB to have the benefit of the State Comptroller's financial expertise, especially in debt management.

Public Authorities Law § 51—and the circumscribed review of the ESDC's financial participation in the Atlantic Yards Project that the PACB undertook pursuant to it—are also fully consistent with the PACB's specific and limited mission. The Scheuermann affidavit recounts how the Legislature and the Governor created the PACB in 1976 as an emergency response to a potentially ruinous credit crisis—caused by the unsupervised issuance of billions of dollars of debt by public authorities—that nearly caused the financial collapse of the UDC and severely jeopardized the State's credit. (Scheuermann Aff. ¶¶ 3-18.) In doing so, they implemented in large part the recommendations of the New York State Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies, which had called on the State to “control[] the volume and pace of [public] authority borrowing and commitments” by creating a “control mechanism” to review “certain selected debt issues or projects which are particularly significant in terms of their size, degree of risk, or potential impact on the State's or the [public] authority's financial condition.” (Scheuermann Aff. ¶¶ 4, 10-13.)

As envisioned by the Moreland Act Commission, and created by the Legislature, the PACB controls the volume and pace of public authority borrowing and commitments and protects the State's credit by exercising certain specific powers. (Scheuermann Aff. ¶¶ 14-17, 31-38.) It has

the power to disapprove or modify the amount and form of an authority obligation, and to disapprove or modify any covenants or other agreements with bondholders. (*Id.* ¶¶ 34-36.) Pursuant to its funds-sufficiency review of proposed project financings, the PACB reviews in detail projected revenues and expenses, expected bond ratings by financial ratings firms, and security arrangements. (*Id.* ¶¶ 31-32.)

Nonetheless, the PACB's funds-sufficiency review power is limited to financial concerns. By statutorily circumscribing the PACB's jurisdiction, the Legislature and the Governor heeded the Moreland Act Commission's warning that the new "control mechanism" should "review only certain selected debt issues or projects which are particularly significant in terms of their size, degree of risk, or potential impact on the State's or the [public] authority's financial condition." (*Id.* ¶ 13; Ex. A, at 21-22.) If it did not, it would "regulate excessively" and "create an elaborate bureaucratic structure." (Ex. A, at 21-22.) That sensibly limited conception of the PACB as a financial control mechanism is sharply at odds with petitioners' assertion that the PACB has a legal obligation under SEQRA to act as a *political* "check on ESDC's extraordinary authority" to override New York City land use laws. (Pet. Mem. at 13.)<sup>8</sup>

As the Scheuermann affidavit shows, the PACB's review of ESDC's application was detailed, but limited exclusively, as provided by Public Authorities Law 51(3), to whether sufficient commitments of funds existed to finance the acquisition and construction" of the

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<sup>8</sup>Indeed, the Moreland Act Commission concluded that despite the problems of uncontrolled authority debt and project commitments, the State realistically had to continue to rely on public authorities like ESDC to finance, construct, and operate public improvements because their "independence" offered the State so many significant advantages, among them their ability to "supersede local jurisdictional boundaries and restrictions." (Scheuermann Aff. ¶ 10.)

Atlantic Yards Project. Pub. Auth. Law § 51(3). (Scheuermann Aff. ¶¶ 56-65, 67, 69.)<sup>9</sup> After reviewing the application ESDC submitted in early December, the PACB asked ESDC for additional financial information. (*Id.* ¶¶ 56, 62-65.)<sup>10</sup> The additional financial information included analyses of projected revenue, expenses, and income for the proposed arena and housing portions of the Atlantic Yards Project. (*Id.*)

Because the PACB undertook a circumscribed review only of ESDC's financial participation in the Atlantic Yards Project, its Resolution was not an "action" for purposes of SEQRA.

For the same reason, contrary to petitioner's assertion (Pet. Mem. at 11-12), the PACB was not an "involved agency" under 6 N.Y.C.R.R. § 617.2(s). By adopting the Resolution it approved only ESDC's proposed financial participation in the Atlantic Yards Project. The PACB's narrow, financially-focused approval was not an approval for purposes of SEQRA, 6 N.Y.C.R.R. § 617.11(c), and thus the PACB was not obliged to make a written findings statement under 6 N.Y.C.R.R. § 617.11(d).

**B. State Finance Law § 68-b(11) Exempts from SEQRA Review the PACB'S Resolution Authorizing the Sale of Personal Income Tax Revenue Bonds**

The PACB's Resolution authorized ESDC to issue State Personal Income Tax Revenue Bonds to help finance \$100 million of infrastructure improvements relating to the Atlantic Yards

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<sup>9</sup>For example, following the PACB's vote, one of its three voting members, Speaker Silver, in a press release, stated that he voted for the Resolution "because [he was] satisfied it meets all the necessary criteria under the PACB statute." Press Release, Dec. 20, 2006, available at [http://assembly.state.ny.us/Press\\_20061220](http://assembly.state.ny.us/Press_20061220).

<sup>10</sup>As the Scheuermann affidavit notes, the PACB has no independent staff that undertakes substantive financial analysis. (Scheuermann Aff. ¶¶ 46-49.) Financial information is assembled by the Division of the Budget and shared with the PACB's legislative members, but there is no staff recommendation. The Director of the Budget, who represents the Governor, relies on the Division of the Budget, a part of the Executive office, and the four legislative members rely on the Legislature's staffs, particularly the staffs of the fiscal committees. (*Id.* ¶ 48.)



Project. (Scheuermann Aff. ¶¶ 57-58; Ex.M, at 3-5, 7.) That authorization was not an “action” subject to SEQRA review. State Fin. Law 68-b(11).

State Personal Income Tax Revenue Bonds are authorized by the State’s Revenue Bond Financing Program, established in 2001. State Fin. Law Art. 5-C and 92-z. As explained in the Scheuermann affidavit, the Revenue Bond Financing Program is designed to reduce borrowing costs for five designated public authorities (including ESDC), by permitting bonds to be backed by a percentage of the State’s personal income tax revenues that will be pledged or earmarked for payment of debt service. (Scheuermann. Aff. ¶¶ 57-58.) Because State Personal Income Tax Revenue Bonds are backed by the State’s largest revenue source, they are rated higher than other appropriation-backed debt (and thus are issued with lower interest rates), although it is still subject to annual appropriation. (*Id.* ¶ 58.)

When it established the Revenue Bond Financing Program, the Legislature expressly provided, in section 68-b(11) of the State Finance Law, that the “authorization, sale and issuance” of State Personal Income Tax Revenue Bonds shall *not* be an “action” subject to SEQRA review. Thus when the PACB adopted its Resolution approving ESDC’s “application to the PACB to enable [ESDC] to issue bonds to assist in financing the development of the [Atlantic Yards] Project,” that was not an “action” subject to SEQRA review.

For the same reason, contrary to petitioner’s assertion, the PACB was not an “involved agency” under 6 N.Y.C.R.R. § 617.2(s) required by 6 N.Y.C.R.R. § 617.11(c) to make written SEQRA findings. The PACB neither was undertaking nor funding the Atlantic Yards Project. And its Resolution granting ESDC’s authority to issue Personal Income Tax Revenue Bonds, after first

determining the sufficiency of funds, did not amount to an “approval” of the Atlantic Yards Project as a whole, sufficient to require it to make a written findings statement.

### **III. The State’s Approval of ESDC’s Financial Participation in the Atlantic Yards Project was Not an “Action” Subject to SEQRA**

Actions of the State Legislature and the Governor of the State of New York are not “actions” subject to SEQRA review. 6 N.Y.C.R.R. §§ 617.3(f), and 617.5(a) and (c)(37).<sup>11</sup> *See Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 415 (1991); *Settco, LLC v. New York State Urban Development Corp.*, 305 A.D.2d 1026, 1027 (4th Dep’t 2003); *Cerro v. Town of Kingsbury*, 250 A.D.2d 978, 979 (3d Dep’t 1998), *lv. denied*, 92 N.Y.2d 812 (1998).

The State’s approval of ESDC’s participation financially in the Atlantic Yards Project included (1) legislative appropriations and bonding authority (both approved by the Governor), and, (2) approval by the PACB following its review of the details of ESDC’s financial participation in the Atlantic Yards Project. Taken as a whole, those approvals were actions of the Legislature and the Governor, and thus not subject to SEQRA.

In June 2006, the Legislature passed, and the Governor signed, budget legislation that authorized ESDC to pay for \$100 million of infrastructure improvements relating to the Atlantic Yards Project. (Scheuermann Aff. ¶ 55.) The legislation provided ESDC with two possible sources of funds. It directly appropriated \$100 million to ESDC to spend on infrastructure improvements

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<sup>11</sup>They are designated “Type II actions.” which are actions that do not have a significant impact on the environment or, as here, are “otherwise precluded” from SEQRA review. 6 N.Y.C.R.R. § 617.5(a). When it amended this provision, the Department of Environmental Conservation noted that “state agency” under SEQRA was meant to include only “traditional administrative entities” and not the activities of the Legislature or the Judiciary or the Governor’s activities within the Executive Office/Chamber, which includes the Division of the Budget. *See* New York State Department of Environmental Conservation, Final Generic Environmental Impact Statement on the Proposed Amendments to the SEQRA Regulations, Sept. 6, 1996, at 43-44. This provision was upheld in *West Village Committee, Inc. v. Zagata*, 242 A.D.2d 91, 98-99 (3d Dep’t), *lv. denied*, 92 N.Y.2d 802 (1998).

relating to the Atlantic Yards Project (subject to the PACB's review of the project financing). L. 2006, c. 108. Alternatively, it gave ESDC the authority (again subject to the PACB's review of the project financing) to issue up to \$100 million in bonds to pay for infrastructure improvements relating to the Atlantic Yards Project. L. 2006, c. 109, Pt. J-1, § 4. (The PACB's Resolution refers to this legislation, which "authorized UDC to provide various forms of financial assistance," as the Enabling Legislation. (Ex. M, at 1, 3.)

That appropriation and the bonding authority, which were specifically earmarked for the proposed Atlantic Yards Project, were actions by the Legislature and the Governor, which indicated their approval of ESDC's financial participation in the Atlantic Yards Project.<sup>12</sup> The Legislature passed and the Governor signed legislation approving ESDC's financial participation in the Atlantic Yards Project, knowing that before ESDC could use the \$100 million (either the appropriated funds or the bonds) to help pay for infrastructure improvements this State funding would be subject to financial review by and approval from the PACB. They both knew that the PACB would grant such approval only if it first determined that "there [were] commitments of funds sufficient to finance the acquisition and construction" of the Atlantic Yards Project. Pub. Auth. Law § 51 (3). They also knew that the Atlantic Yards Project would be subject to SEQRA review, and that ESDC would not seek the PACB's approval until after it had undertaken a full examination and review of its potential environmental impacts.

Since it was established in 1976, the Legislature and the Executive have looked to the PACB—whose members are chosen by the leaders of the legislative majorities and minorities and

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<sup>12</sup>The Resolution so recognizes. The "Enabling Legislation," it states (referring to the earlier enacted appropriation and the bonding authorization), "authorized" both "the Project, and the issuance of the bonds by UDC to finance the Project. (Ex. M, at 1, 3)

the Executive—to oversee the financial commitments and indebtedness of important public authorities, including ESDC. Report by the State Comptroller: *New York State's Debt Policy: A Need for Reform* (Feb. 2005), at 80-81.<sup>13</sup>

The PACB's three voting members are chosen by the Governor, the Senate Majority Leader, and the Assembly Speaker. Pub. Auth. Law § 50(2). As set forth in the Scheuermann affidavit, the four governors who have held office since the PACB was established 31 years ago have always installed as chair of the PACB the Director of the Budget. (Scheuermann Aff. ¶ 43.) The Director of the Budget runs the Division of the Budget, Exec. Law § 180, part of the Executive Department, Exec. Law § 31, which is headed by the Governor. Exec. Law § 30. The Director of the Budget is appointed by the Governor, and serves at the Governor's pleasure. Exec. Law § 180. Among other duties, the Director of the Budget is required to "assist" the Governor with the constitutional duty of formulating the State's budget, and in "investigating, supervising and coordinating" the "fiscal operations" of State government. *Id.*

Similarly, the two legislative majority leaders have always chosen sitting members of the Legislature and of their caucus. (Scheuermann Aff. ¶ 43-45.) Unsurprisingly, given the PACB's narrow, statutorily circumscribed financial-review duties, they have often chosen the chairs of the Legislature's fiscal committees—the Senate Finance Committee and the Assembly Ways and Means Committee. (*Id.*)

The voting members of the PACB who adopted the Resolution at issue here were: John F. Cape, the Director of the Budget (chosen by then-Governor Pataki); Sheldon Silver, the Speaker of

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<sup>13</sup>Available at <http://www.osc.state.ny.us/press/debtreport205.pdf>.

the Assembly; and Owen Johnson, chair of the Senate Finance Committee (chosen by the Senate Majority Leader, Joseph L. Bruno). (Id. ¶ 44; Ex.M.)<sup>14</sup>

Moreover, as the Scheuermann affidavit explains, with the exception of a full-time employee of the Division of the Budget who acts as its Secretary, the PACB has neither dedicated offices of its own, nor staff that makes formal recommendations to the voting members.

(Scheuermann Aff. ¶¶ 46-51.) Here, in reviewing the projections and other financial material submitted by ESDC, the Director of the Budget, the Governor's appointee, relied on his staff, and the voting members chosen by the legislative majority leaders relied primarily on their own legislative staffs. (Id. ¶ 48.)

Given the PACB's history, its singular composition and purpose, and given the earlier legislation appropriating money and granting bonding authority, the PACB's unanimous vote to approve ESDC's financial participation in the Atlantic Yards Project was not subject to SEQRA under the exemption relating to legislative and executive actions. It was a Type II action not subject to SEQRA.

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<sup>14</sup>Petitioners and their counsel have gone much further than this, asserting that the PACB is the Governor, the Assembly Speaker, and the Senate Majority. The lead petitioner in this action is Develop Don't Destroy Brooklyn, Inc. Its principal spokesperson, Daniel Goldstein, is also the lead plaintiff in the federal lawsuit brought by Develop Don't Destroy Brooklyn challenging the ESDC's use of eminent domain as part of the Atlantic Yards Project—*Goldstein, et al. v. Pataki, et al.*, No. 06 CV 5827 (NGG) (RML)—now pending in federal court in Brooklyn. Counsel for these petitioners is co-counsel for the plaintiffs in that action, where he has asserted that the PACB's approval was an action of the Governor and the Legislature. In a brief, for example, he asserted that the former Governor of New York controls one of three votes on the PACB. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, Jan. 5, 2007, at 48-49.) He wrote: "Indeed, on December 20, 2006 . . . defendant Pataki granted final approval to the [Atlantic Yards] Project via the PACB." *Id.* at 49 (emphasis added). And a press release that Develop Don't Destroy Brooklyn issued announcing its federal lawsuit, quoted petitioners' counsel: "We are calling on the Public Authorities Control Board—Silver, Bruno and the Governor—to postpone any vote on the proposed 'Atlantic Yards' project until the courts have ruled on eminent domain." Press release, Oct. 26, 2006, available at <http://dddb.net/php:press:061026EDsuit.php>


For the same reason, contrary to petitioner's assertion, the PACB was not an "involved agency" under 6 N.Y.C.R.R. § 617.2(s) required by 6 N.Y.C.R.R. § 617.11(c) to make written SEQRA findings. The PACB neither was undertaking nor funding the Atlantic Yards Project. And its Resolution approving ESDC's proposed financial participation in the Atlantic Yards Project, after first determining the sufficiency of funds, did not amount to an "approval" of the Atlantic Yards Project as a whole, sufficient to require it to make a written findings statement.

**CONCLUSION**

For the foregoing reasons, respondent New York State Public Authorities Control Board respectfully requests that the Court deny the petition and dismiss this proceeding.

Dated: New York, New York  
April 25, 2007

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