

SUPREME COURT OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of  
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DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., : Index No. 104597/07  
:  
Petitioners-Plaintiffs, : IAS Part 11  
:  
- against - : Justice Joan A.Madden  
:  
URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE : **AFFIDAVIT OF TODD L.**  
STATE DEVELOPMENT CORPORATION, et al., : **SCHEUERMANN IN**  
:  
Respondents-Defendants. : **OPPOSITION**  
: **TO PETITION**  
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State of New York )  
)ss.:  
County of Albany )

1. I am an Assistant Chief Budget Examiner in the New York State Division of the Budget. As part of my duties as an employee of the Division of the Budget, I also serve as the designated representative of Paul E. Francis, who is the Director of the Budget and Senior Adviser to the Governor, and is also a member and Chairman of the New York State Public Authorities Control Board ("PACB"). I have done so since being designated by the predecessor to Mr. Francis in August 2006. I respectfully submit this affidavit in support of the PACB's answer and objections in point of law and in opposition to the petition-complaint.

2. This affidavit and the exhibits annexed to it—which to the best of my knowledge include all documents and data that the PACB relied on in making its determination—constitute

the “transcript of the record of the proceedings” for the PACB’s adoption of its December 20, 2006, resolution for purposes of CPLR § 7804(e).

### **New York State’s 1970s Credit Crisis**

3. The PACB was established in 1976 as a temporary response to the credit crisis precipitated by the Urban Development Corporation’s default the year before on \$105 million in bond anticipation notes, a form of so-called moral obligation debt.

4. Governor Hugh Carey responded to the credit crisis, and the need to make public authorities more accountable, by appointing a commission under New York’s Moreland Act to examine the process of the creation and management of all the State’s public debt, in particular the origin and growth of moral obligation financing. *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) (the “Comm’n Report”). (A copy of relevant portions of this report—the Summary and Recommendations and Commentary—is annexed as Exhibit A.) The PACB grew directly out of the Moreland Act Commission’s findings and recommendations.

5. Moral obligation financing involved bonds issued not by the State, but by public authorities, including the UDC. They were backed by the public authority’s pledge to create, out of funds raised by the bonds, a reserve fund equal to one year’s debt service on the bonds. Should a public authority, because of insufficient revenues, be required to draw on the reserve fund to meet debt service, the Governor was required to so certify to the Legislature, which was then obligated to *consider* whether to appropriate the amount needed to make up the deficiency in the reserve. Neither the Legislature nor the State, however, had any legal obligation to do so. What the

bondholders counted on was that the State was likely to appropriate the money because failure to do so would cripple the State's credit. The UDC's 1975 \$105 million default was the first time that the State had to confront its moral obligation even though billions of dollars of such bonds had been issued. Comm'n Report, at 1-6.

6. The Moreland Act Commission found that since 1960, when the Housing Finance Agency first introduced moral obligation bonds, *id.* at 3, the State had made no effective attempt to control the volume of moral obligation bonds issued by the State's public authorities. *Id.* at 4. The UDC—a public authority established in 1968, and charged with promoting a vigorous and growing economy through a multi-purpose approach combining industrial development and sponsorship of housing in urban renewal areas—relied heavily on moral obligation bonds to help finance its construction projects. The Moreland Act Commission found that financing for the UDC's projects, which specifically involved issuing UDC general obligation bonds backed by the full faith and credit of the State (rather than revenue bonds), was “inherently more risky” than the housing projects, hospitals, universities, and mental institutions financed by the Housing Finance Agency. *Id.*

7. In addition to the inherent risks of the types of projects UDC undertook, the Moreland Act Commission noted that the UDC had rapidly accumulated construction commitments that “had got it too far ahead of its ability to go to market with its bonds to finance such commitments.” *Id.* at 10.

8. By 1976, the State's public authorities had issued billions of dollars in moral obligation bonds, which gravely exposed the State's credit. “The independence enjoyed by authorities,” the Moreland Act Commission found, “while necessary to successful implementation

of the State's social and economic programs, allowed authority debt and project commitments to increase dramatically to the point that the credit of the State is now threatened." *Id.* at 31.

9. The Moreland Commission also found that "neither the Executive nor the Legislative Branches of the government made any preparation against the day when a part of the State's moral obligation behind the billions of dollars of construction projects might have to be met." *Id.* at 4. Instead, the Moreland Act Commission observed, it had been assumed that the projects for which the moral obligation bonds were issued would always be able to pay their own way, including all debt service on the bonds. *Id.* Albany, the Moreland Act Commission noted, "looked to the bond market, rather than to the underlying projects, to determine the financial condition of the issuing public authorities." *Id.* at 10.

10. Yet despite New York State's credit crisis, which it blamed primarily on the uncontrolled issuance of moral obligation bonds, the Moreland Act Commission concluded that New York had no choice but to continue to rely on public authorities to finance, construct, and operate public improvements. *Id.* at 19-20. Public authorities, the Moreland Act Commission found, offered the State significant advantages: they could finance capital construction programs without resorting to additional taxes or statewide referenda; they could supersede local jurisdictional boundaries and restrictions; and, they had "independent management" that freed them from "established, monolithic bureaucracy." *Id.* at 19.

11. But the Moreland Act Commission also found that the "rapid proliferation of public authorities and of authority debt" was not "adequate[ly] monitor[ed]" by the State. *Id.* at 19-20. The Moreland Act Commission further found that the Executive, Legislature, and the State Comptroller all had failed to "take account of the potential impact of authority debt on State debt

and credit.” *Id.* And there was a lack of “overall state financial planning and debt management.” *Id.*

12. “Public authorities in New York ,” the Moreland Act Commission concluded, “have been allowed to create debt obligations without adequate coordination, supervision or control by the Executive and Legislative branches of government.” *Id.* at 9.

13. Accordingly, the Moreland Act Commission called on the State to devise a means “for controlling the volume and pace of authority borrowing and commitments, coordinating authority debt with that of the State and allocating priorities among programs without destroying the initiative of public authorities.” *Id.* at 20. It recommended that the Legislature create a Public Authorities Control Commission (PACC), within the Executive Chamber, 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 authority’s financial condition.” *Id.* at 20-21.

14. As envisioned by the Moreland Act Commission, the PACC would afford added protection to the State’s financial and credit status by exercising certain specific powers. One was the general power to disapprove or modify the amount and form of an authority obligation, including its terms, conditions, rates of interest, amount, or form. *Id.* at 22-23. Specifically, the Moreland Act Commission recommended giving the PACC the power to require public authorities to make yearly allocations out of project reserves in an amount sufficient to satisfy that year’s debt service requirements. *Id.* at 23. In addition, the Moreland Act Commission recommended that the PACC should not approve any bond issue if the issuing public authority was permitted to apply bond proceeds to uses not directly related to the construction of the public authority’s projects. (The UDC had done just that in the past). *Id.*

15. The Moreland Act Commission also recommended that the PACC be able to review and disapprove or modify any covenants or other agreements with bondholders of obligations in connection with the issuance of any bond by a New York public authority. *Id.* at 23-26. Such covenants, it noted, might impair the authority's future flexibility, or interfere with the State's ability to pursue of its public policy in the future. *Id.* at 25. It was understood that interest rates payable on bonds would increase in direct proportion to the amount of flexibility achieved. *Id.* The PACC was to "strike a delicate balance between the maximum possible flexibility and the lowest possible interest rate." *Id.*

16. A third concern of the Moreland Act Commission was the competition among authorities, municipalities, and the State for financing through the private credit market. *Id.* at 26. To ensure that authority debt issues not compete unnecessarily (and expensively) with the State's full faith and credit issues, the Moreland Act Commission recommended that the PACC supervise the scheduling of authority debt issues. Specifically, the Moreland Act Commission recommended giving the PACC the power to regulate the timing and amounts of any sale of obligations by public authorities.

17. Finally, the Moreland Act Commission recommended that the PACC have the power to disapprove the committing of any funds, resources or assets of any public authority for any capital project for which funds, resources or assets had not yet been contractually obligated. *Id.* at 26-28.

### **March 1976: Establishment of the Public Authorities Control Board**

18. The Governor and the Legislature moved swiftly to implement the Moreland Act Commission's call for a "control mechanism" over the public authorities' issuance of debt and

project financing commitments. Agreeing with the Moreland Act Commission, the Legislature found that the amount of debt incurred by public authorities “has grown dramatically and without effective or comprehensive monitoring by the State government” and as a result “the traditional markets for bonds and notes of the State” and its cities have been “adversely affected,” and are “virtually closed to all issues offered” by public authorities. L. 1976, c. 39, § 1. And so, in March 1976, the Legislature passed, and the Governor approved, legislation creating the New York State Public Authorities Control Board. L. 1976, c. 38 and 39. (Copies of these two laws are attached as Exhibit B.)

19. The Legislature also imposed a cap on the issuance of further moral obligation debt. L. 1976, c. 38.

20. There was at least one significant difference between the Moreland Act Commission’s proposed “control mechanism” and the new PACB. The Moreland Act Commission wanted the “control mechanism” established within the Executive branch of the State government, which it believed “more suited” than the Legislature to exercising the review and control powers needed to control the “volume and pace of authority borrowing and commitments.” *Id.* at 20-21. Believing that the Governor’s office “cannot assume the full burden of personally regulating” the financial operations of all public authorities, however, the Moreland Act Commission called for a three-member body appointed by the Governor, established within the Executive Chamber, with a full-time chair who would be a member of the Governor’s Cabinet. *Id.* at 21.

21. Although the Legislature agreed with the Moreland Act Commission’s call for a “control mechanism,” it chose not to create it wholly within the Governor’s office. As established

in 1976, the PACB had three members, all appointed by the Governor, one on the recommendation of the Speaker of the Assembly and one on the recommendation of the Senate Majority Leader. L. 1976, c. 38, § 15. The PACB was required to act by unanimous vote of its three members. The Governor designated one member to serve as chair.

22. Although the Legislature provided initially that the PACB would exist only for a few years, it was made permanent in 1978. L. 1978, c. 47.

23. As created in 1976, the PACB was authorized to review applications for approval of the financing and construction of projects undertaken by three public authorities. L. 1976, c. 39, § 2. The UDC and its subsidiaries were added in 1978. L. 1978, c. 47. Since then, the Legislature has added more, while others have expired. At present the PACB reviews applications from ten public authorities. Pub. Auth. Law § 51(1). (These ten are by no means all of the State's public authorities. The State Comptroller in February 2005 stated that there are over 200 public benefit corporations within the State and local authorities. Report of the State Comptroller, *New York State's Debt Policy: A Need for Reform* ( February 2005), available at <http://www.osc.state.ny.us/press/debtreport205.pdf> .

24. The Legislature conferred on the PACB “[c]ertain express and limited powers, functions and duties.” L. 1976, c. 39, § 2. It directed the PACB to receive applications from specified public authorities “for approval of the financing and construction of any project” proposed by the public authority. Before it could approve an application, the PACB first was required to give the State Comptroller an opportunity to review and comment on it. *Id.*



25. The PACB was allowed to approve an application for the financing and construction of a project only if it first determined that “there are commitments of funds sufficient to finance the acquisition and construction” of the project. L. 1976, c. 39, § 2(3).

26. This criterion—the sole criterion on which PACB reviews applications submitted by public authorities for project financing—is now codified as Public Authorities Law § 51(3). It has come to be known as “funds sufficiency.” The PACB has delayed many proposed projects that it felt did not meet this funds-sufficiency test. And public authorities often have had to revise their proposed projects to satisfy the PACB’s funds-sufficiency test.

27. Six years after creating the PACB, the Legislature in 1983 expanded its jurisdiction to include six additional public authorities, and gave it two more members. L. 1983, c. 838. Joining the three members chosen by the Governor and the leaders of the legislative majorities, were two members appointed on recommendations by the leaders of the legislative minorities. But, unlike the members chosen by the Governor and the leaders of the legislative majorities, those two new members had no vote. (Their comments could be entered on the PACB’s “official record” unless one of the voting members objected.)

28. The 1983 amendment also recognized that when the PACB considers whether there is a sufficient commitment of funds so that a project will not jeopardize the State’s financial standing, it also “reasonably [must] reflect the projected ability of an applicant [i.e. a public authority] to repay a proposed indebtedness or assure against potential liabilities.” Memorandum of State Executive Department, *reprinted in* McKinney’s 1983 Session Laws of New York, at 2695-97. (A copy of the memorandum is annexed as Exhibit C.) Accordingly, the amendment

added statutory language “to specify, in statute, the considerations underlying approval of new projects.” *Id.*

29. That new statutory language specified that in determining funds sufficiency, the PACB “may consider commitments of funds, projections of fees or other revenues and security,” which could include “collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken.” L. 1983, c. 838 § 2. The Executive Department’s Memorandum noted that “[a]n effectively functioning PACB lessens the possibility of future calls for State moneys to assist financially distressed authorities.” *Id.*

30. As set forth in its organic legislation, the PACB’s review of a proposed project is limited to determining whether there are “commitments of funds sufficient to finance the acquisition and construction” of the proposed project. Pub. Auth. Law § 51(3). In particular, when a public authority proposes to issue bonds in connection with a project, the PACB reviews the public authority’s ability to repay a proposed indebtedness, and considers the total amount of already outstanding public authority debt.

**The PACB’s Statutory Powers Embody the Moreland Act Commission’s Recommendations**

31. The sufficiency-of-funds-review power, and the other powers that the PACB exercises under the Public Authorities Law, are directly traceable to recommendations first made by the Moreland Act Commission in 1976.

32. The Moreland Act Commission was concerned with ensuring that sufficient funds existed to support an authority’s financial commitments for a proposed project. Funds that the PACB authorizes public authorities to borrow and spend generally support the acquisition and

construction of projects by paying debt service on long-term bonds. As the Moreland Act Commission noted, the issuance by public authorities of long-term debt affects the State's credit for years and thus future generations of New Yorkers. To ensure that public authorities will be able to meet all their future debt service requirements the PACB, before it approves any proposed bond issue, first reviews in detail projected revenues and expenses of proposed projects, expected bond ratings by financial ratings firms, and security arrangements.

33. Forms of security for public authority projects typically are combinations of (1) restrictive financial covenants (which restrict the pledging of assets and the incurring of additional debt); (2) early warning covenants (which warn of impending credit deterioration); (3) provisions for the use of qualified management consultants should other covenants not be met; (4) credit enhancements (including municipal bond insurance and irrevocable standby or direct-pay letters of credit issued by a commercial bank); and (5) debt service reserve funds (funded with letters of credit, surety bonds, or certain proceeds from sales of obligations).

34. As it reviews applications from public authorities for project financings under Public Authorities Law § 51, the PACB can modify specific financial conditions, and often does so, based on its power—as recommended by the Moreland Act Commission and conferred by statute—to receive applications including the terms and conditions, including rates of interest, amounts, and forms of any authority obligation, as well as dates of repayment of State appropriations authorized by law pursuant to a repayment agreement; and, approving such applications only if it determines, through consideration of commitments of funds, projections of fees, other revenues and security, that there are commitments of funds sufficient to finance the project.

35. Each PACB resolution approving a proposed project financing contains a sources-and-uses page. Typically, a sources-and-uses page spells out highly specific terms, conditions, amounts, and forms of any authority obligation, including specified dollar amounts for various components of the proposed project. A sources-and-uses page also specifies a “do not exceed” amount for the maximum allowable issuance of bonds. Each sources-and-uses page identifies the name of the project or refunding and, when applicable, the components of the named project to be funded with the bond proceeds. Meanwhile, each PACB resolution approving a proposed project acquisition, grant, or loan financing contains a terms-and-conditions page. Typically, a terms-and-conditions page sets forth specific financial terms, conditions, and amounts for, and identity of, the project, either in a matrix or a list format. For certain resolutions approving single or multiple tax-exempt loans all of which contain the same term and interest rate, the term and interest rate is specifically presented in “Whereas” clauses within the body of the resolution, while the terms-and-conditions page contains a list naming the projects, their components, and specified dollar amounts for the projects.

36. In addition, bondholder covenants proposed by public authorities must conform to the PACB’s rules, practice, precedent, and to Public Authorities Law § 51. Over the years, as the PACB has reviewed proposed debt issues, it has altered conditions of proposed bond sales. Public authorities and bond underwriters also have undertaken to comply with the PACB’s rules concerning bond issuances.

37. Seeking lower interest rates for new money and refunding bond issuances, the PACB sometimes has insisted on not-to-exceed interest rate reductions more restrictive than the public authority sponsoring the project or the underwriter would prefer, in order to conform with

available rates and reduce debt service. Moreover, seeking greater debt service savings on behalf of projects for which refinancing bonds would be issued, the PACB has frequently insisted on a requirement that a bond refinancing meet a minimum savings test. On the whole, however, bond issuances have been flexible enough to conform to overall State policy and project requirements beyond just interest rates and minimum savings requirements.

38. To elevate credit security, the PACB sometimes adds to a resolution approving a bond issue a “Whereas” clause, or other minimum requirements. Members of the PACB have objected to proposed bondholder covenants that needlessly altered the State’s fiscal policy.

### **The New York Public Authorities Control Board Today**

39. The various legislative enactments creating the PACB and giving its powers now are codified as sections 50 and 51 of the Public Authorities Law.

40. The PACB has five members, though only three members have a vote, and those members must act by unanimous vote.

41. Although formally the Governor appoints all the PACB’s members, four are chosen by the Senate Majority Leader, the Assembly Speaker, and the leaders of the Senate and Assembly minorities. Each member can be replaced at any time at the behest of the person who chose them.

42. Members of the PACB are unpaid and if they are public employees—as they always have been—they are entitled to no reimbursement for any expenses.

43. The Governor designates one member as chair. Beginning with Governor Carey, each of the four governors since the PACB was established 31 years ago has chosen to be represented on the PACB by his Director of the Budget (who have also served as chair). Similarly, the four legislative leaders have always chosen only sitting members of the Legislature. Often, the

Assembly Speaker and the Senate Majority Leader choose the chairs of their respective houses' finance committees—the Senate Finance Committee and the Assembly Ways and Means Committee—to represent them on the PACB.

44. In December 2006, when it adopted the resolution at issue in this proceeding, the PACB's three voting members were John F. Cape, the then-Director of the Budget (chair), chosen by the Governor; the Hon. Sheldon Silver, Speaker of the Assembly, chosen by himself; and, Senator Owen H. Johnson, chair of the Senate Finance Committee, chosen by Senate Majority Leader Joseph L. Bruno. The two non-voting members were Senator Thomas K. Duane (the Assistant Minority Leader for Policy and Administration) chosen by the Senate Minority Leader, and Assemblyman Brian M. Kolb, chosen by the Assembly Minority Leader.

45. In January of 2007, Paul E. Francis, Governor Spitzer's Director of the Budget and Senior Adviser to the Governor, was appointed by Governor Spitzer to the PACB (and designated its chair), replacing Mr. Cape. Speaker Silver, Senator Johnson, and Assemblyman Kolb continue to serve; Senator John L. Sampson is now the Senate Minority Leader's choice as a non-voting member.

46. Unlike conventional State boards and commissions, such as the Public Service Commission or the Racing and Wagering Board, which have paid, full-time commissioners, board members, or directors, as well as numerous full-time employees who assemble and analyze information and present formal recommendations for action, the PACB has no staff of its own.

47. As part of his duties as a full-time employee of the Division of the Budget, Dennis Hodges, Senior Budget Examiner, devotes a substantial portion of his time to tasks relating to the PACB. As the PACB's Secretary, Mr. Hodges, among other duties, ensures that all notices of

PACB meetings are given and served; keeps the minutes of PACB meetings; certifies the correctness of copies of the PACB's records and resolutions; and, ensures that the PACB's members receive all necessary materials relating to matters pending before the PACB. Another full-time employee of the Division of the Budget, George Westervelt, Principal Budget Examiner, has been designated the PACB's Assistant Secretary. He devotes approximately one-quarter of his time to the PACB. In addition to my numerous other duties as an Assistant Chief Budget Examiner, I chair meetings of the PACB, acting as a duly authorized representative of Paul E. Francis, the Governor's appointee and the Director of the Budget.

48. Staff from the State Senate and the Assembly provide similar assistance to the PACB's two other voting, and two non-voting, members, who are chosen by the leaders of the legislative majorities and minorities.

49. From time to time, briefings are held for members of the PACB or their representatives to provide additional financial information about applications submitted to the PACB. Mr. Hodges, in his capacity as Secretary, facilitates these briefings. These briefings generally concern funds sufficiency.

50. Other than the work spaces occupied by the Division of the Budget employees who perform PACB-related duties, the PACB maintains no offices. Meetings are held, usually on the third Wednesday of each month, in a hearing room in the State Capitol in Albany.

51. The PACB receives no appropriations from the Legislature.

## **The Public Authorities Control Board is Not Subject to the State Environmental Quality Review Act**

52. In the 31 years since it was established to protect the State's interest with respect to the financial commitments and debt obligations undertaken by public authorities, the PACB has reviewed and approved hundreds of applications from public authorities relating to the financing and construction of proposed projects, and has approved billions of dollars of bond sales.

53. The PACB does not consider its limited review and approval of proposed financial commitments by public authorities to be subject to the State Environmental Quality Review Act (SEQRA). For that reason, it has never served as a "lead agency," prepared an environmental impact statement, nor acted as an "involved agency" and made a written findings statement. Nor to my knowledge has anyone ever asserted that the PACB is subject to SEQRA. Certainly, this proceeding is the first time this issue has ever been litigated.

54. The PACB's determinations as whether to approve a public authority's proposed financing of a project are to provide some added assurance that the State's financial interests are not at risk. This limited determination would not be informed by the type and scope of information contained in an environmental impact statement.

## **The Resolution Approving ESDC's Financial Participation in the Atlantic Yards Project**

55. In April 2006, the Legislature appropriated \$100 million to the Empire State Development Corporation (ESDC) to help finance new infrastructure relating to the ESDC's Atlantic Yards Land Use Improvement and Civic Project (the Atlantic Yards Project) including streets and sewers, garages, transit connections, improvements to the Long Island Rail Road, and



publicly accessible open space. At the same time, the Legislature also authorized ESDC to issue \$100 million of bonds to finance this appropriation.

56. Because the Empire State Development Corporation is the Urban Development Corporation's doing-business-as name, it is one of the public authorities specified under the PACB's statute. Pub. Auth. Law § 51(1). In December 2006, ESDC submitted an application to the PACB relating to the Atlantic Yards Project. (A copy of the ESDC's initial application is annexed as Exhibit D.)

57. ESDC sought the PACB's approval for two things. First, ESDC applied for approval to issue bonds to assist in financing the development of the Atlantic Yards Project. Specifically, ESDC wanted approval for the sale and issuance of \$100 million of Personal Income Tax Revenue Bonds, which are authorized by the Revenue Bond Financing Program (set forth in Article 5-C and section 92-z of the State Finance Law) to pay for the State-financed infrastructure improvements.

58. The Revenue Bond Financing Program is designed to reduce borrowing costs for certain specified public authorities, including ESDC. Under the program, a public authority issues debt that is backed by a percentage of the State's personal income tax revenue that will be pledged or earmarked for payment of debt service. This debt is rated the same as general obligation debt and a notch higher than other appropriation-backed debt because it is backed by the State's largest revenue source, even though the pledged revenues are still subject to annual appropriation by the Legislature.

59. ESDC also wanted the PACB to conduct a funds-sufficiency review of the adequacy of the Atlantic Yards Project's corporate sponsor's commitments to ESDC to pay all

costs that ESDC incurred in connection with its expected acquisition by eminent domain of certain properties as part of the Atlantic Yards Project.

60. As required by section 51(2) of the Public Authorities Law, ESDC's application (and several other applications that also were on the agenda for the PACB's December 2006 meeting) was furnished to the State Comptroller. The State Comptroller provided some comments but did not comment specifically on the Atlantic Yards Project. (A copy of the State Comptroller's letters, dated November 15 and December 20, 2006, are attached as Exhibit I.)

61. The following describes additional information relating to the Atlantic Yards Project that was provided to members of the PACB before it met on December 20, 2006.

62. To assess the funds sufficiency of the proposed Atlantic Yards Project, members of the PACB asked for and obtained from ESDC and the Atlantic Yards Project's corporate sponsor, Forest City Ratner Companies (FCRC), certain confidential financial documents. Among them was a memorandum prepared by KPMG LLP at the request of a New York law firm, Skadden, Arps, Slate, Meagher & Flom LLP, to assist it in reviewing FCRC's projected cash flows for the Atlantic Yards Project. (A copy is annexed as Exhibit H.) Skadden, Arps was representing ESDC in the preparation and adoption of the Atlantic Yards Project's Modified General Project Plan.

63. Members of the PACB requested this confidential cash flow analysis to help fulfill their statutory duty to evaluate the funds sufficiency of the proposed Atlantic Yards Project, specifically ESDC's proposal to enter into commitments to provide funds to accomplish the acquisition of property and infrastructure improvements.

64. Another package of documents, which was distributed to PACB members (dated December 13), provided additional detail on costs and financings relating to the proposed Atlantic

Yards Project, including sources and uses of funds; infrastructure budget; and, mitigation budget. (A copy is annexed as Exhibit F.

65. PACB members later in December 2006 asked for and were provided certain additional analyses of projected revenue, expenses, and income for the arena (a part of the proposed Atlantic Yards) through the year 2012, and of projected land, master planning, site, and infrastructure costs and for projected rental, office, condo, and hotel cash flow through the year 2015, to help assess funds sufficiency for the proposed Atlantic Yards Project. (Copies of these documents are annexed as Exhibit G.)

66. The PACB duly gave notice that it would consider ESDC's application at a meeting on December 20, 2006. (A copy of the Notice of a Meeting and Agenda is annexed as Exhibit J.)

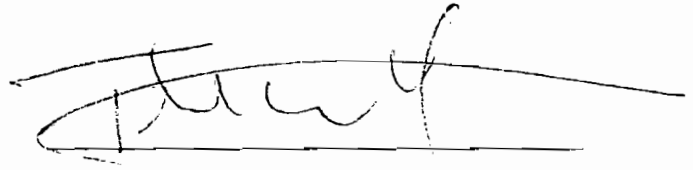
67. The minutes of the PACB's December 20, 2006, meeting indicate that two voting members of the PACB asked questions relating to ESDC's proposed financial participation in the Atlantic Yards Project. (A copy of the minutes, which the PACB approved at its March 14, 2007, meeting, is annexed as Exhibit K, and a copy of the notice and agenda for the March 14, 2007, meeting is annexed as Exhibit L.) One asked if the PACB was being asked to approve \$100 million in bonds to help pay for "infrastructure support," and was told yes. Another asked when the State's liability would end, and who would finance the construction of proposed housing.

68. By unanimous vote, the PACB on December 20, 2006, adopted Resolution No. 06-UP-953. (A copy of the Resolution is annexed as Exhibit M.)

69. The Resolution states that PACB "approves [ESDC's] participation in the Project" and does so "in accordance with section 51 of the Public Authorities Law. As I noted earlier, the PACB determined, as required by section 51(3) of the Public Authorities Law, that with respect to

the ESDC's financial participation in the Atlantic Yards Project "there are commitments of funds sufficient to finance the acquisition and construction of such project." In reaching that determination, the PACB considered "commitments of funds, projections of fees or other revenues and security" including "collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities" that ESDC proposed to undertake.

Dated: Albany, New York  
April 25, 2007



Todd L. Scheuermann

Sworn to before me this  
25th day of April, 2007

  
Notary Public

MICHAEL P. KENDALL  
Notary Public, State of New York  
No. 01KE6031437  
Qualified in Albany County  
Commission Expires October 4, 2009

Index No.: 104597/07 (The Hon. Joan A. Madden, J.S.C.)

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**AFFIDAVIT OF**  
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**IN OPPOSITION TO**  
**PETITION**

ANDREW M. CUOMO  
Attorney General of the State of  
New York

ATTORNEY FOR RESPONDENT-DEFENDANT  
NEW YORK STATE  
PUBLIC AUTHORITIES CONTROL BOARD (PACB)

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*Due Service of a copy of the within is  
admitted this \_\_\_ day of April, 2007*