STATE OF NEW YORK
SUPREME COURT NEW YORK COUNTY

DEVELOP DON'T DESTROY (BROOKLYN), INC., COUNCIL OF BROOKLYN NEIGHBORHOODS, INC., ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC., BROOKLYN BEARS COMMUNITY GARDENS, INC., BROOKLYN VISION FOUNDATION, INC., CARLTON AVENUE ASSOCIATION, INC., CENTRAL BROOKLYN INDEPENDENT DEMOCRATS, by its President Lucy Koteen, CROWN HEIGHTS NORTH ASSOCIATION, INC., DEAN STREET BLOCK ASSOCIATION, INC., DEMOCRACY FOR NEW YORK CITY, INC., EAST PACIFIC BLOCK ASSOCIATION, INC., FORT GREENE ASSOCIATION, INC., FORT GREENE PARK CONSERVANCY, INC., FRIENDS AND RESIDENTS OF GREATER GOWANUS, PARK SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS ACTION COALITION, by its President Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, AND SOUTH PORTLAND BLOCK ASSOCIATION, INC.

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

EMPIRE STATE DEVELOPMENT CORPORATION, FOREST CITY RATNER COMPANIES, LLC,

Respondents.

PETITION

Index No.

RJI No.

Petitioners, by their attorneys Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC allege as follows:

Summary of Proceeding

1. This proceeding seeks to annul the September 17, 2009 determination by the Respondent Urban Development Corporation doing business as the Empire State Development Corporation (ESDC) to approve a Modified General Project Plan ("MGPP") for what is known as the Atlantic Yards Land Use Improvement and Civic Project in Brooklyn, New York ("Atlantic Yards" or "the Project").

2. ESDC originally approved the first General Project Plan ("GPP") for Atlantic Yards on December 8, 2006. That determination has been the subject of extensive litigation, including *inter alia*, the unconstitutional use of the power of eminent domain in *Goldstein v. Pataki* 516 F.3d 50 (2d Cir. 2008) and *Goldstein v. N.Y. State Urban Development Corp.* 879 N.Y.S.2d 524 (2d Dept. 2009). In *Develop Don't Destroy Brooklyn v. ESDC*, 59 A.D. 3d 312 (1st Dept. 2009) petitioners challenged ESDC's decisions under both the Urban Development Corporation Act ("UDCA") and the State Environmental Quality Review Act ("SEQRA"), and a motion for leave to appeal in that matter is currently pending before the Court of Appeals. The New York State Court of Appeals heard argument on *Goldstein v. N.Y. State Urban Development Corp.* on October 14, 2009, and that appeal is *sub judice*.

3. In reviewing and approving the MGPP in September 2009, the ESDC understated the significance of the changes to the Project and characterized the changes as minor. In reality the Project has undergone significant changes that are inconsistent with ESDC's determination that Atlantic Yards is a Land Use Improvement Project ("LUIP") under the UDCA.

4. The MGPP fails to consider the fact that the previously existing agreement between the project sponsor, Respondent Forest City Ratner Companies ("FCRC"), and the Metropolitan Transportation Authority ("MTA") for FCR to acquire the Vanderbilt Rail Yard

("Vanderbilt Yards"), which form the approximately nine-acre core of the Atlantic Yards Project, has been replaced with a materially different agreement.

5. At the time of the original approval by ESDC in 2006, FCRC had committed to a $100 million cash payment for the rights to the entire Vanderbilt Yards, representing a significant financial commitment by the project sponsor to the completion of the entire project. By the time the ESDC Board of Directors approved the MGPP on September 17, 2009, however, FCRC had reached a new agreement with, and approved by, the MTA so that the initial cash payment was limited to only $20 million for the land associated with the planned Barclays' Arena and the balance of the agreement was structured to extend the full acquisition of the balance of the MTA property beyond 2030 and allow FCRC to abandon the planned further acquisition at any time, in its sole discretion, with virtually no penalty.

6. Upon information and belief, the ESDC Board was never officially informed about the changed financial terms with MTA or the consequences of that change to either the completion of the Project or the potential for a very significant delay in the completion date that would affect the environmental review of the action under SEQRA.

7. The sole justification for the Project under the UDCA as a Land Use Improvement Project is the elimination of blight that allegedly exists and has been determined by ESDC as likely to continue due to the presence of Vanderbilt Yards.

8. The new agreement between FCRC and MTA reduces, if not eliminates, the likelihood that Vanderbilt Yards will be redeveloped in a timely manner, if at all. Thus, instead of eliminating the alleged blight, the project will make the alleged blighting conditions and influence of Vanderbilt Yards a permanent feature.

9. The ESDC Board of Directors never considered or addressed that change of circumstances when it reaffirmed its findings under the UDCA for the Land Use Improvement Project. Nor did the ESDC consider those new facts or change in circumstances when it failed to undertake a supplemental environmental review. The extended time frame for completion of the project necessitated the preparation of a Supplemental Environmental Impact Statement ("SEIS") to consider the extended construction period impacts, changes in community character and increased traffic impacts that were never previously considered.

10. ESDC Staff dismissed the foregoing concerns, raised repeatedly by members of the public during the public comment period, in a conclusory fashion. It never addressed the fact that FCRC would not be contractually obligated to MTA to complete acquisition before 2030 and simply stated, without explanation, that there would be unspecified financial assurances that the project would be built.

11. Those generalized non-specific references are legally insufficient to meet the criteria of the UDCA that a plan exists for the elimination of blight to qualify as a Land Use Improvement Project.

Summary Description of the Proposed Project

12. The project is formally known as the Atlantic Yards Arena and Redevelopment Project (the "Project"). As currently proposed, it is a publicly-subsidized, mixed-use redevelopment plan to be built in two phases that would cover 22 acres of land in and around the Vanderbilt Rail Yards ("Vanderbilt Yards"), an approximately 9 acre working rail yard still owned by the MTA, which lies at the intersection of two of Brooklyn's busiest thoroughfares – Flatbush and Atlantic Avenues.

13. The proposed Project would cover all or parts of eight city blocks and would require the permanent closing of city streets. It includes a sports arena called the Barclays Center for the professional basketball franchise currently known as the New Jersey Nets, which will accommodate approximately 18,000 persons; and purportedly will contain 16 high-rise apartment and office towers containing 7 million square feet of residential (up to 6,430 units), office and commercial space; and a 180-room hotel.

14. The proposed Project site is surrounded by low-rise, brownstone-Brooklyn neighborhoods that have been economically resurgent for at least the last 15 years. With the exception of the recent economic downturn, real estate values have risen rapidly and there has been ample new private development, including luxury condominiums and retail businesses both within and surrounding the proposed Project footprint.

15. As outlined by ESDC the essential elements of the project and the benefits conferred include:

- The 18,000 seating capacity Arena.
- 5,325 to 6,430 residential units of which 2,250 will be rental units supposedly affordable to low-, moderate- and middle income families.
- Possible first-class office space and a hotel.
- 8 acres of privately owned, publicly accessible open space.
- Community facility spaces.

16. Of the 16 high-rise buildings that will contain the residences and commercial space, only three are proposed for Phase I to be located on Blocks 1118, 1119 and 1127.

17. Phase I will include between 1,005 and 2,110 residential units depending upon the ultimate configuration and amount of commercial and hotel use in those buildings.

18. The balance of approximately 4,000 planned residential units and all of the eight acres of publicly accessible open space will be deferred to Phase II.

19. ESDC has exercised its authority under the UDCA to promote Atlantic Yards as a state project, has acted as Lead Agency under SEQRA and determined to exercise its authority to override the local zoning regulations and land use approval process.

20. ESDC began its approval of the project in February 2005 when it signed a Memorandum of Understanding with FCRC governing the basic elements of the Atlantic Yards project and ESDC's presumptive approval of the project.

21. The foregoing notwithstanding, ESDC did not formally begin the review of the project until September 2005 when it declared itself Lead Agency under SEQRA and issued a Draft Scoping Document.

22. ESDC released the first General Project Plan in July 2006 together with the Draft Environmental Impact Statement and held a truncated public comment period on the massive documents that closed on September 29, 2006.

23. ESDC released its Final Environmental Impact Statement on November 27, 2006 and proceeded to adopt SEQRA Findings, a Modified GPP and Findings under the Urban Development Corporation Act and the Eminent Domain Procedures Law on December 8, 2006.

24. In the nearly two and one-half years between the adoption of the first MGPP and the presentation of the second MGPP on June 23, 2009, FCRC did little to move the project forward.

25. While ESDC and FCRC blame the delay on the intervening litigation, that was only a partial factor as it became evident that the original design was not feasible due to its complexity, excessive cost and the lack of a viable market for the commercial and market rate

residential elements. Furthermore, the collapse of the capital markets further demonstrated that the project could not be built as originally proposed and approved.

26. Despite the fact that its offer was accepted by the MTA in September, 2005, FCRC never finalized its purchase agreement with the MTA for Vanderbilt Yards wherein it was required to make a $10 million deposit and *inter alia*, to pay $100 Million in cash for the air rights above Vanderbilt Yards and construct an upgraded state-of-the art replacement storage rail yard for the Long Island Railroad with nine tracks with a capacity of 76 cars for the LIRR's MU Series Trains.

27. The only agreement entered into between FCRC and the MTA was a licensing agreement signed in or about late 2006 which permitted FCRC to begin preliminary work on MTA property at FCRC's sole expense and at its sole risk without an obligation by MTA to finalize the sale of the Vanderbilt Yard rights.

28. Then, on June 22, 2009, almost four years after the MTA accepted FCRC's original offer, a new agreement between FCRC and MTA was presented to the MTA Board's Finance Committee which for the first time reduced FCRC's cash payment from $100 Million to $20 Million covering only the MTA property on Block 1119 and extended the payments for the acquisition of the MTA air rights on Blocks 1120 and 1121 to the year 2030. It also reduced the size of the replacement yard from nine tracks with a 76 car capacity to seven tracks with a 56 car capacity. The proposed new agreement also limited the security for FCRC's commitment to build the transit improvements to an $86 Million letter of credit.

29. The MTA Finance Committee did not take any action on a vote to recommend the amended agreement to the full MTA Board.

30. One day later, on June 23, 2009, the ESDC Board of Directors granted a preliminary approval to the second MGPP. There was no mention in the MGPP of the terms of the new agreement between FCRC and MTA including that the full payment for the property could be extended until 2030, nor was there any mention whatsoever of the new agreement at the ESDC Board meeting.

31. Part of the documents reviewed by the ESDC Board of Directors was a "Technical Memorandum" prepared by ESDC Staff which purported to consider the potential environmental impacts from the modification of the GPP.

32. ESDC held public hearings on the MGPP on July 29 and 30, 2009 and accepted written comments until August 31, 2009.

33. ESDC received numerous comments critical of the MGPP that included demands that ESDC prepare an SEIS because of substantial changes to the project and the new information relating to its likely completion date well beyond the 2019 projected completion.

34. Amongst the comments submitted was a detailed expert real estate market analysis that demonstrated that completion of the project by 2019 was simply impossible and that the actual time frame would likely be an additional 20 years.

35. On September 17, 2009, the ESDC Board of Directors met to consider the final approval of the MGPP. At that time the ESDC Board was presented a document prepared by ESDC staff that summarized and responded to the comments submitted by the public to the MGPP. On that date, the ESDC Staff also informed the Board that KPMG had prepared an updated economic benefits analysis that purportedly determined that there was sufficient demand for residential and commercial space to support the projected 2019 project completion date.

36. Upon information and belief, the ESDC Board was not presented with the responsiveness summary or the KPMG report until the day of the Board meeting which commenced at 10:30 AM.

Venue

37. This proceeding is properly venued in New York County as that is the county in which ESDC maintains its principal offices and is the location where the primary determinations to be annulled were made.

Parties

38. Petitioner Develop Don't Destroy (Brooklyn), Inc. ("DDDB") is a New York State Not-for-Profit corporation with its principal mailing address located at 89 Fifth Avenue, PMB # 150, Brooklyn, N**Y, 11217**. In existence for over five years, DDDB leads a broad-based community coalition that advocates for greater transparency, government accountability and community involvement in the development of the Vanderbilt Rail Yards and surrounding areas. DDDB's mission includes assuring that the redevelopment of Vanderbilt Railyards is consistent with the character and scale of the surrounding area and protects the scale of traditional Brooklyn neighborhoods. DDDB has thousands of members living in the project footprint and in adjacent neighborhoods.

39. Petitioner Council of Brooklyn Neighborhoods, Inc. ("CBN"), a New York State Not-for-Profit corporation with its principal mailing address at 201 DeKalb Avenue, Brooklyn, NY 11205, is a coalition of 40 diverse community groups active in Community Boards 2, 3, 6, and 8, all of whom are concerned with the cumulative effects of development proposed in their area of Brooklyn, and many of whose individual members reside in, or within 500 feet of, the Project footprint.

40. CBN was formed in 2005, and funded by the New York City Council in 2006, to educate the community on its role in the SEQRA process, to objectively analyze the environmental impacts of the Project, and to report its findings to its members, elected and appointed city and state officials, community boards and the general public. In 2006 CBN retained experts who found significant flaws in the Project's environmental review -- including adverse impacts that were not disclosed; mitigations not considered; errors in supporting documents and data, study area boundaries, methods and measurements; and failure to seriously evaluate the alternatives. In 2009 CBN again retained experts to review the MGPP and supporting documents. Those experts included Kahr Real Estate Services which prepared a financial feasibility study of the project and its projected time frames and Dr. Tom Agnotti who prepared comments demonstrating the need for an SEIS.

41. Petitioner Atlantic Avenue Betterment Association, Inc. ("AABA") is a New York State Not-for-Profit membership corporation, with its address at 321 Atlantic Avenue, Brooklyn, NY 11201. AABA was formed in 1993 to address the concerns of the over 250 businesses (representing 4000 jobs) on or in proximity to Atlantic Avenue between Fourth Avenue and Hicks Street in Brooklyn, and the hundreds of residents living on the Avenue (a vibrant mixed use which gave rise to AAABA's slogan "Atlantic Avenue is a Destination, not a Highway"). Members of AABA live within 500 feet of the Project footprint and the area AABA serves borders the Project footprint. AABA is dedicated to encouraging the economic development, preserving the historic character and promoting the street-front viability of Atlantic Avenue, as well as improving the quality of life and work on Atlantic Avenue by addressing issues of safety, traffic calming, zoning, sanitation, and Avenue beautification.

42. In particular, AABA has worked with the City on the Downtown Brooklyn Traffic Calming Study, and is seriously concerned that the recommendations of that study regarding Atlantic Avenue will be overridden in an attempt to accommodate the traffic congestion this Project will admittedly create. Years of small business investment will be severely undermined if Atlantic Avenue is turned into no-parking lanes and long turn lanes in the interest of speeding traffic between this huge Project, including an arena, and the Brooklyn Bridge and Brooklyn-Queens Expressway.

43. Petitioner the Brooklyn Bears Community Gardens, Inc. ("The Bears") is a New York State Not-for-Profit membership corporation stewarding three garden sites in the Fort Greene and Park Slope neighborhoods, and has its address at 771 Union Street, Brooklyn, NY 11215. The original Bear's Garden, begun in 1982, is located on Flatbush Avenue at Pacific Street in Brooklyn, within the footprint of the Project (on the block known as Site 5), and is owned by the Trust for Public Land. The Bears' gardens are publicly accessible open spaces recognized by the New York City Parks Department Green Thumb Program and are maintained by volunteers. The Bears' mission is to promote a cleaner and safer neighborhood through the creation and maintenance of community open spaces for cultural, agricultural and educational purposes, as well as to stimulate and encourage community participation in the planning, development, use and maintenance of neighboring green spaces. The gardens are open to all at regular hours, and the public is always encouraged to visit. In particular, The Bears' members are very concerned about the scale of the project and how it will impact the sustainability of the garden as it is currently conceived.

44. Petitioner Brooklyn Vision Foundation, Inc. ("Brooklyn Vision") is a New York State Not-for-Profit corporation with its mailing address at 167 Bergen Street, Brooklyn NY

11217. Its mission is to involve the residents of Brooklyn in the planning of Brooklyn by facilitating communication between community groups, community boards and government officials. Membership is borough-wide with some members residing immediately adjacent to the Project and others within 500 feet of it. Members have been active in the environmental review of the Project and in facilitating public participation.

45. Petitioner Carlton Avenue Association, Inc. ("CAA"), a New York State Not-for-Profit corporation with its address at 622 Carlton Avenue, Brooklyn NY 11238, was formed over 25 years ago and represents the residents of Carlton Avenue from Park Place to Pacific Street in Prospect Heights, Brooklyn. Members of CAA reside within 500 feet of the Project footprint. CAA has worked to promote and preserve the neighborly character, cultural diversity and the environment of the area through advocating for various quality of life issues of concern to its residents.

46. Petitioner Central Brooklyn Independent Democrats ("CBID") by its President Lucy Koteen is an unincorporated neighborhood membership organization founded in 1968 to further the interest and participation of all citizens in the political and civil affairs of the communities where CBID is based. CBID's membership largely resides in the communities surrounding the Atlantic Yards project, including the 52nd, 57th, and 44th Assembly Districts, all in Brooklyn. At least three members of CBID's executive committee reside within three blocks of the Project footprint. CBID has been actively involved in following the review of the Atlantic Yards Project and on June 16, 2005 held a heavily attended community forum featuring speakers both in support and in opposition to the Project. At that same forum, members of CBID ultimately voted to oppose the Project because CBID believed that the ESDC, as lead agency, failed to prepare an adequate Environmental Impact Statement as required under SEQRA. CBID

continues to oppose the project based on the failure of ESDC to prepare an SEIS and that the impacts from the uncertain completion of the project or its extended construction period have not been fully considered.

47. Petitioner Crown Heights North Association, Inc. ("CHNA") is a New York State 501(c)(3) Not-for-Profit corporation located at 986 Sterling Place, Brooklyn, New York 11213, within Community Board 8 and Council District 36, in Brooklyn. CHNA, founded in 2001, represents the numerous residents who live in Crown Heights North, Brooklyn, which is bounded by Franklin Avenue to the West, Albany Avenue to the East, Eastern Parkway to the South, and Pacific Street to the North. Crown Heights North is adjacent to the neighborhood of Prospect Heights where the majority of the Project is to be located, and shares all the impacts threatening that community, with a particular vulnerability to secondary displacement due to gentrification. CHNA is dedicated to the preservation of the communities' historic buildings, responsible and contextual community development and revitalization, economic advancement, housing stabilization and cultural diversity.

48. Petitioner Dean Street Block Association, Inc. ("Dean Street") is a New York State Not-for-Profit corporation with its address at 410 Dean Street, Brooklyn NY 11217, serving the area of Dean Street between 4th and 5th Avenues, in Brooklyn. All of the members of Dean Street live within 500 feet of the Project footprint. Dean Street has been in existence since 1981 to advocate for its residents' quality-of-life interests, and to improve, encourage and maintain the cultural diversity and environmental integrity of the community.

49. Petitioner Democracy for New York City, Inc. ("DFNYC") is a volunteer-driven non-profit political action committee, and is a not for profit corporation with 501(c)(3) status. DFNYC is part of a national coalition of local groups committed to the ideals espoused by

Democracy for America, the organization founded by Howard Dean. DFNYC develops innovative ways to advocate for the issues that matter to its members and promotes legislation which has a positive effect in its communities. DFNYC engages people in the political process and gives them the tools to organize, communicate, mobilize, and enact change on the local, state, and national level. DFNYC has been particularly concerned with repeated instances of undemocratic development processes that impact communities all over New York City. In particular, DFNYC and many of its members have been actively engaged in trying to ensure a community voice in Atlantic Yards, the most egregious instance of this lack of democracy in development.

50. Petitioner East Pacific Block Association, Inc. ("East Pacific") is a New York State Not-for-Profit corporation with its address at 568 Pacific Street, #4E, Brooklyn, NY 11217. East Pacific has served the residents of Pacific Street from 3rd Avenue to Flatbush Avenue in Brooklyn for over 19 years, advocating on quality-of-life issues and promoting a safe, diverse neighborhood. One of the two blocks of East Pacific lies adjacent to the Project footprint, directly across the street from Site 5.

51. Given its proximity to the Project, East Pacific is particularly concerned about construction impacts, notably vibration damage to the present residential buildings, one containing rent-regulated apartments, and the structures of the Public Library and Church of the Redeemer. East Pacific opposed the project because the 2006 FEIS admitted serious adverse construction impacts on these blocks, but avoided any mitigation by claiming construction will be completed on Site 5 within 2 years. There was no guarantee that a 2-year timeline will be met, and in any event the vibrations should be mitigated. The analysis by ESDC for the MGPP no longer even assumes that the construction will be completed in two years.

52. Petitioner Fort Greene Association, Inc. ("FGA") is a New York State Not-for-Profit corporation with its address at P.O. Box 170563, Brooklyn, NY 11217. Members of FGA live within 500 feet of the Project footprint and the neighborhood of Fort Greene, Brooklyn, borders the Project footprint. FGA was initially formed in 1973 as a historic preservation committee. In 1978 historic designation was awarded. Together with the Historic District of Clinton Hill, Fort Greene is one of the largest intact remnants of a 19th century city in New York State, and one of the nation's largest contiguous historic enclaves. FGA adopted its present name in 1994 and is devoted to neighborhood and park enhancement, historic preservation, as well as advocating for and maintaining cultural and economic advancement and housing and community/diversity.

53. Petitioner Fort Greene Park Conservancy, Inc. ("FGPC") is a New York State Not-for-Profit corporation with its address at 85 S. Oxford Avenue, Brooklyn, NY 11217. FGPC was organized to preserve, enhance and maintain community use of Fort Greene Park, a New York City public park located within one-half mile of the Project. Members of FGPC reside within 500 feet of the Project footprint. Fort Greene Park is a 30-acre park in Brooklyn bounded by Myrtle and DeKalb Avenues on the north and south, and by Washington Park on the east and Brooklyn Hospital on the west. It is rich in history and culture and is a vital community resource. The Park's playgrounds, basketball courts and tennis courts are all very popular with the community. The Park has grassy hills, mature trees and walking paths, all utilized by dog walkers, picnickers and classes from local schools.

54. Petitioner Friends and Residents of Greater Gowanus ("FROGG") is a community group with its address at 268 Smith Street, Brooklyn NY 11231. FROGG was formed in 2002 for the purpose of improving the Gowanus mixed-use area and educating the community about the

environmental, preservation and public use issues of special importance to the area encompassing the Gowanus Canal, in Brooklyn. FROGG advocates on behalf of the Gowanus area, from approximately Fourth Avenue to Court Street, particularly concerning storm water and water quality impacts within the Gowanus Canal. The Gowanus Canal will be the recipient, either directly or indirectly, of the stormwater and wastewater generated by the Project.

55. Petitioner Park Slope Neighbors, Inc. ("PSN") is a New York State Not-for-Profit Corporation with its address at 423 Fourth Street, Brooklyn, NY 11215. Members of PSN reside within the one-half mile study area for the Project. PSN is committed to the protection and enhancement of the quality of life in Park Slope, to protect the cultural, historic, economic, aesthetic and natural dimensions of Park Slope, and encourage sustainable development practices that take advantage of ecologically friendly and energy efficient technology. PSN commented on the 2006 EIS and again in 2009 on the MGPP and asked that measures be taken to protect the quality of life in the neighborhood.

56. Petitioner Prospect Heights Action Coalition ("PHAC") by its President Patricia Hagan is an unincorporated association with its address at 117 St. Mark's Avenue, Brooklyn, NY 11217. Members of PHAC live within 500 feet of the Project footprint. PHAC was formed in July 2002, to defend and protect the integrity of Prospect Heights, Brooklyn, a neighborhood whose living history dates to the 18th century, through the dissemination of information to members through various media outlets. In 2003, PHAC was the first voice of warning of the Project developer's intentions for Prospect Heights. PHAC has been actively advocating for residents' concerns regarding the many significant adverse impacts the Project will have on the neighborhood.

57. Petitioner Prospect Place of Brooklyn Block Association, Inc. ("PPBBA") is a New York State Not-for-Profit corporation with its address at 307 Prospect Place #4D, Brooklyn, NY 11238. PPBBA represents the residents of Prospect Place between Flatbush Avenue and Underhill Avenue, in Brooklyn, which is within 500 feet of the Project footprint. Formed in 1992, PPBBA has endeavored to protect and improve the quality of life of its residents through advocacy. Among other initiatives, in 2006 PPBBA formed an Atlantic Yards Taskforce that surveyed residents to ascertain their concerns regarding the Project, which were many and substantial.

58. Petitioner Society for Clinton Hill, Inc. ("Clinton Hill") is a New York State Not-for-Profit corporation with its address at 437 Clinton Avenue, Brooklyn, NY 11238, which has been in existence for 37 years. Members of Clinton Hill live within 500 feet of the Project footprint and Clinton Hill borders the Project footprint. Clinton Hill's mission includes the promotion of the public good through activities and advocacy designed to combat community deterioration in the Clinton Hill Historic District and the surrounding areas of Brooklyn.

59. Petitioner South Oxford Street Block Association ("South Oxford"), by its President Abbot Weissman, is an unincorporated association with its address at 38 S. Oxford Street, Brooklyn, NY 11217. Formed in 1950, it is one of the oldest registered block associations in Brooklyn and represents the residents of South Oxford Street from Fulton Street to Dekalb Avenue, Brooklyn, located less than a half-mile from the Project footprint. South Oxford serves many civic functions, addressing local concerns affecting neighborhood quality of life and advocating for cultural and housing diversity in Fort Greene. Its Atlantic Yards Committee has been advocating for residents' concerns regarding the Project since 2005.

60. Petitioner South Portland Block Association, Inc. ("SPABA") is a New York State Not-for-Profit corporation with its address at 38 S. Portland Avenue, Brooklyn, NY 11217. Founded in 1972, it represents residents of South Portland Avenue between Fulton Street and De Kalb Avenue in Brooklyn, and is within one-half mile of the Project footprint. SPABA serves many civic functions and is an advocate for homeowners, renters and business owners and operators concerned about quality of life issues. SPABA is dedicated to the preservation of the historic houses and the mature trees (some 100 years old) in the neighborhood and is specifically concerned with the Project's significant environmental impacts on them, as well as with the on-going blighted conditions that FCRC has created for the past six years within the Project footprint, and the certain potential for further blighting that a large-scale project of this magnitude will have on its adjacent low-scale adjacent community.

Respondents

61. Empire State Development Corporation ("ESDC") is the current operating name of the New York State Urban Development Corporation, a corporate governmental agency of the State of New York constituting a political subdivision and public benefit corporation. ESDC is organized and authorized by the New York State Urban Development Corporation Act; McKinney's Unconsolidated Laws Chapter 24. ESDC's principal office is located at 633 Third Avenue, New York, New York. ESDC is serving as "lead agency" for the SEQRA review of the Project.

62. Upon information and belief, Forest City Ratner Companies, LLC (FCRC) is a New York limited liability company with its principal place of business at 1 Metrotech Center North. FCRC is the project developer and is responsible for the planning and implementation of

the Project. FCRC includes its affiliated companies, Atlantic Yards Development Co., LLC and Brooklyn Arena, LLC.

Prior Litigation

63. Most of the Petitioners in this proceeding brought an earlier action against ESDC, FCRC, the MTA and the Public Authorities Control Board that challenged various aspects of the approvals, including violations of the UDCA and SEQRA.

64. That petition was denied in *Develop Don't Destroy Brooklyn v. Urban Development Corporation*, 59 A.D. 3d 312 (1st Dept. 2009). A Motion for Leave to Appeal the decision of the Appellate Division is currently pending before the Court of Appeals.

65. The Motion for Leave to Appeal seeks the review of ESDC's blight determination that the project qualifies as a Land Use Improvement Project, the classification of the arena as a Civic Project under the UDCA, and compliance with SEQRA.

66. For the purpose of this proceeding, and at least until the Court of Appeals rules on the Motion for Leave, Petitioners recognize that the validity of ESDC's 2006 blight determination is not subject to review in this proceeding.

67. ESDC's 2009 MGPP fails to meet the requirements of the UDCA by not presenting a plan to alleviate the alleged blighting and blighted conditions.

STATUTORY SCHEME AND SUMMARY OF LEGAL ARGUMENTS

A. The Urban Development Corporation Act (UDCA)

68. The UDCA, McKinney's Unconsolidated Laws §6251 et. seq., is a broad statutory scheme for urban redevelopment. It created the New York State Urban Development Corporation (which operates under the name of respondent ESDC) for the purpose of undertaking, supervising, and approving urban redevelopment projects, and granted broad

powers to the Corporation in undertaking such projects, including the power to override local law. (McKinney's Uncons. Laws of NY §6266 [UDCA §16; L 1968, ch 174, as amended])

69. The designation of the Project as one pursuant to the UDCA permitted the ESDC to bypass the normal City land use approval process (the Uniform Land Use Review Procedure ["ULURP"]) and to disregard the limitations of the City zoning code, paving the way for a Project exceeding, by many times, the zoning code's height restrictions and uses – such as a sports arena in a residential neighborhood – that the code would otherwise prohibit.

70. The ESDC's power to override local law, however, is not unlimited. The UDCA is essentially intended to benefit the urban public by applying the forces of economic development to blighted and underutilized areas. (McKinney's Uncons. Laws of NY §6252 [UDCA §2; L 1968, ch 174, as amended]). The scope of powers granted under the UDCA is therefore limited to certain defined projects. Unless the Project satisfies the criteria of a project under the UDCA, the ESDC is without authority to bypass local New York City zoning and land use laws. (McKinney's Uncons. Laws of NY §6260 [UDCA §10; L 1968, ch 174, as amended])

71. ESDC has designated the arena portion of the Project as a "civic project" pursuant to section 3 of the UDCA and the non-arena portion as a "land use improvement project" under section 3 of the UDCA.

72. The UDCA defines a "land use improvement project" as a plan for the "clearance, re-planning, reconstruction [and/or] rehabilitation...of a substandard and insanitary area...." (McKinney's Uncons. Laws of NY §6253(6)(c), [UDCA § 3; L 1968, ch 174, as amended]).

73. The UDCA defines a "substandard or insanitary area" as "interchangeable with a slum, blighted, deteriorated, or deteriorating area, or an area which has a blighting influence on

the surrounding area....” (McKinney’s Uncons. Laws of NY §6253(12), [UDCA § 3; L 1968, ch 174, as amended]).

74. The UDCA prohibits the UDC from undertaking a land use improvement project unless it finds, among other things, that “the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area, and tends to impair or arrest the sound growth and development of the municipality....” (McKinney’s Uncons. Laws of NY §6260(c), [UDCA § 10; L 1968, ch 174, as amended]).

75. ESDC must also find that “the Project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto”. (McKinney’s Uncons. Laws of NY §6260(c), [UDCA § 10; L 1968, ch 174, as amended]).

B. State Environmental Quality Review Act (SEQRA)

76. SEQRA, codified in Article 8 of the Environmental Conservation Law (“ECL”), declares a broad public purpose to protect the environment and requires that all state and local agencies conduct their affairs “with an awareness that they are stewards of the air, water, land, and living resources” (ECL §8-0101; ECL §8-0103[8]). The definition of “environment” under SEQRA includes “existing patterns of population concentration, distribution or growth, and existing community or neighborhood character.” (ECL §8-0105[6])

77. When an agency proposes an action which may have a significant effect on the environment, it must prepare an environmental impact statement (“EIS”) , “use all practicable means to realize the policies and goals” of SEQRA, and “choose alternatives which, consistent with social, economic, and other essential considerations, to the maximum extent practicable,

minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process." (ECL §8-0109[1] and [2])

78. The EIS must analyze the significant adverse impacts of the action, describe mitigation measures, and evaluate the range of reasonable alternatives to the action that are feasible. (ECL §8-0109[2]; 6 NYCRR 617.9[b])

79. The standard which the case law imposes on the lead agency under these substantive requirements is that it take a "hard look" at the adverse environmental impacts of a project and make a "reasoned elaboration" of the basis for its determination.

80. Each agency that approves an action which has been the subject of an EIS must make an explicit finding that the requirements of the ECL section governing the EIS have been met "and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided." (ECL §8-0109[8])

81. More specifically, the agency must make findings which: "consider the relevant environmental impacts, facts and conclusions disclosed in the EIS; weigh and balance relevant environmental impacts with social, economic and other considerations; provide a rationale for the decision; certify that from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable . . ." (6 NYCRR §617.11[d])

82. After an EIS has been completed by the lead agency, a supplemental EIS ("SEIS") may be required to address adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from:

a. changes proposed for the project; or

b. newly discovered information; or

c. a change in circumstances related to the project.

(6 NYCRR §617.9(a)(7)(i))

83. For newly discovered information the decision to require an SEIS must be based on the importance of the relevant information and the present state of the information in the EIS. (6 NYCRR §617.9(a)(7)(ii)).

AS AND FOR A FIRST CAUSE OF ACTION
VIOLATION OF THE UDCA

84. ESDC's stated principal goal of the Project is to transform an area that is blighted and underutilized into a vibrant, mixed-use, mixed-income community and to eliminate the blighting influence of the below-grade Vanderbilt Yard. (Ex. A at pp 4-5)[1].

85. As set forth in the original MGPP adopted in 2006, ESDC stated the project would be completed in 2016 and alleviate the existing blight and blighting influence of Vanderbilt Yards with the completion of Phase II including the construction of the platform over the Vanderbilt Yards and construction of all of the high-rise towers.

86. The vast majority of the purported benefits of the Atlantic Yards Project are derived in Phase II including the majority of the housing and the majority of the affordable housing, all of the privately owned, publicly accessible open space, the majority of the community facilities and the majority of the economic benefits associated with construction jobs, tax revenue and permanent employment.

[1] All references to Exhibits refer to the Exhibits attached to the accompanying Affirmation of Jeffrey S. Baker dated October 16, 2009.

87. At the time of the 2006 MGPP, FCRC was committed to purchasing the entire rights to the Vanderbilt Yards, thus making a very substantial investment and incentive for the completion of the project.

88. As part of its 2006 Blight Study, which supported the approval of the MGPP, ESDC determined that underutilized lots, including lots used for surface parking lots, were evidence of blight and had a blighting influence on surrounding properties hindering their sound redevelopment.

89. The 2009 new agreement with the MTA materially changed the amount that FCRC was paying for the rights to the Vanderbilt Yards and changed the incentives for FCRC to complete the project. (Ex. B)

90. Even if FCRC does eventually complete the project, the agreement with MTA permits the commencement of the final portions of Phase II to be postponed until 2030.

91. FCRC is only required to pay $20 Million for the rights to MTA's property on Block 1119 required for the construction of Phase I.

92. FCRC is not required to make any additional payments to MTA until June 2012 at which time it must make an additional payment of $2 Million.

93. Thereafter, FCRC must make further payments of $2 Million on June 1, 2013, 2014 and 2015.

94. Commencing on June 1, 2016 the annual payments to MTA increase to $11 Million per year and continue for 15 years until 2030.

95. MTA agreed to a redesigned and reduced scope of the replacement yard for the LIRR and required that construction of the replacement yard commence by June 30, 2012 and be completed by September 1, 2016. MTA valued the planned improvements at $147 Million but

only required a letter of credit from FCRC for $86 Million to secure FCRC's obligation to complete the replacement yard.

96. The outline of the agreement with MTA provides that it will convey the parcel necessary for the construction of the arena upon the payment of the initial $20 Million. The conveyance of the MTA air rights for parcels on Blocks 1120 and 1121 will only occur upon the payment of the subsequent amounts associated with each parcel.

97. If FCRC fails to construct the yard, it loses the rights to the air space on Blocks 1120 and 1121 and MTA can draw on the letter of credit.

98. The result of the new MTA agreement has two direct impacts on the timing of the completion of Phase II and the potential that it will be completed at all.

99. First, the structure of the deal assures that the final payment for the air rights over the Yards will not be made until June 2030. Until that payment is made, the rights to that parcel will not be conveyed to FCRC and FCRC will not have title to permit construction of the last towers to even begin.

100. Second, the deal is structured so that FCRC can decide to abandon the project at virtually any time and mitigate its potential financial loss and limit its up front investment.

101. FCRC can decide as early as June 1, 2012 to abandon Phase II and avoid the first additional payment of $2 Million.

102. FCRC could decide to keep its option on the air rights parcel and simply pay $2 Million per year to maintain that option and still abandon Phase II by June 1, 2016 before the annual payments significantly increase to $11 Million.

103. If FCRC decides to abandon Phase II at any of those points, it can also walk away from the obligation to complete the permanent replacement rail yard and simply forfeit the $86

Million letter of credit that is far less than the estimated cost of $147 Million to complete the project.

104. If FCRC decides not to build Phase II—failing to cover the rail yard with a platform—then the blight that supposedly dominates the project area, particularly the below grade yards on Blocks 1120 and 1121, will continue without any plan for their redevelopment.

105. Even if FCRC proceeds with the project consistent with the timeframe in the MTA agreement, construction for the completion of Phase II will not commence until after 2030.

106. As a result, the alleged blighting influence of the Yards will remain a dominant feature for at least 15 years beyond the 2019 completion date that forms the basis of ESDC's assumptions.

107. While there is no record evidence that ESDC Staff ever informed ESDC's Board of Directors about the changes made in the new MTA agreement and the consequences of those changes, particularly the inconsistency of that agreement with the anticipated completion date, upon information and belief, ESDC Staff and the Board had full knowledge that the construction of Phase II would extend far beyond 2030.

108. At the September 17, 2009 meeting, the ESDC Board was told that KPMG had analyzed FCRC's projections of the market's ability to absorb the 6,430 units of housing in ten years and supposedly concluded that the projection was "not unreasonable".

109. The KPMG report did not consider the financial feasibility of the project or assess the availability of credit to finance the project in the period projected.

110. The KPMG report did not include any reference to the new terms with the MTA.

111. The new terms between FCRC and MTA were material facts, which should have been disclosed in the report and included in the analysis.

112. At its September 17, 2009 Board Meeting, the Board was presented with a memorandum outlining the action to be taken, including a resolution approving the MGPP and related actions. (Ex. E)

113. Attached to that memo as Exhibit D is a document entitled "Project Leases Abstract" which sets forth the basic terms for the interim lease, ground lease, arena lease and leases for the non-arena developments.

114. The leases for the non-arena developments cover the parcels upon which each of the 16 high-rise buildings will be constructed.

115. The term sheet establishes, consistent with the MGPP, that ESDC will lease the land to an FCRC affiliate for each parcel until each building thereon is completed and upon completion will be transferred to the entity owning each of those buildings.

116. Exhibit D to the September 17, 2009 memo demonstrates, for the first time, ESDC's expectation of when those transfers will occur.

117. Specifically it states that the leases for those parcels:

> Terminates upon completion of construction of the improvements to be located on the parcel of land leased thereby, but no later than the 25th anniversary of vacant possession of the Arena Block and any other properties acquired in the first taking (subject to force majeure).

118. Therefore, it is evident that FCRC's lease rights to the non-arena parcels will continue until at least 2035 before FCRC will lose its rights to develop under the MGPP.

119. During the public comment period, ESDC was made aware of the new MTA agreement, the opportunity for FCRC to abandon the project, and the provision for completion beyond 2030.

120. Commenters did not raise or address the issue of the extended period for the non-arena leases because that information was not publicly available at that time.

121. In its responsiveness summary, ESDC Staff essentially ignored the public comments regarding the substantially extended timeline by not providing an accurate summary of the comments and issues, simply making a conclusory statement that there would be assurances that FCRC would be obligated to complete the project.

122. ESDC has never identified what those obligations are.

123. By failing to recognize and consider the clear contractual elements that allow FCRC to escape from any obligation to complete the project and failing to consider the contractual timelines that allow FCRC to complete the project far beyond 2030 and far beyond any time frame considered by the ESDC Board, the ESDC Board violated the UDCA by failing to approve a plan for the reconstruction and rehabilitation of the area that it deemed blighted.

124. The paper elements of the MGPP, tied to a specific developer without actual obligations, is not a plan for the redevelopment of a blighted area but is only an aspirational goal.

125. The reality is that, at a minimum, the area will remain either undeveloped or in a long term construction phase stretching decades that will not alleviate blight but rather exacerbate it and make it a permanent condition.

126. ESDC completely failed to consider those facts and, made thusly, its determination under the UDCA was illegal and arbitrary and capricious.

AS AND FOR A SECOND CAUSE OF ACTION

127. Petitioners reassert and reallege the allegations set forth in paragraphs 1 through 126 as if fully set forth herein.

128. The MGPP approved by the ESDC Board on September 17, 2009 states that the Project will generate at least 2,250 units of affordable housing and that not more than 50% of the Phase II units will be completed without the completion of 50% of the Phase II affordable housing units.

129. Part of the September 17, 2009 memo presented to the ESDC Board included Exhibit D—the Project Leases Abstract.

130. A section of that abstract is entitled "Development Agreement" and purports to include the obligations upon FCRC, which will be included in the Development Agreement.

131. One of the obligations states "no less than Two Thousand Two Hundred Fifty (2,250) affordable housing units, subject to governmental authorities making available to Party B [FCRC] or its applicable successor or assign, after good faith review by the applicable administering agency, affordable housing subsidies consistent with then applicable program rules and standards then generally available to developers of affordable housing units". (Emphasis added.)

132. That provision of the Development Agreement is inconsistent with the MGPP which provides no conditions precedent to the requirement that the Project include affordable housing. (Emphasis added.)

133. The resolution of the ESDC Board, which authorizes staff to enter into the agreements to complete the project including the Development Agreement, is illegal and arbitrary and capricious as it includes a material term to avoid providing affordable housing, which is inconsistent with the MGPP.

AS AND FOR A THIRD CAUSE OF ACTION
FAILURE TO PREPARE AN SEIS

134. Petitioners reassert and reallege the allegations set forth in paragraphs 1 through 135 as if fully set forth herein.

135. ESDC Staff prepared a Technical Memorandum that reached the conclusion that there were no significant changes to the Project, no newly discovered information or a change in circumstances related to the project that warranted the preparation of an SEIS.

136. In its September 17, 2009 resolution the ESDC Board, acting as Lead Agency under SEQRA, adopted and agreed with the staff report and found that an SEIS was not necessary.

137. The fundamental premise in the ESDC's 2009 SEQRA analysis was reliance upon a projected completion date of 2019 for the Project. ESDC determined that the environmental analysis in the 2006 FEIS, which projected a completion date of 2016 was only a three year difference and that there would not be any significant adverse impacts that had not been considered.

138. The Technical Memorandum recognized that adverse economic conditions could delay the project further and contained a truncated analysis that considered the potential impacts from a further delay.

139. That analysis only considered impacts until 2024, a further five-year delay and only used that year for the consideration of traffic and transit impacts.

140. There was no specified future date considered for the other areas of environmental concern such as neighborhood impact, land use and construction related impacts.

141. Neither the Technical Memorandum nor the Response to Comments made any mention of the extension of the time frame in the new MTA agreement for acquisition of the Vanderbilt Yards until 2030.

142. The Response to Comments wholly ignored the expert report submitted by Kahr Real Estate Services LLC, which provided detailed comments, data and analysis demonstrating that there was insufficient demand and financing available to complete the project within 10 years and that the more realistic time frame was in excess of 20 years.

143. ESDC Senior Counsel Steve Matlin, speaking to reporters immediately after the ESDC Board vote on September 17, 2009, admitted that ESDC's consultants, KPMG, never directly responded to the Kahr report.

144. The foregoing notwithstanding, ESDC relied upon KPMG's less than resounding, alleged conclusion that it was "not unreasonable" to conclude that it is financially feasible for the project to be completed in 10 years.

145. At that same discussion with the reporters, Mr. Matlin also admitted the time line for completion of the project would be well beyond 10 years.

146. Mr. Matlin stated there would be incentives included in the development agreement to facilitate completion of the project in the 10-year time frame. Mr. Matlin could not identify those incentives as he claimed they were still being negotiated.

147. Upon information and belief, neither Mr. Matlin nor any other ESDC staff person informed the ESDC Board that they believed the project would be completed well beyond 2019 or that incentives would be necessary to facilitate completion of the project in that time.

148. By choosing the artificial date of 2019 as the project completion date, ESDC was able to minimize the potential adverse impacts that would be caused by the project.

149. By only considering a 2019 completion date, ESDC was able to understate the change in background environmental conditions by saying that the FEIS considered impacts in 2016 and that the three year difference was not significant.

150. The new deal with the MTA constituted both a change in the project and a change in circumstances, which raised new issues concerning both the timing and completion of the project.

151. By failing to even recognize the new MTA terms, ESDC failed to identify the relevant issues and take the hard look necessary to make its determination that an SEIS was not required.

152. By failing to consider the likely completion date ESDC failed to consider further growth in background traffic and transit demand levels.

153. ESDC failed to consider the impacts to the neighborhood from construction activities extending beyond 20 years.

154. ESDC failed to consider the impacts to the community character from an abandoned or partially completed project including the blighting impacts from abandonment or partial completion.

155. ESDC failed to consider the potential impacts to traffic, air pollution and storm water runoff from long-term or permanent use of Blocks 1129, 1121 and 1120 as surface parking lots for the arena if the underground parking was never built or significantly delayed.

156. ESDC ignored the fact that it had previously deemed surface parking lots as evidence of blight or a blighting influence.

157. ESDC failed to consider the potential impacts of the reduction in the size of the replacement rail yard from the nine tracks included in the 2006 design to the 7 tracks in 2009 and the reduction in the capacity of rail cars by more than 25% from 76 cars to 56 cars.

158. As lead agency under SEQRA it was ESDC's obligation to consider whether the reduction in capacity would result in any potential adverse impacts.

159. ESDC completely ignored the issue and relied solely upon an alleged acceptance of the change by MTA without the benefit of any analysis of the impacts of the reduced capacity.

160. ESDC's failure to identify those issues and take a hard look at the potential impacts was arbitrary and capricious and an abuse of discretion and mandates an annulment of its determination that an SEIS was not necessary.

WHEREFORE, Petitioners demand judgment:

1. annulling and vacating ESDC's September 17, 2009 resolution finding that the Project qualifies as a Land Use Improvement Project under the UDCA.
2. annulling and vacating ESDC's September 17, 2009 resolution determining that an SEIS was not required.
3. annulling and vacating ESDC's September 17, 2009 resolution to the extent it authorizes ESDC Staff to enter into development agreements with FCRC which condition the requirement for affordable housing on the availability of public subsidies.
4. awarding Petitioners the costs and disbursements of this action; and
5. granting such other and further relief that the Court deems just and proper.

Dated: October 16, 2009

YOUNG, SOMMER, WARD,
RITZENBERG, BAKER & MOORE, LLC

By: _____

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