COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of

:

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., :

Petitioners-Plaintiffs-Appellants, :

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment : New York County Index No. 104597/07

:

-against-

:

URBAN DEVELOPMENT CORPORATION d/b/a Empire State Development Corporation, et al., :

:

Respondents-Defendants-Respondents.

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MEMORANDUM OF LAW

July 30, 2009

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs-Appellants Develop Don't Destroy (Brooklyn), Inc., *et al.* ("Petitioners") respectfully seek leave of the Court of Appeals to appeal the Decision and Order of the Appellate Division, First Department, dated February 26, 2009 (the "Decision"), by which that court affirmed Supreme Court Justice Joan Madden's dismissal of Appellants' combined Civil Procedure Law and Rules ("CPLR") Article 78 petition and complaint for declaratory judgment, by which Petitioners challenged Respondent-Defendant-Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation's ("ESDC") approval of the proposed Atlantic Yards Arena and Redevelopment Project (the "Project") in the Prospect Heights neighborhood of Brooklyn, New York.

The Project, which would be the largest mixed-use real estate development in New York City's history, was initially conceived of and proposed by its private developer, respondent Forest City Ratner Companies ("FCRC"), which persuaded respondent ESDC to adopt and promote the Project, ostensibly pursuant to ESDC's authority under the New York State Urban Development Corporation Act ("UDCA"), New York Unconsolidated Laws § 6251, *et seq*. ESDC has exercised its extraordinary powers under the UDCA to override local zoning laws and

review of the Project by the New York City Council, and has designated two and one third blocks of privately owned businesses and properties in Prospect Heights "blighted" in order to exercise the State's condemnation power to take them and transfer them to FCRC for the Project.

The neighborhood in which the Project site is located has experienced widespread, private redevelopment, conversion of former industrial buildings into desirable residential buildings, and rapidly rising property values, including the blocks which ESDC has condemned for the Project, since long before FCRC proposed the Project. It is undisputed that ESDC purposefully misrepresented conditions in the Project area and in the surrounding areas in order to bolster its stated basis for condemning valuable private property and to support its stated justifications for the Project.

In a concurring opinion by Appellate Division Justice Catterson, which reads more like a dissent than a concurrence, he accurately surmised that the UDCA "is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are 'underutilized'," and noted

> the obvious point raised by petitioners and dismissed by ESDC is that if the non-ATURA properties were in the midst of an economic revival, it would be counter to ESDC's mandate to step in, stop all productive development, and, in partnership with a private enterprise, develop the neighborhood according to its

> own vision of urban utopia, complete with professional basketball for the masses.

Decision at 36 (Catterson, J., concurring).

Nevertheless, Justice Catterson felt compelled to join the majority in upholding ESDC's findings and determinations regarding the Project, based on a perceived standard of review under which courts are compelled to defer to ESDC's findings and determinations as long as ESDC can provide any arguably plausible justification for them, regardless of how contrary they may be to the clearly stated purposes and plain language of ESDC's enabling statutes and the environmental laws which ESDC is obliged to follow. Appellants respectfully submit that the Court of Appeals should review this case to determine the boundaries of judicial review of ESDC's determinations under the applicable provisions of the UDCA and the New York State Environmental Quality Review Act ("SEQRA"), New York Environmental Conservation Law ("ECL") § 8-0101, *et seq*.

Simply put, Justice Catterson cannot be correct that New York law permits the UDCA to be "used as a tool" by a private developer, or that New York law permits ESDC to willfully abdicate its plainly enumerated statutory obligations under the UDCA and SEQRA and to misrepresent material facts about the Project

area in order to facilitate a profit-driven proposal by a favored private developer. At the very least, this Court should review the issues raised by Justice Catterson.

Petitioners also challenge ESDC's claimed authority to exercise its extraordinary powers under the UDCA to undertake as a purported "civic project" the development of a professional sports arena which would be leased to and operated by a private, for-profit affiliate of the Project's developer, with no obligation or significant commitment to utilizing the arena for civic purposes or community events. While a for-profit sports arena might conceivably serve a cognizable civic purpose, the State Legislature has not authorized ESDC to undertake as a "civic project" a professional basketball arena to be operated solely for the purpose of generating profits for a private developer.

Petitioners respectfully submit that this case presents important questions which the courts of this State have not previously addressed, and which warrant the consideration of this Court. We note that this Court has already accepted the appeal of a related case, *Goldstein v. New York State Urban Dev. Corp.*, 879 N.Y.S.2d 524 (N.Y. App. Div. 2009), in which property owners and residents in the Project area have challenged ESDC's takings of their properties under the New York Eminent Domain Procedure Law. The legal issues raised in the case at bar are complementary to, but distinct from, the issues raised in *Goldstein*, 879

N.Y.S.2d 524, in that they arise under the UDCA and SEQRA and address the statutory limitations of ESDC's authority and the appropriate standard of judicial review of an agency's determinations in the context of demonstrated agency bias and corruption.

QUESTIONS PRESENTED

FIRST QUESTION: Whether ESDC's purposeful denial and mischaracterization of the uncontroverted economic conditions and trends in the Project area, and its knowing misrepresentations of crime data in the Project area, to support its "blight" determination, demonstrate a degree of bias and corruption on the part of ESDC which warrants invalidation of its determination that the area is "substandard and insanitary" for purposes of designating the Project a "land use improvement project" under the Urban Development Corporation Act.

The Appellate Division reviewed the record to determine whether ESDC had stated the minimal basis required to support its designation of the entire Project area as "blighted", but failed to address that ESDC purposefully omitted evidence of and mischaracterized the area's undisputed redevelopment and economic revival, and misrepresented crime statistics in the area, evidencing impermissible levels of bias and corruption in ESDC's blight determination. *See Kaskel v. Impellitteri*, 306 N.Y. 73, 78, 115 N.E.2d 659 (1953) *reargument*

denied, remittitur amended, 306 N.Y. 609, 115 N.E.2d 832 (1953). The issue of whether and when demonstrated bias and corruption on the part of an agency can render its otherwise facially sufficient findings invalid has not previously been considered by any court in this State, and appears to have been overlooked by the Appellate Division and trial court in this action.

SECOND QUESTION: Whether ESDC's purposeful denial and mischaracterization of the uncontroverted economic conditions and development trends in the Project area, in order to justify its rejection of project alternatives, demonstrate a degree of bias and corruption on the part of ESDC which warrants invalidation of its rejection of Project alternatives under SEQRA.

Under SEQRA, ESDC was required to undertake "reasonable consideration of alternatives" to the Project. *Town of Dryden v. Tompkins County Bd. of Representatives*, 78 N.Y.2d 331, 334, 580 N.E.2d 402 (1991). It is undisputed that ESDC based its rejection of Project alternatives which would have excluded the portion of the Project area already undergoing redevelopment and economic revival, in substantial part, on its purposeful denial and misrepresentation of the redevelopment and economic revival. The Appellate Division determined that ESDC had stated other, legally sufficient bases for its rejection of the alternatives, but failed to address the compelling evidence of bias and corruption in ESDC's

consideration of those alternatives. The issue of whether and when demonstrated bias and corruption on the part of an agency can render invalid its otherwise facially sufficient rejection of project alternatives under SEQRA has not previously been considered by any court in this State, and appears to have been overlooked by the Appellate Division and trial court in this action.

THIRD QUESTION: Whether ESDC was required to consider the economic conditions and development trends in the Project area in order to exercise its authority to designate and undertake the Project as a "land use improvement project" under the UDCA.

The appellate panel failed to recognize that the UDCA authorizes ESDC to undertake redevelopment of a purportedly blighted area as a "land use improvement project" only upon finding that, among other things, the area "tends to impair or arrest the sound growth and development of the municipality". UDCA § 6260(c). ESDC violated the UDCA by purposefully ignoring the undisputed redevelopment and economic revival in the Project area, and designating the entire area for redevelopment by the favored private developer of the Project. This issue has not previously been considered by any court in this State, and appears to have been overlooked by the Appellate Division and trial court in this action.

FOURTH QUESTION: Whether a sports arena leased for one dollar per year to a private, for-profit entity to be operated as a professional sports facility, with *de minimus* civic benefits, may nevertheless be designated a "civic project" under the UDCA.

While a professional sports arena may, in appropriate circumstances, be deemed a "civic project" under the UDCA, the UDCA permits ESDC to lease a "civic project" to a private entity only if that entity "is carrying out a community, municipal, public service or other civic purpose." UDCA § 6259(1). The Appellate Division incorrectly interpreted that statute so as to render the quoted language superfluous, by deeming any private, for-profit business entity operating a professional sports arena to be "carrying out . . . a civic purpose", which contravenes the plain language of the statute as a whole. This issue had not previously been considered by any court in this State.

FIFTH QUESTION: Whether the standard of review of an agency action under CPLR Article 78 is the same as the standard of review in a taxpayer action under section 51 of the General Municipal Law.

In upholding ESDC's "blight" determination and designation of the Project as a "land use improvement project" under the UDCA, the Appellate Division

appears to have incorrectly applied the lenient standard of review for taxpayer actions under section 51 of the General Municipal Law, which is whether the agency was authorized to undertake the challenged action, rather than the "arbitrary and capricious" standard applicable under Article 78 of the CPLR. *See Kaskel*, 306 N.Y., 79.

TIMELINESS OF THIS MOTION

Petitioners were served with notice of entry of Decision and Order of the Appellate Division, First Department dated February 26, 2009, on that same date. On March 27, 2009, Petitioners served their notice of motion for leave to appeal the Decision, addressed to the Appellate Division, First Department, upon all other parties.

On July 1, 2009, Petitioners were served with notice of entry of the order of the Appellate Division, First Department, denying their motion for leave to appeal. The within motion for leave to appeal is timely, in that is being served on the respondent on July 30, 2009 and filed with this Court on July 31, 2009, within 30 days of service of notice of entry of the aforesaid order.

STATEMENT OF JURISDICTION

The Court has jurisdiction over the proposed appeal, pursuant to CPLR 5602(a)(1)(i), because the Decision and Order of the Appellate Division below,

from which petitioners seek to appeal, finally determines the entire action.

STATEMENT OF FACTS

A. Project Overview

The Project area encompasses approximately 22 acres on all or a portion of eight city blocks in the Prospect Heights neighborhood of Brooklyn, and includes the Vanderbilt Yards, an eight-acre parcel owned by Respondent-Defendant-Respondent Metropolitan Transit Authority ("MTA") and used as a rail yard for the Long Island Rail Road. (R. 88a) The Project would be developed entirely by Respondent-Defendant-Respondent Forest City Ratner Companies ("FCRC"), and is the largest single-developer project in New York City history. (R. 15a)

ESDC has overseen and promoted the Project since around 2004, purportedly pursuant to its authority under the UDCA, and designated itself the "lead agency" for the Project for purposes of the requisite environmental review under SEQRA. In July 2006, ESDC first formally declared, in its Draft Environmental Impact Statement ("DEIS"), that the Project was "both a land use improvement and a civic project" under the UDCA. (R.204256)

When ESDC issued its final approval of the Project in December 2006, the Project included a professional basketball arena designed by star architect Frank Gehry, intended to house the New Jersey Nets. The Project also included 16

high-rise buildings ranging from 184 feet to 620 feet, up to 6,430 residential apartments, 180 hotel rooms, 583,000 square feet of retail and commercial space, and 3,670 parking spaces, and was to be completed in two phases over a projected ten-year timeline. (R. 88a; R 259a)

The professional basketball arena would technically be publicly owned, but would be leased to and operated by a private, for-profit business entity affiliated with and controlled by FCRC, for a term of 99 years at the rate of one dollar per year, and would be known as the Barclays Center Arena, pursuant to a reported $400 million naming-rights agreement made between FCRC and Barclays Bank around two months after ESDC approved the Project. FCRC purportedly committed to making the Barclays Center Arena available for no more than ten community events per year, with arena operation costs, estimated to be around $100,000 per event, to be paid for by the event sponsor. The trial court in this action correctly found that the alleged civic benefits are "*de minimus* when compared with the primary use of the arena by the Nets". (R. 40a)

Since 2006, the Project has undergone dramatic changes, requiring ESDC to issue a new modified General Project Plan on June 23, 2009. As the Project currently stands, among other changes, only one of the three residential high-rises that were to be built in the Project's first phase and include hundreds of promised

low-income and affordable housing units is scheduled for construction; an office building touted by FCRC as an engine for job creation has been put on indefinite hold; and the construction of the Project's second phase, which was to include thousands more low-income and affordable housing units and several acres of publicly accessible open space, has been postponed indefinitely.[1] In addition, FCRC has replaced architect Frank Gehry as the designer of the Barclays Center Arena, touted by ESDC as the "centerpiece of the Project",[2] and replaced his design with a much cheaper one which has been unfavorably compared to an airplane hangar.[3] As yet, neither ESDC nor FCRC has made available to the public any site plan or rendering of the modified Project.

Around 60 percent of the Project area, including the Vanderbilt Yards, lies within the Atlantic Terminal Urban Renewal Area ("ATURA"), which was created by New York City in 1968 in order to facilitate redevelopment of what was determined to be a blighted area. The MTA-owned Vanderbilt Yards are the primary portion of ATURA that remains un-redeveloped, and there is no dispute

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[1] *See* Theresa Agovino, *MTA Approves Atlantic Yards Schedule Changes*, CRAIN'S NEW YORK BUSINESS.COM, June 24, 2009, available at http://www.crainsnewyork.com/article/20090624/FREE/906249969.

[2] *See, e.g.*, ESDC's brief in opposition to appeal to Appellate Division, at 6 ("The centerpiece of Project will be an Arena designed by the noted architect Frank Gehry").

[3] *See* Nicholai Ouroussoff, *Battle Between Budget and Beauty, Which Budget Won*, NEW YORK TIMES, June 9, 2009, at C1.

that MTA allowed its property to deteriorate into a substandard, unsanitary, and blighted condition. (Decision at 27, 32, Catterson, concurring)

Three of the blocks that make up the Project area – designated Blocks 1127, 1128,[4] and 1129, comprising around 40 percent of the Project footprint – are not included within ATURA, and had never before been designated blighted by any governmental entity. Those three privately owned, contiguous blocks (referred to herein as the "Non-ATURA Blocks") are located between Dean and Pacific Streets, directly across the street from and south of the Vanderbilt Yards, and are part of a rapidly redeveloping area of Prospect Heights characterized by private conversions of former warehouse and factory buildings into residential apartments, and rapidly increasing property values. (R. 550a-553a) ESDC has exercised its power of eminent domain to condemn privately owned homes and businesses in the Non-ATURA Blocks, including recent residential conversions which would be razed to make way for the Project.

ESDC, as part of its environmental review under SEQRA, purportedly considered various Project alternatives, including a "no-build" alternative and an alternative that would have limited redevelopment to the ATURA portions of the Project area. ESDC rejected those alternatives, and expressly based its rejections, in substantial part, on the false assumption that without the Project "significant

new development" of the Non-ATURA Blocks "is considered unlikely given the blighting influence of the rail yard and the predominance of low-density manufacturing zoning on the project site" (R. 11793), and that the area "would remain blighted and continue to permit low-density industrial uses." (R. 11847)

B. The Genesis of the Project

The Project was conceived and initiated around 2002 by FCRC and its principal, Bruce Ratner, who first proposed it to City and State officials, and secured the unqualified support of his old law school friend, then-Governor George Pataki, who had long enjoyed Mr. Ratner's political contributions and support.[5] FCRC first identified the publicly and privately owned property it desired for the Project (R. 584a), and then enlisted ESDC, a quasi-governmental entity created under the UDCA and controlled by Governor Pataki, in order to utilize its power to acquire property for the Project through eminent domain and to exempt the Project from local zoning laws and the City's Urban Land Use Review Procedures ("ULURP").

There is no indication in the record prior to September 2005 that the Non-ATURA Blocks were included in the Project area for any reason other than to make the Project larger and more profitable for FCRC and Bruce Ratner than it

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[4] Block 1128 is only partially included in the Project area. (R. 46a)

would be if the Project were limited to property within ATURA. When the Project was formally announced in December 2003, there was no claim made that the Project was allegedly intended to cure blight in Prospect Heights, even though part of the Project was located in ATURA.

On at least two separate occasions in 2004, MTA's chief spokesperson told reporters that the Vanderbilt Yards had already been conveyed to FCRC. (R.14) In February 2005, FCRC and MTA entered into a written agreement for FCRC to gain the right to develop over MTA's Vanderbilt Yards, concurrently with a Memorandum of Understanding ("MOU") between the City, ESDC, and FCRC which established the terms and parameters of the project. (R. 20296, 20303). Notably, the MOU did not state how the Project might be authorized under the UDCA.

In May 2005, three months after MTA agreed in writing to grant the Vanderbilt Yards development rights to FCRC, MTA belatedly issued a Request for Proposals ("RFP") to assess the interest of other parties in developing the yards, with detailed response requirements and a 45-day application deadline. Despite the extremely short application period, a well respected developer, Extell Development Corporation, bid $150 million for the Yards – the appraised value of

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[5] *See For Brooklyn, a Celebration or a Curse?*, WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki.")

which was $214.5 million – and proposed a lower-density development limited to the ATURA portion to the ATURA portion of the Project area. In contrast, FCRC offered $50 million for the Yards, contingent upon condemnation of properties on the Non-ATURA Blocks, and failed to provide the requisite profit projection.

Not surprisingly, In September 2005, MTA selected FCRC's bid over Extell's. (R.15) Two days later, ESDC designated itself the lead agency for the Project under SEQRA. It was then, for the first time, that ESDC stated that the Project was intended to cure purported "blight" in the Non-ATURA Blocks of the Project area. (Decision at 28, Catterson, J., concurring)

C. ESDC's Purposeful Disregard of the Private Development and Rising Values in the Non-ATURA Blocks

ESDC ultimately supported its designation of the Non-ATURA Blocks as "blighted" with a "Blight Study" conducted by ESDC's environmental consultant, AKRF, Inc. ("AKRF"), in late 2005 and early 2006, around two years after the Project was announced.[6] (R. 216, *et seq.*) The Blight Study failed to distinguish between the almost 40 percent of the Project area comprised by the

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[6] ESDC regularly engages AKRF as its consultant on development projects, and, as Justice Catterson noted in this case, the First Department has previously criticized ESDC and AKRF "for their failure to maintain a relationship separate and distinct from the developer in another gargantuan project." Decision at 16 (Catterson, J., concurring), citing *Matter of Tuck-It-Away Assoc. v. Empire State Dev. Corp.*, 54 A.D.3d 154 (2008).

privately owned Non-ATURA Blocks and the portion of the area within ATURA. The Blight Study also failed to acknowledge that some of the purported "blighted conditions" it found in properties in the Non-ATURA Blocks were the result of those properties having already been purchased by FCRC and allowed to lie vacant for one or two years before the study took place.

ESDC engaged AKRF to prepare the Blight Study pursuant to a written contract which expressly provided that the Blight Study was to include, among other things, the following:

> A. Determine the study area for analysis of blight conditions and prepare and draft criteria that will be used as the basis for the blight study area, in conjunction with state and city agencies, including ESDC and DCP.
>
> B. Document blighted conditions, including the following:
>
> - Analyze residential and commercial rents on the project site and within the study area;
> - Analyze assessed value trends on the project site, and compare sample blocks with comparable uses in the study area, such as Atlantic Center;
> - Describe residential and commercial vacancy trends;
> - Compare current economic activity on the project site, such as direct and indirect employment, with relevant surrounding sites.[7]

[7] ESDC failed to include the EIS Contract Scope in the Administrative Record it produced to the Court below, and Petitioners learned of its existence through a reporter who obtained it from ESDC through a Freedom of Information Law request and discussed it in an online blog.

(RA 28)

For reasons which ESDC has never adequately explained, the published Blight Study omitted any analysis, comparison, or discussion of rents, real estate value trends, vacancy trends, or economic activity, and the "study area" excluded all property that FCRC had not already determined would be part of the Project. Had the Blight Study included those factors and considered the impact of the Project's announcement in 2003 on further development in the Non-ATURA Blocks, AKRF almost certainly would have been compelled to draw different conclusions about purported "blight" in the Project area.

It is undisputed that at the time the Project was announced in December 2003, the Non-ATURA Blocks and surrounding areas were undergoing rapid, private residential redevelopment without any governmental development plan or public subsidies directed to the area, as was well reported in the press.[8] Examples of private development in the Non-ATURA Blocks include the conversion of a former warehouse at 636 Pacific Street into the "Atlantic Art Building" which

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[8] *See, e.g.*, Rachelle Garbarine, "Residential Real Estate: 2 Brooklyn Business Sites Converting," NEW YORK TIMES, August 30, 2002, at B6 ("In the onetime manufacturing neighborhood around Dean and Pacific Streets in Prospect Heights, Brooklyn, the conversion of old warehouses and factories to housing marches on".) (R. 550a – 551a); Eric Neutusch, *Here Comes the Neighborhood: Prospect Heights*, BROOKLYN RAIL, Autumn 2002, available at http://www.thebrooklynrail.org/local/fall02/prospectheights.html ("The empty industrial lots along Dean and Pacific Streets are being rejuvenated by a residential housing boom.") (R. 552a – 553a).

opened in 2003 with 31 luxury condominium units,[9] and the conversion of the former Spalding factory, at 64 Sixth Avenue, which opened in 2002 with 21 new loft condominiums.[10]

In the fall of 2002 a private developer filed a plan with the New York City Buildings Department to convert the factory building located at 754 Pacific Street, which directly faces the Vanderbilt Yards, into a luxury residential building, although the developer withdrew that plan after the Project was announced. (R. 22788) The current owner of 754 Pacific Street has filed a plan with the Buildings Department to develop a ten-story building, including seven stories of hotel space, on that property and two adjacent lots, and intends to proceed with that development in the event ESDC does not take the properties.[11] (R. 22789)

On Block 1128, which is only partially within the Project footprint, a private developer converted a former Daily News printing plant located at 535 Dean Street and 170 Pacific Street into a 137-unit luxury condominium building known as "Newswalk"[12] which opened in 2002, directly across Pacific Street from

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9 *See* Garbarine, *supra*, at B6; Neutusch, *supra*.

10 *See Id.* In addition, around the same time, another private developer converted two former industrial buildings at 616-630 Dean Street, on the south side of the street opposite Block 1129, into a 21-unit luxury condominium complex known as the "Merchant House". *See Id.*

11 The current owner/developer, Pacific Carlton Development Corp., is a plaintiff in *Goldstein*, 879 N.Y.S.2d 524.

12 *See Id.*

the Vanderbilt Yards. Given the enormous cost of acquiring that building, FCRC simply carved it out of the Project area,[13] and, as a result, the Project has a shallow U-shaped footprint, surrounding Newswalk and adjacent portions of Block 1128 on three sides. After the Project was announced in 2003, other properties on the excised portion of Block 1128 continued to experience private redevelopment and rising values, including a newly constructed, three-story, luxury condominium building known as the "DeanCarlton" which opened at 565 Dean Street;[14] the redevelopment of 543 Dean Street as a four-unit luxury condominium building;[15] and the sales of a four-story townhouse at 532 Carlton Avenue for $1.5 million[16] and of a three-story townhouse at 518 Carlton Avenue for $1.35 million.[17]

ESDC published the Blight Study with its General Project Plan in July 2006, following which ESDC received hundreds of pages of detailed, substantive

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13 *See* Matthew Schuerman, *Ratner Rules: Brooklyn Nets Plan Spares Developer Shaya Boymelgreen's Project*, VILLAGE VOICE, Apr. 5, 2004, available at http://www.villagevoice.com/news/0414,schuerman,52432,4.html.

14 According to information available on the New York City Buildings Department's web site, at http://www.nyc.gov/html/dob/html/home/home.shtml, the final Certificate of Occupancy for the DeanCarlton was issued on March 14, 2008.

15 The Buildings Department issued its final Certificate of Occupancy for the building on May 29, 2008. See http://www.nyc.gov/html/dob/html/home/home.shtml.

16 Sales information is from Property Shark, at www.propertyshark.com.

17 Sales information is from Property Shark, at www.propertyshark.com, and renovation information is from the NYC Buildings Department, at

comments from residents of Prospect Heights and other members of the public concerning the area's ongoing redevelopment and high property values, and questioning the conclusions of the Blight Study with regard to the Non-ATURA Blocks. (*See, e.g.*, R. 14035-43, 14178-81, 14185-87, 15494-97, 15502-06) ESDC failed to respond substantively to the comments, summarily dismissing them in less than three pages of discussion (R. 19924-26).

D. ESDC's Purposeful Misrepresentation of Crime Statistics in the Project Area

ESDC and AKRF sought to bolster their pre-determined conclusion that the Non-ATURA Blocks were "blighted" by asserting in the Blight Study that "per capita crime rates on the project site and in surrounding blocks are higher than for the broader precincts in which the project site is located" (R. 484), without distinguishing the rapidly redeveloping, largely residential Non-ATURA Blocks from the ATURA portion of the Project area, characterized by the concededly blighted MTA-owned rail yards and vacant commercial buildings. In reality, as AKRF and ESDC were well aware, the reported overall crime rates in the Non-ATURA Blocks were measurably lower than in surrounding areas, and substantially lower than in the ATURA portion of the Project area.

The Blight Study was able to paint its skewed picture by aggregating crime

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http://www.nyc.gov/html/dob/html/home/home.shtml.

rates in the three police precinct sectors that include the Project area and comparing them with overall precinct averages. Thus, it was able to report higher crime rates for the Project area as a whole than for the larger precinct area in 2004 and 2005.[18]

Moreover, AKRF and ESDC failed to acknowledge that the precinct sector in which the ATURA portion is located includes the adjacent Atlantic Terminal Mall and Atlantic Center shopping area, which draw large crowds of shoppers and serve as magnets for shoplifting and other crimes. Thus, the Blight Study presented no real evidence that crime rates in any portion of the Project area are higher than in surrounding areas.

AKRF responded to public complaints that it had misrepresented crime data in the non-ATURA sectors by simply asserting that it had "accurately described the blighted conditions on the project site." (R. 20280) In contrast, in a

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[18] As discussed in the Blight Study, New York City Police Department ("NYPD") precincts are divided into sectors, which are the smallest geographical areas for which the NYPD publishes crime data. The entire ATURA portion of the Project area is located within Sector E of Precinct 88 (Sector 88E), while in the non-ATURA portion, Block 1127 is within Sector D of Precinct 78 (Sector 78D), and Blocks 1128 and 1129 are located within Sector A of Precinct 77 (Sector 77A). (*See* Blight Study, R. 484 and Figures 8, 9, R. 485-486). In 2004, the crime rate in the ATURA sector was approximately twice as high as in the non-ATURA sectors, and the crime rate in the ATURA section was more than three times as high as in the larger precinct, while the crime rates in the two non-ATURA sectors of the Project area were only slightly lower or slightly higher than in the larger precincts. (R. 487 and 19228-19232) In 2005, the crime rate in the ATURA sector of the Project area increased, while the crime rates in the non-ATURA sectors decreased, and the crime rate in the ATURA sector was still more than three times as high as in the larger precinct., while the crime rates in the non-ATURA sectors of the Project area

Memorandum to the ESDC Board of Directors, then-Chairman Charles Gargano acknowledged that the sectors encompassing the Non-ATURA Blocks had lower crime rates, but nevertheless dismissed complaints about the skewed crime data by asserting that "because block by block statistics are unavailable, there is no support for the assertion that there is no significant crime on Blocks 1127, 1128 (partial) and 1129." (R. 19926) Mr. Gargano did not bother to address the relevant issue, that ESDC had no valid support for its position that crime rates on those blocks were higher than surrounding areas so as to justify its designation of them as blighted.

LEGAL ARGUMENT

POINT I: THIS COURT SHOULD REVIEW ESDC'S DEMONSTRATED CORRUPTION AND BIAS AND THEIR EFFECTS ON ITS FINDINGS

More than half a century ago, this Court held in *Kaskel*, 306 N.Y., 78, that when an agency makes its findings regarding blight "not corruptly or irrationally or baselessly, there is nothing for the courts to do about it." (emphasis added). The natural corollary of that holding, which remains good law and was relied upon by the Appellate Division in this case, is that when an agency makes its findings corruptly, the courts should do something about it.

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were from 12 to 34 percent lower than in the larger precincts.

More specifically to this case, when there is compelling evidence that an agency based its findings, in substantial part, on statements and data it knew to be false, and purposefully omitted material information which was contrary to its findings, it is the job of the courts to determine whether the findings were so tainted by the agency's corruption and bias that they should be vacated. The courts below limited their reviews of ESDC's findings to whether ESDC had proffered any rational bases for them, and failed to consider the extent to which ESDC's findings were corrupted by its own bias and deliberate misrepresentations, which *Kaskel* teaches is an alternative basis for a court's invalidation of an agency's findings.

There is no dispute that ESDC purposefully disregarded the substantial, ongoing, desirable private redevelopment and rapidly rising property values in and around the Project area,[19] and misrepresented the crime rates in the non-ATURA portion as higher than surrounding areas while ESDC's own data showed just the opposite,[20] in order to falsely bolster its finding of "blight" which was necessary to support its designation of the Project as a "land use improvement project" under the UDCA. Nor is there any dispute that ESDC expressly based its rejection of Project alternatives which would have spared the Non-ATURA Blocks from being

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[19] *See* Record on Appeal ("R.") 14035-43, 14178-81, 14185-87, 15494-97, 15502-06; Reply Appendix ("RA.") 28; *see also* Decision at 35 (Catterson, J., concurring).

condemned and razed for the Project, in substantial part, on the false assumption that those blocks would not experience desirable residential redevelopment without being included in the Project, even though ESDC knew that assumption to be false.[21]

Moreover, there is no dispute that the politically connected private developer, FCRC, first identified and selected the rapidly redeveloping Non-ATURA Blocks to be taken for the Project, and then presented the Project to the State and City years before there was ever any finding by any governmental entity that the Non-ATURA Blocks were "blighted" or in need of governmental intervention to ensure their proper redevelopment. The Project was so pre-determined that MTA agreed to sell the development rights for Vanderbilt Yards to FCRC several months before MTA even solicited bids for those rights.

The courts below ignored these circumstances, and limited their review to whether ESDC has stated any plausible rationale at all for its findings. Thus, the Appellate Division upheld ESDC's designation of the entire Project area as blighted, despite ESDC's purposeful omission of contrary economic, real estate and development data from the Blight Study, and its knowing misrepresentation of relevant crime data, on the ground that ESDC also cited other factors which

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20 *See* R. 487, 19228-32, 19926, 20280.

21 *See Id.*

courts in this State have previously found indicative of "substandard and insanitary" conditions. (Decision at 21.)

And, the Appellate Division upheld ESDC's rejection of those Project alternatives which would have excluded the Non-ATURA Blocks, despite ESDC's knowingly false claims that those blocks would not develop unless they were included in the Project, on the ground that ESDC also cited other benefits of including those blocks in the Project which, taken independently, were deemed to provide a sufficiently rational basis for ESDC's decision. Under SEQRA, however, ESDC was required to undertake "reasonable consideration of alternatives" to the Project, and ESDC's purposeful misrepresentation of conditions in the Non-ATURA Blocks demonstrates that it failed to do so. *Town of Dryden*, 78 N.Y.2d, 334.

New York law should and does require ESDC to do more than simply throw out a number of purported justifications for its findings without regard to truth, accuracy, or logic, secure in the knowledge that as long as at least some of its proffered justifications can be called "rational", its findings will not be disturbed by judicial review. To the contrary, where, as here, an agency blatantly misrepresents the facts and disregards contrary evidence, courts should find the

agency's ultimate determination irremediably tainted, regardless of whether a few of its proffered justifications might arguably be valid.

In *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478, 485, 335 N.E.2d 327 (1975), this Court held that in reviewing an agency's blight findings, "courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases." To affirm ESDC's designation of the entire Project area as "blighted" and its rejection of Project alternatives in light of the demonstrated corruption and bias renders the courts, in this context, little more than the rubber stamps which this Court has cautioned against. Courts need not substitute their judgment for that of a governmental agency, but they can and must require an agency to be truthful and unbiased in making its judgment.

POINT II: THIS COURT SHOULD DETERMINE THAT ESDC WAS REQUIRED TO CONSIDER KNOWN ECONOMIC CONDITIONS AND DEVELOPMENT TRENDS BEFORE UNDERTAKING A "LAND USE IMPROVEMENT PROJECT" UNDER THE UDCA

One of the Legislature's stated reasons for creating ESDC was to address areas which are "slum or blighted, or which are becoming slum or blighted areas . . . which impair or arrest the sound growth of the area, community or municipality, and the state as a whole." UDCA § 6252. Therefore, in order for

ESDC to undertake a "land use improvement project", it is required to make findings that, among other things, the project area "is a substandard or insanitary area, or is in danger of becoming substandard or insanitary and tends to impair or arrest the sound growth and development of the municipality". UDCA § 6260(c)(1) (emphasis added).

Thus, the UDCA expressly required ESDC not only to determine whether the Project area was blighted, but also to make a finding that the perceived "blight" in the Project area impairs sound growth and development before designating the Project a "land use improvement project". ESDC plainly recognized this requirement, because it explicitly engaged AKRF to analyze property value trends, economic activity, and rents in the Project area and compare them with other blocks in a larger study area. (RA. 28)

Nevertheless, ESDC excluded any such analysis from its published Blight Study. Had ESDC included the analyses of property value trends, economic activity, and rents in the Project area for which it engaged AKRF, they would have substantially undermined its pre-determined conclusion that the Non-ATURA Blocks would not continue to experience desirable redevelopment and economic revival unless they were included in the Project, because it is undisputed the area was undergoing a well documented economic revival and redevelopment

boom when the Project was announced in December 2003 and continuing through 2006 when the Blight Study was published.

In fact, honest analyses of property value trends, economic activity, and rents in and around the Project area would have substantially undermined ESDC's claim that the Project was needed to cure blight in any of the Project area, including the Vanderbilt Yards, because the neighborhood's redevelopment and economic revival were literally lapping at the borders of the MTA-owned yards. As proved by Extell Development Corporation's bid for the rights to develop the yards – put together and submitted within just 45 days after MTA issued its belated RFP – all that was needed for desirable development of the Vanderbilt Yards to occur was for MTA actually to make them available for development.

As the Appellate Division stated in this case,

> Condemnation is not an end in itself, but merely an instrument for the achievement of social purpose, here urban redevelopment. Courts, even in the condemnation context, have understood that the issue before them in determining whether property was blighted was not simply whether it could be condemned and cleared but ultimately whether by reason of blight it "qualifie[d] for renewal."

Decision at 17, quoting *Yonkers Cmty. Dev. Agency*, 37 N.Y.2d at 484, and citing *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir.

1985); *Kaskel*, 306 N.Y. at 79. Unfortunately, the Appellate Division ended its analysis at determining whether any of the proffered objectives of the Project might rationally be deemed a cognizable "public purpose" under eminent domain law, and did not take the necessary step further of determining whether the privately owned homes and businesses to be condemned at FCRC's behest "qualified for renewal" as a "land use improvement project" under the UDCA.

Petitioners submit that that was error, because the UDCA does not authorize ESDC to undertake just any project deemed to serve a "public purpose" under eminent domain law, but, rather, authorizes ESDC to undertake only specifically enumerated projects upon making the requisite findings – as relevant here, that the purported blight in the project area "tends to impair or arrest the sound growth and development of the municipality." *See* UDCA §§ 6253, 6260. That issue distinguishes this case from the eminent domain cases relied upon by the Appellate Division.

POINT III: THIS COURT SHOULD DETERMINE WHETHER THE APPELLATE DIVISION APPLIED THE CORRECT STANDARD OF REVIEW

In upholding ESDC's "blight" determination and its consequent designation of the Project as a "land use improvement project" under the UDCA, the Appellate Division relied heavily upon *Yonkers Cmty. Dev. Agency*, 37 N.Y.2d

478, *Kaskel*, 306 N.Y. 73, and *Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 555 N.Y.S.2d 271 (N.Y. App. Div. 1990) *aff'd,* 76 N.Y.2d 962, 565 N.E.2d 476 (1990), for its view that it was compelled to afford a high level of deference an agency's designation of an area as "substandard or insanitary" in the context of an urban renewal project. However, *Kaskel* and *Jo & Wo Realty* were both taxpayer actions under section 51 of the General Municipal Law, which requires a different level of judicial review than under Article 78 of the CPLR. As this Court noted in *Kaskel*,

> [t]he decisions under section 51 make it entirely clear that redress may be had only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes. Although the plaintiff here complains of the choice of this site for clearing and redevelopment as being 'arbitrary and capricious', we must keep in mind that this is not an 'Article 78' proceeding dealing with a situation wherein it might be claimed that public officials, although acting within their powers, are doing so in a way that is arbitrary or capricious.

306 N.Y. at 79 (emphasis added).Similarly, in *Jo & Wo Realty*, also a taxpayer action, this Court did not review the City's finding that the old Coliseum site at issue in *Kaskel* was "substandard and insanitary" under the "arbitrary and capricious" standard which would have been applicable in an Article 78 proceeding. Rather, this Court relied upon the prior determinations at issue in *Kaskel* to hold that the City was within its discretion to find the building obsolete

and outmoded, and that the City had the authority under the original urban renewal plan to market the property through a Request for Proposals. *Jo & Wo Realty* was limited to the authority of the City to redevelop the site without going through public bidding and did not involve a new determination that the area was blighted or that new properties should be included in the urban renewal area or taken by eminent domain.

In *Yonkers,* the plaintiffs did not challenge the city agency's blight determination at all, but, rather, challenged whether the purpose of the condemnation, which was to permit Otis Elevator Company to expand its facility, was a permissible "public purpose" under Federal and State Constitutions and applicable laws. Thus, this Court stated that, while the city agency had offered no more than general statements to support its blight determination, the plaintiffs in that case had failed to raise the validity of the agency's blight determination in their pleadings. *Yonkers Cmty. Dev. Agency*, 37 N.Y.2d at 485-87.

In the case at bar, the Appellate Division found ESDC's proffered basis for its "blight" determination sufficient despite multiple fallacies in its published findings, and despite blatant misstatements and omissions of material facts. Rather than applying the highly deferential standard of a taxpayer challenge in *Kaskel* and *Jo & Wo Realty*, the Appellate Division should have addressed

whether ESDC met the "arbitrary and capricious" standard applicable in an Article 78 challenge.

POINT IV: THIS COURT SHOULD REVIEW WHETHER A CIVIC PROJECT MAY BE LEASED TO A PRIVATE, FOR-PROFIT ENTITY WITH NO SIGNIFICANT COMMITMENT TO ANY CIVIC PURPOSE

In addition to declaring the Project a "land use improvement project", ESDC has also declared the Project a "civic project", which is another of the enumerated types of projects which the UDCA authorizes ESDC to undertake. *See* UDCA § 6260. The "civic project" designation pertains to the Barclays Center Arena, which would be leased, for one dollar per year, to a private, for-profit entity affiliated with and controlled by FCRC.

Petitioners challenged the "civic project" designation in the courts below on the ground, *inter alia*, that ESDC is not authorized to lease a civic project to a private, for-profit entity which is not engaged in any civic purpose. That is clearly the case here, as FCRC intends to operate the Barclays Center Arena as a profit-making professional sports arena, and has pledged to make the arena available for only ten community events per year, with the estimated approximate $100,000 cost of operating the arena for each such community event to be borne by the event's sponsor. As the trial court noted in this case, any purported civic benefit thereby would be "de minimus" compared to the arena's primary use by a

professional basketball franchise.

The Appellate Division incorrectly limited its review of that issue to whether a for-profit sports arena might serve a "civic purpose" under the UDCA, and overlooked the UDCA's express limitations of the types of entities to which ESDC may lease a civic project:

> Subject to any agreement with noteholders or bondholders, the corporation may sell or lease for a term not exceeding ninety-nine years any civic project to the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose.

UDCA § 6259(1) (emphasis added). Further, the UDCA does not authorize ESDC to undertake any civic project unless it has made a specific finding that the project has been leased to a permitted entity. *See* UDCA § 6260(d)(3) (emphasis added).

As the Appellate Division noted, in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) *cert. denied,* 128 S. Ct. 2964, 171 L. Ed. 2d 906 (U.S. 2008), in which property owners and residents in the Project area challenged ESDC's condemnation of their properties on constitutional grounds, the federal appellate court held that a sports arena may serve a "public purpose" under the takings

clause of the United States Constitution.[22] While the Appellate Division acknowledged that that holding does not preclude plaintiffs' challenge to ESDC's designation of the Project as a "civic project" under the UDCA, it nevertheless proceeded to conflate the two issues, finding an "evidently anomalous disparity" between finding that a sports arena is a "public purpose" under the takings clause and the argument that, in the particular circumstances of this case, it still may not qualify as a "civic project" under the UDCA. Decision at 15.

That was error. Petitioners do not dispute that ESDC might rationally determine, under appropriate circumstances, that a privately operated sports arena made available for community and civic events on an affordable, substantial basis could be a "civic project" under the UDCA. But the Appellate Division failed to consider the UDCA's express limitations of ESDC's ability to lease a civic project to a non-public entity, and thereby failed to note the distinctions between ESDC's authority to undertake a "civic project" under the UDCA, and the scope of the term "public purpose" in the context of the takings clause.

The Appellate Division cited this Court's decision in *Murphy v. Erie County*, 28 N.Y.2d 80, 268 N.E.2d 771 (1971), for the point that a sports arena operated privately for profit may still serve a "public purpose", but overlooked the

[22] The Second Circuit's decision was limited to issues arising under the United States Constitution, and did not consider or address whether a privately operated, for-profit

statutory foundation of that decision. In *Murphy*, this Court determined that the county's plan to lease a publicly funded stadium to a private, for-profit operating company did not violate the act authorizing the county to build the stadium, by analyzing the statutory language. Because the act "specifically empower[ed] the county to 'enter into contracts, leases, or rental agreements with, or grant licenses, permits, concessions, or other authorizations, to any person or persons'", this Court found that the Legislature intended to give the county "the broadest latitude possible in the operation of the stadium", and, therefore, that the lease to a private, for-profit operating company did not violate the act. *Id.* at 87 (emphasis added).

In contrast to the governing statute in *Murphy*, the UDCA permits ESDC to lease a civic project only to a narrowly prescribed category of non-public entities, *viz.* "any other entity which is carrying out a community, municipal, public service or other civic purpose." UDCA § 6259(1) (emphasis added). Had the State legislature intended to permit ESDC to lease a "civic project" to anyone it deemed appropriate to operate it, it could have used language in the UDCA similar to the broad language it used in the governing statute in *Murphy* authorizing the county to lease a project to "any person or persons."

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professional sports arena could constitute a "public use" under the New York Constitution.

Instead, the legislature expressly limited the non-public entities to which ESDC may lease a civic project to those which are "carrying out a community, municipal, public service or other civic purpose." To construe that language to mean that the private, for-profit FCRC affiliate to which ESDC would lease the Barclays Center Arena would be engaged in a "public service or other civic purpose" merely because the Barclays Center Arena has already been designated a "civic project" would render the phrase "which is carrying out a community, municipal, public service or other civic purpose" superfluous, in violation of the well settled principle of statutory construction that reading a statute so as to render a provision meaningless should be avoided. [23] *See Hernandez v. Barrios-Paoli*, 93 N.Y.2d 781, 787, 720 N.E.2d 866 (1999); McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98(a).

[23] Nor does the general statement of legislative findings and purposes of the UDCA encouraging "maximum participation" of the private sector in ESDC's projects (UDCA § 6252) obviate the legislature's explicit limitations of the type of entities to which a "civic project" may be leased or sold. The rule is well settled that "a general provision of a statute applies only where a particular provision does not." *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 198, 397 N.E.2d 724 (1979). *See* McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 238.

CONCLUSION

For the foregoing reasons, petitioners respectfully request leave of the Court of Appeals to appeal the Order of the Appellate Division, First Department, to the extent set forth herein.

Dated: July 30, 2009

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