To be argued by:
PETER KARANJIA

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of DEVELOP DON'T DESTROY (BROOKLYN), Inc.; COUNCIL OF BROOKLYN NEIGHBORHOODS, INC.; ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC.; BERGEN STREET BLOCK ASSOCIATION, INC.; BOERUM HILL ASSOCIATION, INC.; BROOKLYN BEARS COMMUNITY GARDENS, INC.; BROOKLYN VISION FOUNDATION, INC.; CARLTON AVENUE ASSOCIATION, INC.; CARROLL STREET BLOCK ASSOCIATION BETWEEN FIFTH AND SIXTH AVENUES, INC.; CENTRAL BROOKLYN INDEPENDENT DEMOCRATS by its President JOSH SKALLER; CROWN HEIGHTS NORTH ASSOCIATION, INC.; DEAN STREET BLOCK ASSOCIATION, INC.; EAST PACIFIC BLOCK ASSOCIATION, INC.; FORT GREENE ASSOCIATION, INC.; FORT GREENE PARK CONSERVANCY, INC.; FRIENDS AND RESIDENTS OF GREATER GOWANUS by its President MARILYN OLIVA;

N.Y. County Index
No. 104597/07

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENT NEW YORK STATE PUBLIC AUTHORITIES CONTROL BOARD

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August 5, 2008

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC. ("NYPIRG"); PARK PLACE-UNDERHILL AVENUE BLOCK ASSOCIATION by its President LINNEA CAPPS; PARK SLOPE NEIGHBORS, INC.; PROSPECT HEIGHTS ACTION COALITION by its President PATRICIA HAGAN; PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC.; SIERRA CLUB, INC.; SOCIETY FOR CLINTON HILL, INC.; SOUTH OXFORD STREET BLOCK ASSOCIATION by its President ABBOT WEISSMAN; SOUTH PORTLAND BLOCK ASSOCIATION, INC.; and ZEN ENVIRONMENTAL STUDIES INSTITUTE, LTD.,

Petitioners-Plaintiffs-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment

- against -

URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION; FOREST CITY RATNER COMPANIES, LLC; METROPOLITAN TRANSPORTATION AUTHORITY; and NEW YORK STATE PUBLIC AUTHORITIES CONTROL BOARD,

Respondents-Defendants-Respondents.

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PRELIMINARY STATEMENT

This brief is submitted on behalf of respondent the New York State Public Authorities Control Board (the "PACB"). In this hybrid Article 78 proceeding and declaratory judgment action, petitioners-appellants challenge determinations by various governmental entities, including the PACB, approving aspects of a $4 billion project to redevelop the Atlantic Terminal area in downtown Brooklyn, commonly known as the Atlantic Yards project. The PACB's role was limited to approving respondent Empire State Development Corporation's financial participation in the project. Petitioners argue, however, that the PACB was also required to conduct an environmental review before issuing its approval. In a Decision, Order and Judgment, Supreme Court, New York County, rejected that argument.

Supreme Court correctly concluded that, when the PACB approved ESDC's financial participation in the project by issuing bonds, its approval was not an "action" subject to the New York State Environmental Quality Review Act ("SEQRA"). Accordingly, the PACB - an entity created to provide a control mechanism over the issuance of public debt - was not required to make any environmental findings under that statute. In the more than thirty years that it has been in existence, the PACB has reviewed innumerable project financing applications from public authorities and approved billions of dollars of bond issuances. Yet never has it been held subject to SEQRA. The PACB has never acted as a "lead

agency" or "involved agency" within the meaning of SEQRA, and has never prepared an Environmental Impact Statement or held public hearings pursuant to SEQRA. Moreover, no court has ever held that the PACB was required to make environmental findings under the statute, and the sole case to address the question (other than the decision below) correctly concluded that the PACB was not subject to SEQRA. The same conclusion applies here. Consistent with its carefully circumscribed mission and statutory mandate, the PACB properly confined its review of ESDC's financial participation in the project solely to the sufficiency of the commitment of funds, and so its resolution approving ESDC's financial participation was not subject to SEQRA.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was the PACB required to make environmental findings under SEQRA in connection with its limited review of ESDC's financial participation in the Project?

The Supreme Court answered this question in the negative.

STATEMENT OF THE CASE

A. The Public Authorities Control Board

The origins and purpose of the PACB are directed toward financial – rather than environmental – concerns. As the trial court noted, the Legislature created the PACB in 1976 in response

to a credit crisis caused by dramatically increased debts incurred by certain public benefit corporations, "'without effective or comprehensive monitoring by the State government.'" (A. 29a (citing Public Authorities Law § 50, 42 McKinney's Cons. Laws of N.Y., Historical and Statutory Notes, § 1, Legislative Findings and Intent); see also A. 1348a-1354a (Scheuermann Aff. ¶¶ 3-21) & A. 1368a-1383a (Restoring Credit and Confidence: A Reform Program for New York State and its Public Authorities, dated March 31, 1976, at 1-21)).[1]

After the Urban Development Corporation defaulted in 1975 on more than $100 million in bond anticipation notes, a commission appointed by the Governor recommended that the Legislature create a "control mechanism" to bring greater scrutiny to the issuance of debt by public authorities. (A. 1383a (Moreland Commission Report at p. 20)). Concerned by its findings that "the debt of public authorities has grown rapidly in the last two decades to a staggering level of $17 billion, and . . . neither the Legislature, the Executive nor the Comptroller has exerted any meaningful control over the growth of that debt," the Moreland Commission called on the State to devise a means for "controlling the volume and pace of authority borrowing and commitments . . . ." (A. 1383a-1384a (Moreland Commission Report at pp. 20, 22-23)).

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[1] Citations prefaced by "A." refer to portions of the Appendix. Citations prefaced by "A.R." refer to portions of ESDC's Administrative Record.

The Commission thus recommended legislation creating a "Public Authorities Control Commission" to review certain "selected debt issues or projects which are particularly significant in terms of their size, degree of risk, or potential impact on the State's or the authority's financial condition." (Id. (at pp. 20-21)).

These legislative proposals culminated in the creation of the New York State Public Authorities Control Board in § 50 (and later § 51) of the Public Authorities Law ("PAL"). In March 1976, the Legislature passed, and the Governor approved, legislation creating the PACB. See L. 1976, c. 38, 39 (copied at A. 1410a-1434a). Although the Legislature initially provided that the PACB would exist for only a few years, it was made permanent in 1978. L. 1978, c. 47. Over time, the number of public authorities subject to the PACB's financial oversight has expanded. See A. 1354a at § 23; see also PAL § 51(1)(a)-(l).

Under the current version of Public Authorities Law § 51(1), the PACB is directed to control the debt and other financial commitments of public authorities by receiving "applications for approval of the financing and construction" of projects proposed by various enumerated public authorities, including respondent Empire State Development Corporation. PAL § 51(1). Without the PACB's approval, such authorities may not "make any commitment, enter into any agreement or incur any indebtedness for the purpose of acquiring, constructing, or financing" a project. Id. And before

it can approve an application from a public authority, the PACB must first give the State Comptroller an opportunity to comment. PAL § 51(2).

The PACB has three voting members and two non-voting members. Although the Governor appoints all of these members, four are chosen by the Senate Majority Leader, the Assembly Speaker, and the leaders of the Senate and Assembly minorities. Id. § 50(2). Since the PACB's inception, its chair has always been the Director of the Budget - the gubernatorial appointee who runs the Division of the Budget. (A. 1359a-1360a at ¶¶ 43-45).

Further underscoring the PACB's overarching financial focus, the statute provides that the PACB may approve applications from public authorities "only upon its determination that . . . there are commitments of funds sufficient to finance the acquisition and construction" of a proposed project. PAL § 51(3). This - the "funds sufficiency" test - is the sole criterion on which the PACB reviews applications submitted by public authorities for project financing. (A. 1355a at ¶ 26).

B. The Atlantic Yards Project

The Atlantic Yards Arena and Redevelopment Project (the "Project") encompasses twenty-two acres of land that "has suffered from physical deterioration and relative economic inactivity for at least four decades. Dominated by an approximately 9-acre open rail

yard and otherwise generally characterized by dilapidated, vacant, and underutilized properties, the site creates a clear visual and physical barrier between the neighborhoods north and south of Atlantic Avenue" close to downtown Brooklyn. (A.R. 223 (blight study)); see also Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d 144, 146 (1st Dep't 2006), leave denied, 8 N.Y.3d 802 (2007).

As the court below noted, the centerpiece of the Project is a sports arena, designed by architect Frank Gehry, that will serve as the home of the New Jersey Nets professional basketball team. (A.R. 26-27, 30-31). The Project will also create over 6,000 housing units (including 2,250 affordable housing units), as well as office and commercial space, improved public transit facilities, and environmental improvements, including the construction of a platform over the MTA's Vanderbilt Rail Yard - sub-grade rail tracks that currently form a ditch separating a large portion of the Project site from surrounding neighborhoods. (A.R. at 30-31); see also Develop Don't Destroy Brooklyn, 31 A.D.3d at 146.

The Project was announced in December 2003 by respondent property developer Forest City Ratner Companies, LLC. Develop Don't Destroy Brooklyn, 31 A.D.3d at 146. In February 2005, Forest City Ratner entered into two memoranda of understanding, including one with the City of New York, the New York City Economic Development Corporation, and respondent New York State Urban

Development Corporation d/b/a Empire State Development Corporation ("ESDC"). (A. 319a-348a).[2] Among other things, the parties to the memorandum of understanding agreed that, subject to various conditions, ESDC would be the "lead agency" for the Project under SEQRA. (A. 321a). The "lead agency" is the agency "responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required." 6 N.Y.C.R.R. § 617.2(u).

As the lead agency, ESDC developed a Draft Scope of Analysis for an Environmental Impact Statement, and initiated a coordinated review of the proposed project. (A.R. 22707-22747). Simultaneously, ESDC issued public notices that, because the Project might have a "significant effect" on the environment, ESDC would serve as lead agency in preparing an Environmental Impact Statement. (A.R. 20326-20328).

After holding a public hearing on the Project, followed by additional community forums, ESDC's Directors accepted a comprehensive Final Environmental Impact Statement, which ran to over 3,500 pages and included, among other things, a 550-page chapter addressing the 200 comments ESDC received on the Project,

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[2] ESDC is a public benefit corporation that encourages investment in the State by, among other things, fostering urban development and reinvigorating blighted areas. Develop Don't Destroy Brooklyn, 31 A.D.3d at 146.

as well as the more than 1,800 written comments. (A.R. 600-9681; see also A.R. 9741-10465, 14011-19916). Following its extensive review of these comments, in December 2006, ESDC issued its Final Determination and Findings in which its Directors approved, inter alia, a modified General Project Plan under the Urban Development Corporation Act, and its Final Environmental Impact Statement and environmental findings under SEQRA. (A.R. 19932-20026). Later in December 2006, the MTA's Board of Directors adopted its own ninety-one-page environmental findings statement under SEQRA, and authorized the MTA to proceed with its involvement in the Project. (A. 1239a-1334a).[3]

C. The PACB's Resolution

During the course of the events described above, pursuant to PAL § 51, ESDC sought the PACB's approval of its financial participation in the Project by issuing personal income tax revenue bonds. In April 2006, the New York State Legislature appropriated $100 million to ESDC to help pay for new infrastructure improvements relating to the Project. (A. 1362a-1363a at ¶ 55).

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[3] It is undisputed that non-party the City of New York also issued a ninety-one-page findings statement pursuant to SEQRA, a document of which this Court may take judicial notice. See Atlantic Yards Arena and Redevelopment Project: Statement of Findings, issued in May 2007 by the Office of the Deputy Mayor for Economic Development & Rebuilding; see also Siwek v. Mahoney, 39 N.Y.2d 159, 163 n.2 (1976) ("[d]ata culled from public records is, of course, a proper subject of judicial notice.").

The Legislature also authorized ESDC to issue $100 million of bonds for the same purpose. (Id.) But before ESDC could spend the appropriation, or issue the bonds, it had to ask the PACB to approve the proposed debt issuance in connection with ESDC's financial participation in the Project. (A. 1363a at ¶ 56).

Following its adoption in December 2006 of the General Project Plan and its issuance of the Final Environmental Impact Statement, ESDC submitted an application to the PACB seeking its approval to participate financially in the Project. (A. 1363a-1364a at ¶¶ 56-59). As explained by Assistant Chief Budget Examiner Todd Scheuermann, ESDC asked the PACB to (1) approve its issuance of bonds to assist in financing the development of the Project, and (2) conduct a "funds-sufficiency review" of the adequacy of Forest City Ratner's commitments to ESDC to pay all the costs incurred by ESDC in connection with its anticipated acquisition by eminent domain of certain properties within the Project site. (A. 1363a-1364a at ¶¶ 57-59).

After giving the State Comptroller an opportunity to provide comments pursuant to PAL § 51(2) (see A. 1364a at ¶ 60 & A. 1584a-1585a), the PACB requested additional financial data regarding ESDC's participation in the Project (A. 1364a at ¶ 62), and received various financial documents, including a projected cash flow analysis for Forest City Ratner (A. 1554a-1583a), additional details on costs and financing (A. 1512a-1549a), and further

analyses of projected revenue, expenses and income for the area (A. 1550a-1553a).

At a meeting on December 20, 2006, the PACB adopted a Resolution, which noted that "UDC ha[d] made an application to the PACB to enable UDC to issue bonds to assist in financing the development of the Project" (A. 1608a), included a detailed description of the bonds (A. 1608a-1610a), and approved ESDC's "participation in the Project . . . in accordance with section 51 of the Public Authorities Law." (A. 1365a at ¶¶ 68-69; A. 1606a-1614a). Because neither the PACB's limited review of ESDC's proposed financial participation in the Project, nor the adoption of its Resolution, was subject to SEQRA, the PACB did not make a statement of written findings pursuant to SEQRA. (A. 1362a at ¶ 53).

D. Procedural History

Petitioners, various organizations opposed to the Atlantic Yards Project, commenced this proceeding seeking to annul the determinations by the PACB, ESDC, and the MTA that approved various aspects of the Project. In a seventy-one-page Decision, Order and Judgment dated January 11, 2008, Supreme Court (Madden, J.S.C.) dismissed the petition, rejecting each of petitioners' arguments, and concluding that "respondents' determinations approving the Project were neither arbitrary, capricious nor an abuse of

discretion, and that respondents violated neither the procedural nor substantive requirements of SEQRA or the [Urban Development Corporation Act]." (A. 17a).

As relevant here, the court concluded that the PACB was not required to make any environmental findings under SEQRA, because its December 20, 2006 Resolution approving ESDC's financial participation in the Project was not an "action" within the meaning of that statute. (A. 30a). The court noted that, while SEQRA applies to "any action . . . which may have a significant effect on the environment," the statute "expressly exempts from its application 'official acts of a ministerial nature, involving no exercise of discretion.'" (A. 28a (quoting Environmental Conservation Law §§ 8-0109(2), 8-0105(5)(ii), and 6 N.Y.C.R.R. § 617.5(c)(19))).

Following Court of Appeals precedent, the court next noted that "[i]n determining whether an agency decision falls within SEQRA's purview, . . . the courts cannot rely on a mechanical distinction between ministerial and discretionary acts alone," because "the pivotal inquiry . . . is whether the information contained in an [Environmental Impact Statement] may form the basis for a decision whether or not to undertake or approve such action." (A. 28a (quoting Incorporated Vill. of Atl. Beach v. Gavalas, 81 N.Y.2d 322, 326 (1993)) (quotation marks omitted)). The court applied the controlling principle that, "'when an agency has some

discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for the purposes of SEQRA's EIS requirements.'" (A. 28a (quoting Gavalas, 81 N.Y.2d at 326)).

After conducting a careful analysis of the language of the Public Authorities Law and its legislative history, the court concluded that, "[w]hile the PACB undoubtedly has certain discretion, that discretion is confined to reviewing the financial feasibility and impact of proposed debt-incurring projects, which bear no relationship to the environmental concerns that may be raised in an EIS." (A. 30a (citing Gavalas, 81 N.Y.2d at 326)). Accordingly, the PACB's approval of ESDC's financial participation in the Project was not an "action" subject to SEQRA, and the PACB was not required to make any environmental findings under that statute. (A. 30a).[4]

Petitioners filed a Notice of Appeal on January 18, 2008 and simultaneously sought (a) a preliminary injunction enjoining construction of a bridge as part of ongoing development at the Project site, and (b) an interim stay enjoining such construction

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[4] The court went on to reject petitioners' remaining contentions, including, inter alia, their challenge to ESDC's finding that the Project qualifies as a "civic project" and a "land use improvement project" under the Urban Development Corporation Act, and their allegations that ESDC and the MTA violated the requirements of SEQRA. (A. 31a-84a).

pending a ruling on the preliminary injunction motion. After hearing from the parties, this Court (Mazzarelli, J., in Chambers) on January 18, 2008 denied petitioners' motion for an interim stay of construction. Following further briefing on the preliminary injunction motion, the Court (Lippman, P.J., Tom, Nardelli, Catterson, and Moskowitz, JJ.) denied petitioners' motion for an injunction on February 26, 2008.[5]

ARGUMENT

THE PACB WAS NOT REQUIRED TO MAKE ENVIRONMENTAL FINDINGS BECAUSE ITS RESOLUTION APPROVING ESDC'S FINANCIAL PARTICIPATION IN THE PROJECT WAS NOT AN "ACTION" UNDER SEQRA

Supreme Court correctly held that the PACB's Resolution approving ESDC's financial participation in the Project by issuing bonds was not an "action" within the meaning of SEQRA, and that the PACB was accordingly not required to make environmental findings

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[5] The courts have likewise rejected other efforts to halt work in connection with the Project. See Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008) (rejecting constitutional challenge to ESDC's use of eminent domain in connection with the Project), cert. denied, 76 U.S.L.W. 3674 (June 23, 2008); Develop Don't Destroy Brooklyn, 31 A.D.3d at 154-55 (affirming dismissal of petition seeking to annul ESDC's emergency declaration permitting demolition of certain unsafe buildings without undergoing an environmental quality review); Anderson v. State Urban Dev. Corp., 45 A.D.3d 583 (2d Dep't 2007) (rejecting contentions that ESDC failed to comply with SEQRA and the UDCA in authorizing the condemnation of certain property), leave denied, 10 N.Y.3d 710 (2008); Anderson v. State Urban Dev. Corp., 44 A.D.3d 437 (1st Dep't 2007) (affirming dismissal of declaratory judgment action challenging ESDC's authority to condemn various properties on jurisdictional grounds).

under that statute. The text and legislative history of the Public Authorities Law, coupled with the unrebutted evidence in this case, confirm Supreme Court's conclusion that, consistent with the PACB's limited focus on financial considerations, its Resolution was properly based solely on its review of ESDC's financial participation in the Project under the criteria set forth in its governing statute.

While SEQRA generally applies to "any action . . . which may have a significant effect on the environment," Environmental Conservation Law § 8-0109(2), the statute expressly exempts from its application "official acts of a ministerial nature, involving no exercise of discretion." Environmental Conservation Law § 8-0105(5)(ii); see also 6 N.Y.C.R.R. § 617.5(c)(19). As the court below noted, "'[i]n determining whether an agency decision falls within SEQRA's purview, . . . the courts cannot rely on a mechanical distinction between ministerial and discretionary acts alone.'" (A. 28a (quoting Incorporated Vill. of Atl. Beach v. Gavalas, 81 N.Y.2d 322, 326 (1993))). Rather, the "pivotal inquiry" in this case is: could the information contained in an Environmental Impact Statement have any bearing on the PACB's narrow decision, based solely on financial concerns, to approve ESDC's financial participation in the Project? See Gavalas, 81 N.Y.2d at 326; see also App. Br. at 21.

The court below correctly answered that question in the negative. First, the court properly turned to the principle that, "when an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements." Gavalas, 81 N.Y.2d at 326; see also A. 28a. The court undertook a comprehensive review of the Public Authorities Law, including its legislative history, and correctly observed that "[w]hile the PACB undoubtedly has certain discretion," that discretion is confined to reviewing financial aspects of proposed debt-incurring projects, which bear "no relationship to the environmental concerns that may be raised in an [environmental impact study]." (A. 30a) (emphasis added).

The text of the Public Authorities Law makes it clear that, in deciding whether to approve ESDC's application to participate financially in the Project, the PACB had a circumscribed statutory duty to determine whether "there [were] commitments of funds sufficient to finance the acquisition and construction" of the Project. PAL § 51(3). In determining the "sufficiency of commitments of funds," the statute directs that the PACB may consider a number of criteria - all of which focus on fiscal matters. These include the "commitments of funds, projections of fees or other revenues and security," which may, in the PACB's

discretion, include "collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken." Id. Yet nowhere does the statute mention environmental concerns.

Further confirming the focus on financial matters, PAL § 51(2) directs that the PACB shall furnish the state Comptroller (the Chief Fiscal Officer for the State) with a copy of each request for funds-sufficiency approval in order to provide an opportunity for comments. And, while not set forth in the statute, it is undisputed that, since the PACB's inception, its chair has always been the Director of the Budget. (A. 1359a-1360a at ¶¶ 43-45).

The trial court's conclusion regarding the limited purview of the PACB is further buttressed by consideration of the legislative history of its governing statute. As shown above, since its creation in 1976 in response to the credit crisis that precipitated the hearings by the Moreland Commission, the PACB's role has been strictly focused on financial considerations. See pp. 2-5, supra. This is evident from the legislation that created it, which referred to its "express and limited powers, functions and duties," L. 1976, ch. 39, § 2 (at A. 1433a) (emphasis added), and included statements of legislative intent acknowledging the Moreland Commission's recommendation for legislation "to provide immediate and effective control by a public authorities control board of

[certain] . . . public benefit corporations whose activities have . . . had [an] impact on the credit of the state," id.

This singular focus on financial considerations is also underscored by the evidence in this case concerning the bases for the PACB's determinations in response to requests from public authorities. As confirmed by Assistant Chief Budget Examiner Todd Scheuermann, who has chaired meetings of the PACB as the designee of former PACB Chair Paul E. Francis, "[t]he PACB's determinations as [to] whether to approve a public authority's proposed financing of a project are to provide some added assurance that the State's financial interests are not at risk" (A. 1362a at ¶ 54). Mr. Scheuermann also explained that "[t]his limited determination would not be informed by the type and scope of information contained in an environmental impact statement" (id.).

As the Court of Appeals pointed out in Gavalas, given the detailed environmental information that must be included in an EIS, it would be "illogic[al]" to require such a statement where the agency in question "has no authority to approve a proposal based on those environmental concerns," for "[a]n agency that is empowered to consider only criteria that are unrelated to any environmental or land use concerns clearly would not be aided in its decision by the receipt of this highly technical and environmental-specific information." Gavalas, 81 N.Y.2d at 327. Given the PACB's circumscribed focus on financial matters, it would make no sense to

require it to make environmental findings here - particularly where ESDC, the MTA, and the City of New York have each issued such findings.

The case law is consistent with this conclusion. Courts have held that determinations by government entities having oversight over matters far less removed from environmental concerns are "ministerial" acts, rather than "actions" under SEQRA, and thus do not trigger the requirement to make environmental findings. For example, in Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission, 306 A.D.2d 113 (1st Dep't 2003), appeal dismissed as moot, 2 N.Y.3d 727 (2004), this Court held that, in issuing a "certificate of appropriateness" with respect to proposed plans for the construction of a new building, the New York City Landmarks Preservation Commission "was not required to comply with" SEQRA. Id. at 114. Applying the controlling principle from Gavalas that an agency's determination is not a SEQRA "action" when it exercises circumscribed discretion unrelated to environmental concerns, id. (quoting Gavalas, 81 N.Y.2d at 326), the court concluded that:

> The Commission's determination with respect to a [certificate of appropriateness] application, limited to the appropriateness of the proposed building's exterior architectural features and narrowly circumscribed by the architectural, aesthetic, historical and other criteria specifically set forth in the Landmarks Preservation Law . . . was 'ministerial' for SEQRA purposes.

Id. (citation omitted); see also Ziemba v. City of Troy, 37 A.D.3d 68, 74-75 (3d Dep't 2006) (city planning board was not required to conduct a SEQRA review of an application for a demolition permit where the board's discretion was "limited to a narrow set of criteria" pertaining to "conventional safety concerns" that were "unrelated to the environmental concerns that would be raised in an EIS"), leave denied, 8 N.Y.3d 806 (2007).

The conclusion that the PACB's Resolution in this case was not an "action" within the meaning of SEQRA is, moreover, consistent with the only other decision the parties have identified addressing the question of whether the PACB is required to make environmental findings. In New York Public Interest Research Group, Inc. v. PACB, Index No. 6944-97 (Sup. Ct. Albany County Sept. 10, 1998), petitioners brought an Article 78 proceeding to annul the PACB's approval of a major acquisition by the Long Island Power Authority. Like petitioners here, they alleged that the PACB had failed to consider the acquisition's environmental impact and had thereby violated SEQRA. The court rejected that argument, holding that the PACB's discretion was "limited to consideration of financial aspects of the project and did not authorize review of environmental factors," or authorize the PACB to "conduct a SEQRA review." (Slip Op. at 10-11 (included in Respondent PACB's Appendix at A. 88-98)). Indeed, since it was created in 1976, the PACB has never been held subject to SEQRA by any court, nor has it

been deemed a "lead agency" or "involved agency" under that statute. See 6 N.Y.C.R.R. § 617.2(u) (defining a lead agency as "an involved agency principally responsible for undertaking, funding or approving an action"); id. § 617.2(s) (defining an involved agency as one that "has jurisdiction by law to fund, approve or directly undertake an action"); see also Environmental Conservation Law § 8-0109(8) (requiring every agency that approves an "action" to make environmental findings).[6]

The sole basis on which petitioners contend that PACB has a more expansive purview - contrary to the text of the statute, the legislative history, and the unrebutted affidavit by Mr. Scheuermann - consists of statements attributed to a member of the PACB in connection with an unrelated project. See App. Br. at 22-23 (quoting statements attributed to Assembly Speaker Sheldon Silver in connection with his anticipated vote in June 2005 on the proposed West Side Stadium). Petitioners rely on these statements to suggest that the PACB has in fact considered criteria other than financial considerations when approving applications for financial participation in a project. Id. at 22-24. But the minutes of the

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[6] This case is thus a far cry from the decisions on which petitioners rely, including Pius v. Bletsch, 70 N.Y.2d 920 (1987). See App. Br. at 24. As Gavalas explained, Bletsch involved a true agency "action" under SEQRA, because the agency in question exercised "site plan approval powers" and took into account "land use and environmental considerations," thus forging a "relationship . . . between the types of decisions to be made [by the agency] and the environmental concerns enumerated in an EIS." Gavalas, 81 N.Y.2d at 326-27.

actual PACB meeting regarding the West Side Stadium project show that the PACB was focused squarely on financial factors and, when one non-voting PACB member posed a question about security, the chair "ruled the question non-germane to the issue at hand." (PACB Appendix at A. 83). In any event, nothing in the statements attributed to Mr. Silver could alter the limited mandate of the PACB as defined by the Legislature in §§ 50 and 51 of the Public Authorities Law.

Given the limited focus of the PACB on financial considerations, and given that its December 20, 2006 Resolution approving ESDC's financial participation in the Atlantic Yards Project would not have been informed by an Environmental Impact Statement or environmental findings, its Resolution was not an "action" for purposes of SEQRA, and the court correctly held that the PACB was therefore not required to make any SEQRA findings.

CONCLUSION

For the foregoing reasons, the January 11, 2008 Decision, Order and Judgment should be affirmed insofar as it held that the PACB was not required to make environmental findings under SEQRA.

Dated: New York, New York
August 5, 2007

Respectfully submitted,

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Peter Karanjia