

To be Argued by:
JOHN R. CASOLARO
(Time Requested: 30 Minutes)

Court of Appeals
of the
State of New York

In the Matter of the Application of
PARMINDER KAUR, AMANJIT KAUR
and P.G. SINGH ENTERPRISES, LLP,

Proceeding
No. 1

Petitioners-Respondents,

For a judgment pursuant to Section 207 of the EDPL

– against –

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Appellant.

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENT-APPELLANT

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In the Matter of the Application of

TUCK-IT-AWAY, INC., TUCK-IT-AWAY BRIDGEPORT, INC., TUCK-IT-AWAY AT 133RD STREET, INC. and TUCK-IT-AWAY ASSOCIATES, L.P.,

Petitioners-Respondents,

Proceeding
No. 2

For a judgment pursuant to Section 207 of the EDPL

– against –

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Appellant.

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PRELIMINARY STATEMENT

New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) appeals from the December 3, 2009 decision of the Appellate Division rejecting ESDC’s Determination and Findings issued in connection with the Columbia University Educational Mixed-Use Development Project (the “Project”). Petitioners’ original proceedings filed pursuant to Eminent Domain Procedure Law (“EDPL”) §207 in the Appellate Division sought review of ESDC’s decision to acquire property necessary for the Project.

The Project involves the creation of new educational, academic research, recreational and civic facilities. The Project would benefit the City and State of New York and the Manhattanville area of West Harlem by: (1) rehabilitating a blighted area; and (2) constructing new educational facilities. The Project – estimated to cost \$6.28 billion and to create thousands of jobs – would also stimulate the economy and create publicly accessible open space.

ESDC approved the Project under the New York State Urban Development Corporation Act (“UDC Act”) as a Land Use Improvement Project because it will eliminate blighted conditions and as a Civic Project because it will serve educational purposes.¹ Either purpose of the Project – the elimination of blight or the promotion of education – is an independently sufficient rationale for ESDC to approve the Project

¹ See Unconsol. Laws §6260(c) and (d).

under the UDC Act. Similarly, the Project will serve a public use, benefit or purpose whether viewed as an urban renewal project or as an education project.

The plurality opinion in the Appellate Division, written by Justice Catterson (and joined in by Justice Nardelli) wholly ignored the decision of this Court issued nine days earlier in *Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009), *rearg. den.*, 2010 WL 547637 (Feb. 18, 2010) (“*Goldstein*”). The plurality should have confirmed ESDC’s Determination and Findings unless there was “no room for reasonable difference of opinion as to whether the area is blighted.”² Instead, the plurality conducted what in substance was a *de novo* review of the record, second guessing ESDC’s reasoned decision that the Project qualifies as a Land Use Improvement Project. In doing so, the plurality disregarded overwhelming evidence that the Project Site is blighted. Three independent neighborhood conditions studies all documented evidence that numerous buildings in the area are in poor condition as a result of structural deterioration, years of neglect, and environmental and other insanitary conditions. Instead of acknowledging the objective, well documented evidence of these pervasive conditions, the plurality focused its attention on other, more subsidiary factors that ESDC also considered in its assessment – underutilization and vacancy rates. In contravention of decades of this Court’s precedents, the plurality held that it was error for ESDC to even consider underutilization of the Project Site; yet the

² *Goldstein*, 13 N.Y.3d at 526.

underutilization methodology ESDC used here as one factor in its assessment was precisely the same methodology it used in the blight study for Atlantic Yards upheld in *Goldstein*. The plurality's discussion of vacancy rates is riddled with error, as there is no material difference between the vacancy criterion used here and the one used in the blight study upheld in *Goldstein*.

The plurality also held unconstitutionally vague "as applied" the term "substandard and insanitary" area, which this Court had applied in *Goldstein*. The plurality's "void for vagueness" holding is inconsistent with decades of New York case law upholding the designation of areas for urban renewal under the UDC Act and other State statutes with similar language.

The plurality also rejected ESDC's determination that the Project qualified as a Civic Project, which is defined in the UDC Act to include projects that serve "educational ... purposes."³ Contrary to the plain language of the UDC Act, the plurality held that the term "educational" is limited to public education. Since it is undisputed that the Project will serve educational purposes and education is indisputably a public purpose, ESDC properly approved the Project as a Civic Project.

The underlying premise of the plurality's opinion is that ESDC cannot participate in a project proposed by a private sponsor (in this case, Columbia University). Yet, in *Goldstein*, this Court held that ESDC had properly exercised eminent domain for the

³ Unconsol. Laws §6260(d).

Atlantic Yards project proposed by Forest City Ratner and to be constructed and operated by that company.

A third member of the panel, Justice Richter, concurred only on the ground that, in her view, ESDC closed the record and made its Determination and Findings prematurely in view of unresolved Freedom of Information Law ("FOIL") disputes, including one that was pending in this Court. The documents withheld by ESDC as exempt under FOIL were peripheral and did not impede Petitioners' ability to participate in the ESDC hearing and public comment period under the EDPL. Petitioners had copies of the documents that ultimately formed the basis for ESDC's decision well prior to the close of the public comment period and were able to present their critique of these documents to ESDC Directors and agency staff. Indeed, Petitioners submitted over 4,000 pages of comment, together with two legal memoranda. They clearly had the meaningful opportunity to be heard required by procedural due process.

Justice Tom wrote a dissent in which Justice Renwick joined, citing this Court's recent decision in *Goldstein*, and concluding that (1) Petitioners' objections to ESDC's Determination and Findings merely presented a "difference of opinion" as to the conclusions to be drawn from the evidence, in which event the courts are bound to defer to the agency;⁴ (2) ESDC did not exceed its authority under the UDC Act in

⁴ *Goldstein*, 13 N.Y.3d at 526.

designating the Project a "land use improvement project" and a "civic project;" (3) ESDC's finding that the Project will serve a public purpose was neither irrational nor baseless; and (4) there was no basis for Petitioners' contention that ESDC closed the record prematurely and Petitioners failed to seek relief from the automatic stay provided to ESDC under CPLR §5519(a)(1).

STATEMENT OF QUESTIONS PRESENTED

- 1. Did ESDC have a rational basis for determining that the proposed Project qualifies as a Land Use Improvement Project under the UDC Act, where there is ample evidence of "substandard and insanitary" conditions as documented in studies prepared by multiple professional consultants and engineers?*
- 2. Is the UDC Act definition of "substandard and insanitary" unconstitutional under the "void for vagueness" doctrine?*
- 3. Does the term "educational" in the UDC Act definition of "Civic Project" encompass university facilities owned and operated by Columbia University?*
- 4. Did ESDC have a rational basis for determining that the proposed Project would serve a public use, benefit or purpose?*
- 5. Did ESDC violate due process by closing its administrative record during the pendency of Article 78 proceedings commenced by Petitioners pursuant to the Freedom of Information Law, where the studies upon which ESDC made its administrative findings were available to the public well before the close of the public comment period?*

STATEMENT OF FACTS

A. *Overview of the Columbia Educational Mixed-Use Development Project*

The Project involves the acquisition of approximately 17 acres in the Manhattanville area of West Harlem for the development of a modern, gateless, open, urban campus of Columbia University in the City of New York (“Columbia”).⁵ The Project is estimated to cost \$6.28 billion,⁶ and will be funded by Columbia without any contribution by ESDC and without any taxpayer subsidies.⁷

The Project would enable Columbia to construct the modern facilities necessary to maintain its position as a leading university. Those facilities – laboratories, classrooms, academic research facilities, faculty offices, libraries, university housing, study and performance spaces – are essential to the academic research, teaching, learning, and discourse at the core of higher education and are prerequisites for attracting and retaining top faculty and students.⁸

The Project includes buildings to be dedicated to advanced scientific research. Among the first buildings to be constructed as part of the Project will be the Jerome L. Greene Science Center for Columbia’s Mind, Brain and Behavior Initiative for the study of neurological diseases, such as Alzheimer’s, Parkinson’s, autism, dementia and

⁵ The Project is described more fully in ESDC’s Modified General Project Plan (“GPP”). A-2520-93.

⁶ The cost of the Project was calculated based on 2007 dollars.

⁷ A-2.

⁸ A-2528-33.

schizophrenia.⁹ Columbia will be prohibited by restrictive declarations from using the Project Site to conduct scientific research as a commercial enterprise.¹⁰

An essential component of the Project is a nearly 2 million gross square-foot continuous Below-Grade Facility, which will extend from West 129th Street to West 133rd Street, between Broadway and 12th Avenues (the “Below-Grade Facility”). The Below-Grade Facility will be developed with multiple levels extending to a depth of up to approximately 80 feet and will provide integrated space for all of the new buildings to be constructed on the main portion of the Project Site – 13 of the total 16 new buildings that will comprise the Project. By providing below-grade space for central energy facilities, multi-block science support, mechanical operations, and loading, freight and parking facilities that service most of the Project’s new construction, the Below-Grade Facility would help minimize street congestion and its attendant mobile source emissions and would reduce the density of above-grade development, thereby making room for new public open spaces, broader sidewalks and improved sight lines. None of these Project components and associated benefits could be achieved through traditional basement construction.¹¹ Because 4 of the 6 properties owned by Petitioners are situated diagonally across the main portion of the Project Site, the Below-Grade

⁹ A-2541-42 (discussing construction during Phase I of Project).

¹⁰ A-2546 (discussing restriction against conduct of scientific research as a commercial enterprise).

¹¹ A-2527 and A-2538-39 (discussing Below-Grade Facility), A-2589 (illustrating anticipated below-grade development).

Facility and its benefits – and indeed the Project itself – cannot be realized without the use of eminent domain ¹²

Project design calls for existing City streets within the Project Site to remain open (except during construction), thereby providing access to and through the campus and facilitating a mix of street-level uses. This feature of the Project would strengthen Columbia's connection to the area, connect Central and West Harlem to new open space and recreational opportunities planned within the West Harlem Piers Park, and draw nearby residents to new, active ground floor retail and community uses.¹³

B. The Project Will Eliminate Blighted Conditions

The Project site and its surrounding area have long been plagued by depressed economic conditions. Despite numerous urban renewal initiatives dating from the 1950s, substandard and deteriorated conditions have persisted at the Project Site.¹⁴

¹² See A-2581 (identifying Blocks and Lots within Project site); A-87a (identifying Respondents Tuck-It-Away, Inc. as the owner of Block 1997, Lot 44 (a/k/a 614 W. 131st St.) and Block 1998, Lot 29 (a/k/a 3261 Broadway), and Tuck-It-Away Bridgeport, Inc. as the owner of Block 1996, Lot 56 (a/k/a 655 W. 125th St.)); A-198a (identifying Respondent P.G. Singh Enterprises, LLC as the owner of Block 1996, Lot 35).

¹³ A-2527; *see also* A-2902 (ESDC's Response to Comment no. 104); A-1771 (Tuck-It-Away's Submission for the Record (on compact disc), Vol. 1, at p. 384) (West Harlem Master Plan's discussion of waterfront revitalization).

¹⁴ See A-3358 (AKRF Manhattanville Neighborhood Conditions Study, *Exec. Summary*, at p. vi) (“[T]he study area reflects a half a century of limited private sector investment. . . . [N]one of the [renewal] initiatives has been implemented, and as a result, physical conditions in the study area continue to deteriorate.”); A-158 (Manhattanville in West Harlem Rezoning and Academic Mixed-Use Development Project Final Environmental Impact Statement, Chapter 1, *Project Description*, at pp. 1-21 to 1-22) (discussing the history of Manhattanville and the need for revitalization).

1. *Urbitran's Blight Study*

The earliest neighborhood conditions study contained in the record was developed in 2003 by Urbitran Associates, Inc. ("Urbitran"), an engineering, architecture and planning firm, on behalf of New York City Economic Development Corporation ("EDC").¹⁵ That study documented substandard and deteriorated conditions throughout the Project Site and in a larger area of West Harlem.¹⁶ Urbitran looked at four major criteria: signs of deterioration, substandard or unsanitary conditions, adequacy of infrastructure, and indications of the impairment of sound growth in the surrounding community.¹⁷ Urbitran concluded that "the conditions in the study area merit a designation of blight" with respect to three of the four major criteria: signs of deterioration, substandard or unsanitary conditions, and indications of the impairment of sound growth in the surrounding community.¹⁸ When evaluating building conditions, Urbitran characterized a structure as "dilapidated" only if it exhibited "significant evidence of aesthetic degradation (usually a combination of broken windows, peeling paint, and façade damage, among other things)."¹⁹ The study

¹⁵ A-3301-3348. A copy of the Urbitran Study can also be found at p. 1779 (Tuck-It-Away's Submission for the Record (on compact disc), Vol. 9, at pp. 323-37), with unredacted conclusion pages at A-2505-06.

¹⁶ A-3307, A-3319 (describing and illustrating boundaries of study area).

¹⁷ A-3317.

¹⁸ *Id.*

¹⁹ A-3309-10.

“revealed that dilapidated structures were dispersed throughout the study area.”²⁰

Urbitran also undertook a detailed architectural survey of each lot to examine the occupancy, site conditions, exterior conditions, possible accessible interior, health and safety systems, and parking conditions.²¹ The exterior conditions aspect of the survey included examination of foundations, walls, doors, windows, balconies or entryways, roofing, fire escapes and graffiti.²² A significant number of buildings evidenced poor or critical exterior conditions and structural degradation.²³ Urbitran attributed those conditions to the age of the buildings and the nature of the businesses.²⁴ Other factors Urbitran considered include land use conflicts, vacancy rates in the study area, and building violations.²⁵ Two of the blocks with the highest number of deficient lots are in the heart of the Project Site.²⁶ Urbitran determined that, as of 2003, 40 of the 67 lots had critical or poor site and/or building conditions.²⁷

2. *AKRF's Neighborhood Conditions Study*

In order to determine whether the Project area qualified as a Land Use Improvement Project under the UDC Act, ESDC investigated site conditions. ESDC

²⁰ A-3310.

²¹ *Id.*

²² A-3311.

²³ *See* A-3324.

²⁴ *See* A-3317.

²⁵ A-3307-08, A-3312-13, A-3315-16.

²⁶ *See* A-3310 (identifying Blocks 1997 and 1996 as having “the highest number of deficient lots.”); A-3323 (figure identifying sites in poor or critical condition as of October 2003).

considered the conditions documented in the Urbitran study, but opted to commission its own, more current neighborhood conditions study. ESDC retained AKRF, an experienced and respected consulting firm which had prepared the blight study upheld by this Court in *Goldstein* and environmental impact statements upheld by this Court in *Akpan v. Koch*, 75 N.Y.2d 561, 563-64 (1990) and *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 425-26 (1986) (“*Jackson*”), to evaluate the conditions at the Project Site.²⁸ AKRF was selected, in part, because it was already familiar with the site as a result of its work preparing the environmental impact statement (“EIS”) for this Project for Columbia and the City Planning Commission.²⁹ AKRF retained the internationally-known engineering firm of Thornton Tomasetti, Inc. to inspect and evaluate the physical condition of each existing structure among the Project Site’s numerous properties.³⁰

AKRF photographed and conducted detailed inspections and assessments of each of the individual 66 lots in the Project Site, documenting structural conditions, vacancy rates, site utilization, property ownership, and crime data.³¹ For each building, AKRF documented the physical and structural conditions, health and safety concerns, building

²⁷ A-2916 (ESDC Response to Comment no. 129).

²⁸ A printed copy of AKRF’s report, including Thornton Tomasetti’s site condition assessment reports, is included in Respondent’s Appendix beginning at A-3349. AKRF’s report and Thornton Tomasetti’s site condition assessment reports are also included on compact disc at A-159.

²⁹ See A-158 (FEIS, *Foreword*).

³⁰ A-3354.

code violations, underutilization, and environmental hazards.³² AKRF selected these factors “because they are generally accepted indicators of disinvestment in a neighborhood. The widespread presence of one or more of these factors can also demonstrate the need for revitalization and redevelopment of an area.”³³

In evaluating structural conditions, AKRF and Thornton Tomassetti documented the integrity of exterior walls, roof systems, beams, columns, joists, and floor slabs; building materials, such as the roof membrane, ceiling, and flooring; stairways and elevators; windows and doors, including framing; and general sidewalk and curb cut conditions. Based on these objective engineering evaluations, Thornton Tomassetti provided an overall rating of the condition of each lot.³⁴

In their review of health and safety concerns, AKRF and Thornton Tomassetti documented evidence of mold or efflorescence inside the buildings, blocked fire exits, inoperable elevators, unsound stairs, vermin infestation, standing water, excessive debris, obvious environmental hazards, and poor sidewalk conditions. AKRF also noted health and safety concerns noted in New York State Department of Agriculture and Markets sanitary inspection reports.³⁵

³¹ A-3365.

³² A-3366-68.

³³ A-3366.

³⁴ A-3367.

³⁵ *Id.*

AKRF's report shows that most of the lots in the Project Site are devoted to automotive and light industrial use, and, based upon Thornton Tomassetti's inspections, more than 60% of the lots suffer from one or more substandard, unsafe, insanitary or deteriorated conditions, including exhibiting critical and poor physical condition and a utilization rate of 60% or less.³⁶ Approximately 87% of the buildings in the Project Site were built more than 50 years ago and some 14% of the buildings were constructed more than a century ago. The high percentage of lots with multiple substandard conditions indicates that the area has been suffering from long-term poor maintenance and disinvestment.³⁷ A complete copy of AKRF's report with photographs is included in the Appendix.

3. *Earth Tech's Neighborhood Conditions Study*

In response to questions raised about the propriety of ESDC's use of AKRF, which had also prepared the EIS for the Project as Columbia's consultant, ESDC retained a second consultant, Earth Tech, Inc., an internationally-known engineering and environmental consultant, to separately assess Project Site conditions, review Thornton Tomassetti's factual data and analysis relating to the structural conditions of

³⁶ A-3351-54, A-3360.

³⁷ A-3354, A-3361.

buildings in the Project Site, and issue its own independent report.³⁸ Earth Tech does not and has never worked for Columbia.³⁹

Earth Tech's own professional engineers independently photographed, inspected and assessed each of the 66 lots on the Project Site, noting current land uses, structural conditions, health and safety issues, utilization rates under current and former zoning, vacancies, environmental contamination, Building Code violations, crime statistics, and ownership records.⁴⁰ Earth Tech documented a pattern of disinvestment in the neighborhood, demonstrated both by the paucity of new buildings constructed since 1961 and by the long-term neglect of building maintenance and extensive Building Code violations in the area.⁴¹ The long-term neglect of the buildings in the Project area led to chronic problems with water infiltration, ultimately compromising the structural integrity of the buildings.⁴² As of July 2006, there were 410 open Building Code violations, relating to 75% of the lots in the Project Site.⁴³ These violations include the unlawful use of upper floors for parking; lack of building maintenance with respect to walls, windows, ceilings and floors; blocked or non-existent fire exits; a lack of fire-

³⁸ A printed copy of Earth Tech's report is included in Respondent's Appendix beginning at A-5399. Earth Tech's report is also included on compact disc at A-160.

³⁹ A-2878 (ESDC Response to Comment no. 20).

⁴⁰ A-5403

⁴¹ *Id.*

⁴² A-5405.

⁴³ A-5403.

retardant building materials; failure to maintain boilers; and failure to maintain elevators.⁴⁴

Earth Tech also found that many of the buildings have deteriorated facades, severely rusted columns, and chronic neglect of roof maintenance, resulting in deteriorated roof membranes, damaged parapets and poorly sloped roofs.⁴⁵ Several buildings have been sealed by the Fire Department because of their unsafe conditions and numerous properties have sidewalk sheds to protect pedestrians from falling masonry.⁴⁶ There is widespread evidence of vermin on the streets and graffiti on the walls of buildings and other structures.⁴⁷ Inside the buildings, walls and floor slabs are deteriorated and afflicted with mold, cracks, spalling, and efflorescence.⁴⁸ Numerous properties have broken, damaged and deteriorated ceilings and flooring, mostly caused by chronic water infiltration.⁴⁹ The report also exposes inoperable elevators with hazardous building code violations, such as damaged walls and floor plates; inadequate emergency exits; and exposed and haphazardly installed electrical wiring.⁵⁰

The four parcels owned by the Tuck-It-Away Petitioners, taken together, have more than three times the average number of building violations than parcels acquired

⁴⁴ *Id.*

⁴⁵ A-5430-31, A-5454-56.

⁴⁶ A-5430-31.

⁴⁷ A-5434, A-5462-63.

⁴⁸ A-5456.

⁴⁹ A-5457-58.

by Columbia.⁵¹ As an especially egregious example, for more than 18 years, Tuck-It-Away has unlawfully used its building at 3300 Broadway as a parking garage in direct contravention of zoning and its certificate of occupancy.⁵² As a result of improper use, the building, which was constructed in 1918 and not designed to support heavy multi-level automobile parking, was required to be evacuated in 2008 to avoid imminent collapse under the weight of illegally-parked automobiles and misaligned columns.⁵³ A complete copy of Earth Tech reports, with photographs, is included in the Appendix.

C. The Project Will Serve Educational Purposes

Higher education is fundamental to the intellectual, economic and cultural growth of society. Modern educational and research facilities are critical to fulfilling that purpose. New York has always been a leader in offering world class private and public educational opportunities to its citizens. The State's private and public colleges and universities have become a driving force of the 21st century "knowledge economy."

Private colleges, universities and other cultural institutions have grown at a rate more than three times the rate of New York State's economy, increasing employment by 16% between 1990 and 2005. While industrial employment has been steadily decreasing in New York City, private colleges and universities have been growing and currently

⁵⁰ A-5460-61.

⁵¹ A-2916.

⁵² See A-2917, A-3463-67, A-5547-61.

⁵³ *Id.*

annually spend \$2.1 billion in research in New York State, spurring the creation of 10,000 new jobs in the private sector. Although technological changes have shifted jobs in finance, insurance and real estate away from urban centers, the interpersonal nature of educational institutions is more difficult to replicate in cyberspace.⁵⁴

Columbia, a non-profit educational institution accredited by the New York State Board of Regents,⁵⁵ is widely regarded as a leading institution of higher education. Founded in 1754 as Kings College, and renamed Columbia by act of the State Legislature in 1784, Columbia is the oldest institution of higher education in New York State and the fifth oldest in the nation. Columbia has helped promote New York City as a major center of higher education, enabling the City and New York State to maintain their educational, knowledge-based and cultural leadership positions. Columbia's generous financial aid programs provide opportunities to economically-disadvantaged students and support a broad and diverse student population.⁵⁶ Columbia is part of the University of the State of New York governed by the State Board of Regents.⁵⁷

⁵⁴ A-2989; *see also* A-2481-2503 (discussing the economic significance of New York State's private universities).

⁵⁵ Educ. Law §§ 2(3), 214; <http://www.regents.nysed.gov/reports/usny.html>. (The Board of Regents supervises all members of the University of the State of New York. See Point II B (2) below).

⁵⁶ A-2528-29.

⁵⁷ L. 1784, ch. 51; N.Y. Const. art. XI, §2.

Columbia maintains a “need blind” admissions policy for its undergraduate programs in the College and School of Engineering, meaning that Columbia reviews applications for admission to those programs without any knowledge of the applicants’ financial resources. Columbia meets the full demonstrated financial need of all Columbia College and Engineering undergraduate students.⁵⁸

Columbia’s ratio of square footage per student is already considerably lower than any of its peer universities. In order to keep pace with other major research universities, Columbia must expand its program space by approximately 5 to 6 million square feet (exclusive of support space) over the next 25 years and construct buildings that have large floor plates. Because of its densely-populated urban location in the largest and most densely-populated City in the nation, however, Columbia faces significant challenges in addressing its long-term space needs, which are important to promoting integration among disciplines and schools, creating an environment that would foster new areas of educational and academic research, and providing sufficient room for services for both Columbia’s population and local residents.⁵⁹

The Project would create an estimated 6.8 million gross square feet of building space, with just over 5 million gross square feet for use by Columbia for higher

⁵⁸ <http://www.studentaffairs.columbia.edu/finaid/faq/prospective.php#6>; A-2009-10.

⁵⁹ A-2529-33.

education purposes, including teaching, academic research, recreation, below-grade support and university housing.⁶⁰

D. The Project Will Also Generate Thousands Of Jobs And Unprecedented Civic And Community Benefits

In addition to remediating a blighted area and providing academic facilities, the Project will also generate thousands of jobs. Columbia, the seventh largest private employer in New York City, currently employs more than 14,000 people. Columbia will employ an additional 14,000 people during the construction of the Project and, once the campus is fully operational, approximately 6,000 people at the Project Site in long-term jobs not susceptible to outsourcing.⁶¹

In connection with the Project, Columbia will also provide a multitude of other civic benefits valued at \$150 million, including (i) a community benefits fund of \$76 million; (ii) \$20 million of in-kind benefits in the form of access to Columbia facilities, services and amenities; and (iii) \$20 million in total contributions to the Harlem Community Development Corporation (an ESDC subsidiary) to support a range of initiatives benefiting the greater Harlem community. Columbia has also committed support valued at \$30 million in connection with a planned New York City-Teachers

⁶⁰ A-2524, 2533.

⁶¹ A-1, A-2557-58.

College Demonstration Community Public School which would serve students from the Project area.⁶²

Columbia is committed to local infrastructure improvements and other community benefits, including: free wireless internet access throughout the open spaces to be created by Columbia in Manhattanville; shuttle bus service for the elderly and disabled; and viaduct lighting improvements, maintenance and electricity at the intersections of West 125th Street and 12th Avenue and West 125th Street and Broadway; community access to swimming facilities, meeting rooms, and 5,000 square feet of space for community artists; education for the community about diseases that affect the mind and brain, stroke awareness lectures and free blood pressure and cholesterol screenings, free dental services for pre-school children and seniors, and free education, screening and referrals for seniors.⁶³

Columbia will provide extensive educational benefits to the public, including a targeted recruitment effort to support up to 40 aid-eligible students from the area annually; making available its libraries, computer facilities, faculty and other academic support facilities and services to assist students from the New York City Department of Education High School for Math, Science and Engineering; providing a pilot program for up to 15 summer internships for local high school students; initiating a targeted

⁶² A-2567, A-2571.

⁶³ A-2562-65.

outreach program in partnership with community-based organizations to identify and engage disconnected youth to enroll them at no cost in existing New York City programs or GED programs and, upon completion, referring those students to skills training, internships and work-based learning opportunities, and making good faith efforts to offer Columbia employment; offering independent scholars from Northern Manhattan access to a range of Columbia services; arranging for Columbia varsity sports programs and coaches to sponsor and participate in seasonal sports clinics for local children; and offering 25 scholarships per summer based upon financial need to local children to attend Columbia sports camps.⁶⁴

Columbia also has implemented a program with New York City to develop the capacity of minority-, women- and locally-owned construction firms so that they can manage larger contracts, specifically including construction trade work on the Project. Columbia has committed to: a goal of awarding 40% of all construction jobs for the Project to minority, women and local individuals; providing up to \$750,000 to support the design, development and implementation of industry response (skills-based) education and workforce development training; providing \$1 million to the CUNY-Columbia Health Sciences Award Program to double the number of students supported; funding a matching program with community organizations to provide job training; marketing at least 12,000 gross square feet of small format retail space for local

⁶⁴ A-2565-68.

entrepreneurs and existing local businesses; and giving priority for new Project Site space to any business that is displaced by the Project and is in good standing on its current lease.⁶⁵

Columbia will also make the following contributions – and although these contributions might be categorized as efforts to address potential or possible adverse impacts of the Project under SEQRA – they still benefit the community: an affordable housing fund of \$20 million and up to \$4 million in related legal assistance benefits; funding for playground and schoolyard enhancement for a local public school; funding for enhanced services at West Harlem Piers Park; an upgrade of the escalators at the 125th Street IRT Subway Station.⁶⁶

E. The Public Process

The public process for the Project was extensive and spanned over four years. The formal process began when the New York City Planning Commission (“CPC”) and the City Council first considered rezoning approximately 35 acres of West Harlem, including the 17-acre Project Site (the “Rezoning”). This triggered an extensive public review pursuant to New York City’s Uniform Land Use Review Procedure (“ULURP”). CPC considered the potential environmental impacts of the Rezoning in the EIS. The Final EIS (“FEIS”) evaluated nine alternatives to this Project. Among these alternatives were three versions of a proposal by Community Board 9. None of

⁶⁵ A-2568-69. None of these benefits is intended as “mitigation” for Project impacts.

those proposals, however, would allow room for publicly accessible open spaces and community facilities, and CPC and the City Council ultimately determined that the alternatives would be less beneficial to the public interest than the rezoning based on Columbia's proposal.⁶⁷

On November 16, 2007, CPC, as lead agency, issued a Notice of Completion of the Final EIS ("FEIS") and on November 26, 2007, issued its findings on the FEIS.⁶⁸ In its findings, CPC also stated that Columbia "is of significant importance to the City and State as a center of educational excellence and a source of economic growth, and the Academic Mixed-Use Development Plan is intended to fulfill these purposes."⁶⁹

CPC further stated that Columbia "is a major educational institution and center of state-of-the-art research in the sciences and humanities, and makes a valuable contribution to the intellectual, scientific and cultural life of the City."⁷⁰ CPC approved the rezoning for the Project to facilitate the construction of "modern, state-of-the-art educational and research facilities" in the context of "a new urban campus environment" that will be "integrated with the urban grid, with all streets remaining

⁶⁶ A-2562, A-2571.

⁶⁷ A-158 (FEIS, Chapter 24, *Alternatives*).

⁶⁸ See A-3062-63. CEQR is the City's Environmental Quality Review procedure.

⁶⁹ A-2091.

⁷⁰ A-2079.

open to the public ... and a new open space network open to University-affiliated personnel and the general public alike.”⁷¹

CPC “recognized that, as a matter of law, eminent domain may be utilized for projects which fulfill a public purpose, including projects under the sponsorship of private entities, such as Columbia University.”⁷² Based on a careful review, CPC concluded that “the open space network, Central Below-Grade Service Area, and other beneficial features of the Columbia proposal” may require the use of eminent domain,⁷³ and that the exercise of eminent domain “would serve a public purpose insofar as it would allow for realization of the public benefits of the Columbia proposal.”⁷⁴

On December 19, 2007, after compliance with SEQRA and ULURP, which included public hearings and multiple opportunities for comment, the City Council approved the Rezoning.⁷⁵

After the City approved the Rezoning, ESDC adopted a proposed General Project Plan (“GPP”) for public comment on July 17, 2008. The GPP, together with the Rezoning, would allow the development of a Columbia campus that would include academic and academic research facilities, university-related housing, more than two

⁷¹ A-2081.

⁷² A-2090-91.

⁷³ A-2090.

⁷⁴ A-2093.

acres of publicly accessible open space and street-level uses that will transform the Project Site into a vibrant, attractive urban streetscape.⁷⁶

ESDC solicited public comment on the GPP and its proposed use of eminent domain in connection with the Project. Pursuant to EDPL Article 2, ESDC held a duly-noticed public hearing on September 2 and 4, 2008 extending over a period of approximately 13 hours. The public hearing was well attended and 98 attendees, including Petitioners and their counsel, spoke about the Project.⁷⁷ At the public hearing, ESDC distributed copies of the GPP (as adopted) and also made available for inspection by the public copies of the FEIS and the AKRF and Earth Tech neighborhood conditions reports.⁷⁸ Each of these documents was also publicly available for inspection at ESDC's offices and other locations from the time public notice of the hearing was given.⁷⁹ ESDC continued to make these documents available until the close of the public hearing comment period.

⁷⁵ A-3061, A-3063, Zoning Resolution of the City of New York, Art. X, Ch. 4 (Special Manhattanville Mixed Use District) §104-00 *et seq.*, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml>.

⁷⁶ A-3063; A-2585, A-2587 and A-2591 (GPP, Exs. C, D & F).

⁷⁷ A-990-1132 (Notice of Public Hearing & Affidavit of Service of Notice by certified mail); A-1133-1414 (transcript of Sept. 2, 2008 portion of public hearing), A-1415-1706 (transcript of Sept. 4, 2008 portion of public hearing); A-1135 (listing Ms. Arman Kaur and Mr. Smith as speakers), A-1192-96 (statements of Ms. Arman Kaur and Mr. Smith); A-1417, A-1418, A-1420 (listing Messrs. Sprayregen, Siegel and van Buren as speakers), A-1483-99 (statements of Messrs. Sprayregen, Siegel & van Buren), A-1569-79 (continued statement of Mr. Siegel).

⁷⁸ A-1142-43; A-996-97.

⁷⁹ A-996-97.

In addition to participating in the public hearing, Petitioners also submitted two legal memoranda and more than 4,000 pages of materials (including documents which ESDC had previously made available) during the comment period. ESDC prepared a comprehensive document entitled "Response to Comments," which responded to all the comments received from Petitioners and others.⁸⁰

Petitioners and their counsel made additional comments at the December 18, 2008 meeting at which ESDC's Directors affirmed the GPP, which had been modified in certain respects in response to comments received, as a Civic Project and as a Land Use Improvement Project in accordance with the UDC Act.⁸¹ ESDC permitted public comment at this meeting even though not required by the UDC Act.⁸² At the same meeting, ESDC's Directors approved ESDC's 83-page SEQRA Statement of Findings, affirmed the revised GPP and made its Determination and Findings pursuant to EDPL §204.⁸³

⁸⁰A-1732-56 (Tuck-It-Away's Issues, Facts & Objections in Opposition to the Project), A-1757-70 (Tuck-It-Away's Preliminary Findings & Objections to the Finding of Blight), A-1771 (Volumes 1-4 of Tuck-It-Away's Sept. 4, 2008 submissions for the Record); A-2868-2942 (ESDC's Response to Comments).

⁸¹ A-3145-3255 (transcript of Dec. 18, 2008 meeting of ESDC directors), A-3147-48 (listing Messrs. Smith, Siegel, Sprayregen and Ms. Aman Kaur as speakers at Dec. 18, 2008 meeting), A-3168-70 (statement of Mr. Smith), A-3172-77 (statement of Mr. Siegel), A-3182-85 (statement of Mr. Sprayregen), A-3194-96 (statement of Ms. Aman Kaur), A-3209-11, 3214-21 (continued statement of Mr. Siegel); *See* Unconsol. Laws §6260(c) and (d).

⁸² *Id.*

⁸³ *See* A-3231 and A-3231 (affirming Statement of Findings pursuant to SEQRA and Modified GPP) SEQRA findings statement); A-3054-3144 (ESDC's SEQRA findings statement); A-1-11 (ESDC's Determination and Findings).

Both before and during the EDPL process, Petitioners served numerous FOIL requests on ESDC and other agencies seeking all Project-related documents.⁸⁴ In connection with some of their FOIL requests, Petitioners filed Article 78 proceedings requesting an order directing ESDC to disclose withheld documents.⁸⁵ ESDC did not withhold any of the documents that formed part of the administrative record, including the GPP (as adopted by ESDC), the FEIS and the AKRF and Earth Tech neighborhood conditions studies. All of those documents were in the public domain during the EDPL public comment period.⁸⁶ In addition, prior to closing the administrative record, ESDC produced more than 8,000 pages of documents in response to the FOIL requests.

One of Petitioners' Article 78 proceedings relating to the FOIL requests was heard by this Court while the instant proceeding was pending in the Appellate Division.⁸⁷ At no time did Petitioners request an order from this Court or from the Appellate Division lifting the automatic stay pursuant to CPLR §5519 and directing ESDC to disclose the remaining seven documents in dispute.⁸⁸ ESDC provided copies

⁸⁴ A-1734 (stating that Tuck-It-Away filed twelve FOIL requests with ESDC, the New York City Department of City Planning, the New York City Economic Development Corporation, the New York City Law Department and the New York City Fire Department);

⁸⁵ See, e.g., *infra* note 87 and accompanying text (discussing one of Petitioner's Article 78 proceedings).

⁸⁶ Availability of the GPP and FEIS was addressed in ESDC's Public Hearing Notice (A-996-97) and during the September 2 and 4, 2008 public hearings (A-1142-43, A-1426-27). The neighborhood conditions studies were available during the September 2 and 4, 2008 public hearings (A-1142-43, A-1426-27).

⁸⁷ *West Harlem Bus. Group v. New York State Urban Dev. Corp.*, 13 N.Y.3d 882 (2009).

⁸⁸ See *infra* notes 154, 155, 156 and accompanying text.

of those seven documents to Petitioners following this Court's decision in *West Harlem Business Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882 (2009).

ARGUMENT

SUMMARY OF ARGUMENT

The plurality failed to defer to ESDC's Determination and Findings. Instead, the court rejected ESDC's Determination and Findings based on its *de novo* review of the record.

There is ample support in the record for ESDC's determination that the proposed Project will eliminate blight. The Project qualifies under the UDC Act as a Land Use Improvement Project because it will eliminate substandard or insanitary conditions. It is well settled that eminent domain may be used to acquire an area characterized by substandard and insanitary conditions to eradicate these conditions in connection with the redevelopment of the area.

There is ample support in the record that the Project will create new educational, academic research, recreational and civic facilities, as well as publicly accessible open space in the area. Accordingly, the Project independently qualifies under the UDC Act as a Civic Project because it will serve an educational purpose, as well as create publicly accessible open space. Education is a core function of government and therefore qualifies as a public purpose for which the government may exercise eminent domain under the New York and United States Constitutions.

The Appellate Division erred in holding that ESDC violated Petitioners' due process rights by closing the administrative record while FOIL disputes relating to the Project were unresolved. The Appellate Division also erred in holding that ESDC violated Petitioners' due process rights ESDC's closing of the administrative record while FOIL disputes relating to the Project were unresolved violated Petitioners' due process rights. Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. The public process followed by ESDC complied with those requirements. ESDC conducted a 13-hour public hearing, reviewed and responded to the extensive comments submitted by Petitioners, and provided public access to all of the documents upon which the Determination and Findings was founded. None of the documents withheld by ESDC was part of the administrative record and none formed the basis for ESDC's Determination and Findings. The fact that Petitioners did not have access to every piece of paper in ESDC's files before ESDC issued a decision did not violate due process. Moreover, while the instant proceeding was pending in the Appellate Division, Petitioners failed to seek an order lifting the automatic stay under CPLR §5519 and directing ESDC to disclose the remaining seven documents withheld by ESDC.

STANDARD OF REVIEW

It has long been recognized that the power of eminent domain, one of the most ancient and significant sovereign prerogatives, grants government and its authorized agents considerable latitude and discretion to take privately owned property, without the owner's consent, but with just compensation, for a public use. *Fifth Ave. Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342, 347 (1962); *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 341-42 (1936); *see also Jackson*, 67 N.Y.2d 400 (1986). Accordingly, New York statutory law providing for judicial review of proposed condemnations greatly limits the scope of the court's review and New York courts have long deferred, except in the most extraordinary cases, to determinations to condemn property.

EDPL §207 provides original jurisdiction in the Appellate Division as the exclusive mechanism for seeking review of EDPL determinations and findings. Courts afford substantial deference to the condemnor's decision that a project serves a public purpose, deeming such decisions "well-nigh conclusive." *Jackson*, 67 N.Y.2d at 425 (quoting *Berman v. Parker*, 348 U.S. 26, 32-33 (1954)).

This Court, discussing the Atlantic Yards project, held as follows:

Whether a matter should be the subject of a public undertaking – whether its pursuit will serve a public purpose or use – is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is no room for reasonable

difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies; where, as here, “those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts.”

Goldstein, 13 N.Y.3d at 526 (quoting *Kaskel v. Impellitteri*, 306 N.Y. 73, 78).

Judicial review in a §207 proceeding is narrowly circumscribed. Courts may reject the condemnor’s determination and findings only if its decision was not “rationally related to a conceivable public purpose” or was “corrupt,” “baseless,” “palpably without reasonable foundation,” or “involved an impossibility.” *Jackson*, 67 N.Y.2d at 441; *Greenwich Assocs. v. Metro. Transp. Auth.*, 152 A.D.2d at 221 (1st Dep’t 1989); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984).

The reason for the deferential role of the courts is that the decision to condemn is a legislative-type decision. In *Kaskel v. Impellitteri*, 306 N.Y. 73, 80 (1953), *cert. den.*, 347 U.S. 934 (1954), this Court explained that a finding of blight in the Columbus Circle area is the type of determination authorized by the Legislature and, “whether wise or unwise, cannot be overhauled by the courts.... The question is simply not a justiciable one.” *See also Goldstein*, 13 N.Y.3d 511.

POINT I

THE PROJECT QUALIFIES AS A LAND USE IMPROVEMENT PROJECT UNDER THE UDC ACT

The plurality opinion, authored by Justice Catterson, concluded that the Project does not qualify as a Land Use Improvement Project under UDC Act §10(c) (Unconsol. Laws §6260(c)) only after engaging in a *de novo* analysis of the facts and concluding that the site was not blighted. The plurality also concluded that the UDC Act is unconstitutional as applied based on ESDC's alleged "ad hoc and selective enforcement" using "greatly divergent criteria" from one project to the next.⁸⁹ Neither conclusion is correct.

A. *ESDC's Neighborhood Conditions Studies, As Well As The Urbitran Study, Documented Blighted Conditions In The Project Area*

The UDC Act defines a Land Use Improvement Project as "[a] plan or undertaking for clearance, replanning, reconstruction and rehabilitation ... of a substandard and insanitary area, and for recreational or other facilities incidental or attendant thereto...."⁹⁰

In the case of Land Use Improvement Projects, ESDC must find:

(1) 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;

⁸⁹ *Kaur*, 892 N.Y.S.2d at 26.

⁹⁰ Unconsol. Laws §§6253(c) and 6260(c).

(2) 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;

(3) That the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole.

Unconsol. Laws §6260(c).

Each of the two reports prepared by ESDC's consultants, as well as the earlier report prepared by Urbitran, show that the study area is characterized by substandard and insanitary conditions. Justice Catterson rejected the findings of blight made by ESDC, which relied on these documented and undisputed facts of record, finding instead that the only proper analysis was performed by counsel for the Tuck-It-Away Petitioners' attorneys in their so-called "no blight" study.⁹¹ A difference of opinion – even among experts – would not be a sufficient basis to disturb an agency's determination of blight. But here, there was not even a disagreement among experts, as Petitioners' attorneys have no demonstrated expertise in the pertinent engineering and planning disciplines whose expertise ESDC drew upon in making its blight finding. Justice Catterson substituted his own opinion for the condemning authority's and

⁹¹ *Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d at 22 (1st Dep't 2009) ("The 'no blight' study proffered by the petitioners sets forth all of the factors that AKRF, Earth Tech and ESDC should have considered, but did not, to arrive at any conclusion that Manhattanville was, or was not, blighted.").

rejected ESDC's findings, going so far as to state, "[i]n our view," a different conclusion should be reached.⁹²

As explained in Section B of the Statement of Facts, ESDC's consultants (and Urbitran) documented and ESDC considered a wide range of physical, economic, engineering and environmental conditions in the Project Site. ESDC based its determination not on any one factor, but on site conditions as a whole. The reports and photographs document dangerous building conditions which pose threats to occupants, such as potential local collapses of roofs or floors, blocked fire exits, rampant mold growth and vermin infestation, and improper ventilation systems where automobile spray painting was being conducted without legally required safeguards and permits.⁹³ Other conditions, such as leaning parapets or damaged masonry walls, pose a threat to pedestrians as well. Additional factors contributing to the deteriorated conditions in the study area include large-scale transportation facilities that isolate the study area from the rest of the neighborhood, historic diversity of ownership of small parcels that thwarts property assemblage and reinvestment, and environmental concerns that arise due to concentrated auto maintenance and repair businesses.⁹⁴ More than half of the

⁹² *Id.*

⁹³ *See, e.g.*, A-5451-63 (discussing Earth Tech's site investigations and illustrating hazardous conditions encountered), A-3351 (discussing hazardous building conditions that pose a threat to occupants and pedestrians).

⁹⁴ A-3351, A-5402-06, and A-5422-24 (Photos 4-6, 10, 12-13).

lots were found to be in poor or critical condition, suggesting a long-term trend of poor maintenance and disinvestment, leading to the current overall deterioration.⁹⁵

Based on those facts in the Record, ESDC rationally concluded that the Project Site was blighted. As this Court recently explained in the *Goldstein* case:

It is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight, but any such difference would not, on this record, in which the bases for the agency findings have been extensively documented photographically and otherwise on a lot-by-lot basis, amount to more than another reasonable view of the matter; such a difference could not, consonant with what we have recognized to be the structural limitations upon our review of what is essentially a legislative prerogative, furnish a ground to afford petitioners relief.

Goldstein, 13 N.Y.3d at 526. As in the *Goldstein* case, the fact that Petitioners (and two Justices of the Appellate Division) have a "difference of opinion as to whether the area in question is in fact substandard and insanitary ... is not a sufficient predicate ... to supplant respondent's determination." *Id.* at 528.

The plurality stated that "[e]ven when ESDC abandoned AKRF, it nonetheless requested that its subsequent consultant, Earth Tech, 'replicate' the AKRF study using the same flawed methodology."⁹⁶ To the contrary, Earth Tech inspected the area,

⁹⁵ A-5405-06.

⁹⁶ *Kaur*, 892 N.Y.S.2d at 22.

gathered its own data, and independently assessed site conditions using methodologies that *Earth Tech* determined to be reasonable.⁹⁷

The plurality disregarded ESDC's neighborhood conditions studies and instead relied on the unsubstantiated allegations of Petitioners' counsel in their so-called "No Blight" study, authored by Tuck-It-Away's three attorneys, who do not claim to have any expertise or experience in preparing neighborhood conditions studies.⁹⁸ None of the authors of that "study" is an engineer or architect licensed to practice in New York.

The "study" offers no engineering analysis, or even indicates that its authors examined the interiors of more than 80% of the parcels owned by or under contract to purchase by Columbia.⁹⁹ *See, e.g., Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980)

(hearsay affirmation of counsel attesting to alleged material facts was without evidentiary value and therefore unavailing to preclude grant of summary judgment).

Even disagreement among true experts is insufficient to disturb an agency's blight findings, as long as the findings are not "utterly without rational basis." *Develop Don't*

Destroy (Brooklyn), 59 A.D.3d at 322; *Aldrich v. Pattison*, 107 A.D.2d 258, 276 (2nd

Dep't 1985). The averments of Petitioners' counsel – who are not engineers or

⁹⁷ A-5402, A-5438-39, A-5451, A-5466-67.

⁹⁸ *See* A-1779 (Tuck-It-Away's Submission for the Record (on compact disc), Vol. 9 ("No Blight" Study)).

⁹⁹ *See Id.* ("No Blight Study," at p. 51).

architects – are even less availing as a basis for overturning the agency’s Determination and Findings.¹⁰⁰

The plurality also cited to data prepared for the West Harlem Master Plan by Ernst & Young, an accounting firm, which supposedly found “no blight, nor did it describe any blighted condition in the area;” rather, the plurality suggested that the Ernst & Young data indicate that 54 of the 66 lots were in “good,” “very good” or “fair” condition.¹⁰¹ Yet, Ernst & Young, an accounting firm, did not consider whether the Project Site was marked by substandard and insanitary conditions. Instead, it considered whether the area had development potential for 1) revenue generating uses on the waterfront; 2) ferry use; and 3) commercial uses in a larger study area.¹⁰² Ernst & Young considered properties only from the perspective of potential economic impact on the Project Site. They did not purport to conduct safety or engineering analysis or to look at the range of neighborhood conditions bearing on whether the Project area is blighted. This stands in stark contrast to the reports prepared by Urbitran, AKRF, Thornton Tomassetti and Earth Tech, all of which described the deteriorated conditions in the Project area. Even when considering the Site from a purely economic

¹⁰⁰ A-1779 (“No Blight Study”). Moreover, as advocates, counsel have effectively assumed a testimonial role concerning a significant factual issue in dispute herein in contravention of the Disciplinary Rules. See <http://www.op.nysed.gov/opsearches.htm#nme> (New York State Office of the Professions licensee database); See DR 5-102; 22 NYCRR §1200.21. As of April 1, 2009, the Rule is now set forth as Rule 3.7 of the Rules of Professional Conduct.

¹⁰¹ *Kaur*, 892 N.Y.S.2d 11-12.

¹⁰² A-1771 (Tuck-It-Away’s Submission for the Record (on compact disc), Vol. 1, at p. 440).

perspective, moreover, Ernst & Young pointed out that that, although Harlem generally was experiencing revitalization, the “Study Area” was not.¹⁰³

The plurality severely criticized ESDC for relying upon “underutilization” as one factor it considered in its assessment of the character of the area. But ESDC’s methodology for identifying underutilized parcels at the Project site here (deeming the parcel underutilized if its build-out was less than 60% of the permitted build-out under the Zoning Resolution) was the very same methodology that AKRF had used in the blight study reviewed and upheld by this Court in *Goldstein*. Moreover, even prior to *Goldstein*, the reliance upon underutilization as a factor in determining whether an area is blighted was well established by the caselaw. See *Yonkers*, 37 N.Y.2d at 481, 483-84 (“underdevelopment” and “vacant land” are indicia of “substandard and insanitary” conditions); see also *Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 218 (1st Dep’t), *aff’d*, 76 N.Y.2d 962 (1990); *G. & A. Books, Inc. v. Stern*, 770 F.2d 288, 292 (2d Cir. 1985); *Haberman v. City of Long Beach*, 307 A.D.2d 313, 313 (2d Dep’t 2003); *Sunrise Props., Inc. v. Jamestown Urb. Renewal Agency*, 206 A.D.2d 913 (4th Dep’t 1994); *NRDC v. City of New York*, 672 F.2d 292, 294 (2d Cir. 1982); *Rosenthal & Rosenthal Inc. v. New York State Urb. Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985). Contrary to the plurality’s suggestion,¹⁰⁴ ESDC considered underutilization in the

¹⁰³ *Id.* (Tuck-It-Away’s Submission for the Record (on compact disc), Vol. 1, at p. 263).

¹⁰⁴ *Kaur*, 892 N.Y.S.2d at 22-23.

context of the prior zoning as well as the CPC's Rezoning for the Project.¹⁰⁵ Moreover, as noted above, the principal basis for ESDC's blight was the identified presence of numerous substandard and insanitary buildings in the area,¹⁰⁶ not merely "underutilization."

The plurality further stated that the "vacancy rate" criterion used by AKRF on this Project differed from the vacancy rate criterion it used in the Atlantic Yards project,¹⁰⁷ and it was principally this conclusion that led the plurality to strike down the UDC Act definition of "substandard and insanitary" as unconstitutional as applied.¹⁰⁸ The plurality's discussion of the vacancy rate factor is riddled with error.

First, the plurality failed to comprehend that criteria used from one project to the next may differ depending upon the character of the neighborhood under review. There is no inflexible rule that requires studies of neighborhood conditions to apply exactly the same criteria. In the Manhattanville neighborhood for example, most of the buildings are one and two story structures. AKRF documented buildings which had vacancies of 25% or more. In contrast, in a neighborhood where the buildings are six to eight stories high, a 25% vacancy rate might not have as much of an impact on the

¹⁰⁵ A-3947-48 (table presenting results of AKRF site utilization analysis under then-current zoning), A-5436-37 (table presenting results of Earth Tech site utilization analysis under former and current zoning). Earth Tech also determined that because CPC's rezoning was not applicable when AKRF conducted its study, "it [was] more appropriate to focus on the recent past in order to assess the degree to which underutilization has been a characteristic of the neighborhood." A-5438.

¹⁰⁶ A-5.

¹⁰⁷ *Kaur*, 892 N.Y.S.2d at 25.

neighborhood. It was within the expertise of AKRF to determine the appropriate vacancy rates and to evaluate other factors they deemed relevant in reviewing the neighborhood conditions.

Second, the plurality overemphasized the importance of the vacancy rate factor to the consultants' analysis. For the vast majority of the lots on the Project Site (all except four), the lot's vacancy rate could not have impacted whether or not the lot was considered blighted.¹⁰⁹ Thus, even if AKRF had used a different vacancy rate for this Project than it had used in Atlantic Yards, the difference could, at most, have affected only four lots on the Project Site and thus is not material.

Third, the plurality opinion focused on the asserted difference between the vacancy rate used by AKRF for this Project (according to the plurality opinion, 25%) and the vacancy rate it used for Atlantic Yards (50%). The plurality failed to acknowledge, however, none of the buildings in the Project Site had a vacancy rate greater than 25% and less than 50%.¹¹⁰ Thus, AKRF's report would have drawn the same conclusion as to the number of vacant lots on the Project site irrespective of which of the two vacancy rates it used. Accordingly, the distinction between the two

¹⁰⁸ *Kaur*, 892 N.Y.S.2d at 25-26.

¹⁰⁹ See A-3670, A-3782, A-3925, A-3931, A-5439, A-5934, A-6103, A-6339, A-6345 (demonstrating that, even if the vacancy criterion had not been considered at all, the majority of the lots in the Project Site would still be considered blighted).

¹¹⁰ See A-5439 (Earth Tech data on vacancy rates by block and lot).

vacancy rates is not material and does not warrant vacating ESDC's Determination and Findings.

Finally, in focusing its attention on the AKRF study, the plurality overlooked the fact that Earth Tech applied the same 50% vacancy rate that ESDC had used in Atlantic Yards and that this Court upheld in *Goldstein*.¹¹¹

For all of these reasons, it was error for the plurality to set aside ESDC's blight finding for the Project based on its disagreement with ESDC's assessment of the vacancy status of the buildings. ESDC made a rational determination, which is amply supported by objective facts documented with particularity in the record, that the Project Site is blighted.

After criticizing ESDC's blight findings, the plurality opined that ESDC's stated public purposes in approving the Project were pretextual and that ESDC's actual purpose was to benefit Columbia. There is absolutely nothing in the record to support such a theory. In light of the extensive evidence documenting blight in the Project Site, ESDC's decision to approve the Project could be overturned only by the most compelling evidence that the stated purposes of the Project were a sham and a fraud and the actual purpose was solely to transfer private property from one party to another. *See Goldstein v. Pataki*, 516 F.3d 50, 61-64 (2nd Cir. 2008) (holding that once the court determines that a project will achieve valid public purpose, such as the elimination of

¹¹¹ A-5405, A-5438-39.

blight or the construction of civic facilities, based on *objective* criteria, further judicial inquiry as to the *subjective* motivation of the condemning authority is precluded); *Goldstein*, 13 N.Y.3d at 523-24 (rejecting claim that the proposed use of eminent domain was for the private economic gain of a private commercial entity); *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 617-18 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985). As this Court held in the *Waldo's* case, “mere allegations of bad faith do not justify the judicial creation of an additional ‘due process’ hearing” or discovery. *Waldo's, Inc. v. Vill. of Johnson City*, 74 N.Y.2d 718, 722 (1989); *Vill. Auto Body Works v. Incorporated Village of Westbury*, 90 A.D.2d 502, 502 (2d Dep’t 1982), *appeal dismissed*, 58 N.Y.2d 778 (1982). To reject a condemning authority’s determination, “there must be a clear showing of bad faith,” not just mere allegations. *Faith Temple Church v. Town of Brighton*, 17 A.D.3d 1072, 1073 (4th Dep’t 2005); *Woodfield Equities, LLC v. Incorporated Vill. of Patchogue*, 28 A.D.3d 488, 490 (2d Dep’t 2006).

The plurality opinion’s “pretext” discussion was inextricably intertwined with its criticism of ESDC for retaining AKRF, which had also had prepared the EIS for Columbia and CPC. There is no basis to conclude that AKRF’s factual findings are inaccurate or biased. For example, there is no allegation that AKRF (or ESDC’s other consultants) misstated or distorted property descriptions or doctored photographs. Indeed, Justice Catterson does not identify any specific factual errors in the AKRF

report; rather, he states that he disagrees with AKRF's methodology, suggesting – in effect – that, in his opinion, ESDC should have departed from the methodology that ESDC used in Atlantic Yards and that this Court held to be reasonable in *Goldstein*. In any event, the AKRF report was but one document in the administrative record, which also includes the independent report prepared by Earth Tech, whose findings are consistent with the earlier findings of Urbitran that the area is burdened by multiple blighted conditions.

B. The Plurality Incorrectly Concluded That There Was No Evidence Of Blight Before Columbia's Purchase Of The Majority Of The Property In The Project Area

The plurality stated that there was “no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein,” suggesting that Columbia created the blighted conditions at the Project site.¹¹² Petitioners improperly raised this claim for the first time in their petitions,¹¹³ having failed to raise the claim either orally at the public hearing or in the thousands of pages of comments they submitted before the close of the hearing.¹¹⁴ The claim does not provide a basis to reject ESDC's blight finding, for several distinct reasons.

¹¹² *Kaur*, 892 N.Y.S.2d at 20.

¹¹³ See A-88a-89a, A-91a, A-110a, A-114a (Tuck-It-Away Petition ¶¶ 26, 37, 102, 111).

¹¹⁴ In response to the new claim in the petitions, ESDC submitted with its answer to the petition an Affidavit of R. Andrew Parker, a Principal Urban Planner for Earth Tech, who has more than 36 years of experience as a professional planner in New York City, and has conducted hundreds of urban renewal and environmental studies, including for several urban renewal and rezoning projects in the Bronx, Brooklyn and Queens. See A-246a. Since EDPL proceedings are to be reviewed on the

First, pursuant to EDPL §202(C)(2), Petitioners' claim regarding the previous lack of blight findings should not be considered at all because it was raised for the first time in their petitions. As required by EDPL §202(C)(2), ESDC notified Petitioners that "those property owners who may subsequently wish to challenge condemnation of their property via judicial review *may do so only on the basis of issues, facts, and objections raised at [the public] hearing*" (emphasis added).¹¹⁵ Nevertheless, Petitioners alleged for the first time in their Petition that the Project does not qualify as a Land Use Improvement Project because there were no blight findings before Columbia purchased most of the property in the area.¹¹⁶ Factual allegations of this nature cannot be made after the conclusion of the administrative process, since the focal point of judicial review is whether the ESDC Directors rationally addressed the issues before them when they made their determinations. *See* EDPL §202(C)(2); *Jackson*, 67 N.Y.2d at 427 (rejecting challenge to FEIS based on claim raised for the first time in Article 78 proceeding by petitioners who commented extensively during administrative process); *Aldrich*, 107 A.D.2d 258, 267-68 (holding that issues not raised during the administrative process may not be the basis for judicial review of an agency decision).

record before the agency, Petitioners' post-record litigation claim that there were no prior findings of blight at the Project Site should not be considered at all; nevertheless, if Petitioners' claim is considered, it would be appropriate to consider ESDC's rejoinder as set forth in the Parker Affidavit. *See* CPLR §403(b) (allowing submission of an affidavit with an answer in a special proceeding to respond to allegations raised in the petition). In any event, as noted below, Petitioners' claim that there were no prior findings of blight is contradicted by the administrative record.

¹¹⁵ A-997 (Notice of Public Hearing).

Second, even if the Court considers the unsupported allegations raised by Petitioners, there is ample evidence in the record that the Project Site has suffered from longstanding blight.¹¹⁷ Numerous urban renewal initiatives dating from the 1950s demonstrate that substandard and deteriorated conditions have persisted at the Project Site.¹¹⁸

As of 2000, Columbia owned only 2 properties in the Project Site.¹¹⁹ Most of the properties Columbia acquired thereafter were in poor or critical condition when they were purchased as is evidenced by the Urbitran study, which found that, as of 2003, 40 of the 67 lots had critical or poor site and/or building conditions.¹²⁰ AKRF also documented evidence showing that 64% of the buildings rated as poor and 42% of the buildings rated as critical were not owned by Columbia. This record evidence refutes the plurality's speculation that the deteriorated conditions may be attributable to Columbia.

¹¹⁶ See A-88a-89a, A-91a, A-110a, A-114a (Tuck-It-Away Petition ¶¶ 26, 37, 102, 111).

¹¹⁷ See A-3358 (AKRF Manhattanville Neighborhood Conditions Study, *Exec. Summary*, at p. vi) (“[T]he study area reflects a half a century of limited private sector investment. . . . [N]one of the[] [renewal] initiatives has been implemented, and as a result, physical conditions in the study area continue to deteriorate.”), A-158 (Manhattanville in West Harlem Rezoning and Academic Mixed-Use Development Project Final Environmental Impact Statement, Chapter 1, *Project Description*, at pp. 1-21 to 1-22) (discussing the history of Manhattanville and the need for revitalization); A-3369-74.

¹¹⁸ See *id.*; see also A-248a-50a (Parker Aff. ¶¶4-8) (expanding upon the long history of blight in the Project Site described in the FEIS and the neighborhood conditions studies).

¹¹⁹ *Kaur*, 892 N.Y.S.2d at 12.

¹²⁰ A-2916.

Far from allowing its newly acquired its properties to deteriorate, Columbia invested more than \$6 million on urgent repairs to building systems and other property conditions, addressing preexisting code violations and life safety issues, and making appropriate capital repairs, and plans to spend another \$3 million for additional stabilization efforts on the Project Site.¹²¹

C. *The Broad Array Of Factors Set Forth In The UDC Act For Determining Blight Are Not Void For Vagueness*

The UDC Act defines the term “substandard and insanitary area” and identifies factors that may be considered in making a blight determination. The term “substandard or insanitary area” is defined generally as “a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area....” Unconsol. Laws §6253(12). In its statement of legislative findings and purpose in the UDC Act, the Legislature elucidates the following broad range of factors that may be considered in establishing “substandard” or “blighted” conditions:

substandard, insanitary, deteriorated or deteriorating conditions, including obsolete and dilapidated buildings and structures, defective construction, outmoded design, lack of proper sanitary facilities or adequate fire or safety protection, excessive land coverage, insufficient light and ventilation, excessive population density, illegal uses and conversions, inadequate maintenance, buildings abandoned or not utilized in whole or substantial part, obsolete systems of utilities, poorly or improperly designed street patterns and intersections, inadequate access to areas....

¹²¹ See A-2908 (ESDC Response to Comment no. 118), A-158 (FEIS, Chapter 3, *Land Use*, at. p. 3-6) (“Columbia advises that as of September 30, 2007, it has invested approximately \$4.1 million in 33 properties” and intends “to bring total investment to approximately \$9 million.”).

Unconsol. Laws §6252.

The plurality erroneously held that the UDC Act is unconstitutionally vague because ESDC does not have a “regulation or written standard for the finding of blight” and allows ESDC “to apply the law in an arbitrary and discriminatory fashion.”¹²²

Although the UDC Act provides notice to the public of the factors that may be considered in determining whether an area is blighted, that level of specificity is not constitutionally required. Use of the term “substandard and insanitary” to describe property subject to redevelopment has a long history in New York and is embedded in the New York State Constitution.¹²³

The United States Supreme Court and this Court have consistently held that blight is an elastic concept that does not call for detailed or inflexible, one-size-fits-all requirements, but must be viewed on a case by case basis. For example, in *Berman v. Parker*, the Supreme Court upheld a statute allowing the elimination of “substandard housing and blighted areas” even where the term “blighted areas” was not defined and the term “substandard housing conditions” was defined in a manner that is less plain or detailed than the UDC Act.¹²⁴ 348 U.S. at 28.

¹²² *Kaur*, 892 N.Y.S.2d at 25.

¹²³ N.Y. Const. art. XVIII, §1 (“[T]he legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income ..., or for the clearance, replanning, reconstruction and rehabilitation of *substandard and insanitary areas*....”) (emphasis added)

¹²⁴ The term “substandard housing conditions” was defined by Congress as: “the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for

More than a quarter century ago, in the *Yonkers* case, this Court explained that the word “blight” is to be interpreted liberally rather than literally. Blight may consist of any of the following characteristics:

irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution It is something more than deteriorated structures. It involves improper land use.

Yonkers, 37 N.Y.2d at 483 (internal quotation marks and citations omitted); *see also*, *Jo & Wo Realty Corp.*, 157 A.D.2d at 218 (upholding a condemnation premised on blighted conditions at Columbus Circle, one of the most valuable pieces of real estate in the City). That is, “an area does not have to be a ‘slum’ to make its redevelopment for a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings.” *Cannata v. City of New York*, 11 N.Y.2d 210, 215 (1962). “[E]conomic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.” *Yonkers*, 37 N.Y.2d at 481-82.

human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.” *Berman*, 348 U.S. at 28 n.1.

The Court has not imposed any requirement that an agency set forth detailed mathematical computations and statistics. *Yonkers*, 37 N.Y.2d at 484. In practical terms, the Court stated that it is unnecessary to compute precisely the degree of deterioration or obsolescence or any other factors. *Id.* These factors are highly variable and diverse from one location to another and “call for the exercise of a considerable degree of practical judgment, common sense and sound discretion. Moreover, extensive authority to make the initial determination that an area qualifies for renewal as ‘blighted’ has been vested in the agencies and the municipalities; courts may review their findings only upon a limited basis.” *Id.* at 484. Thus, the conditions described by the Legislature in the UDC Act and quoted above “are to be understood ‘liberally’ so as not to unduly constrict the governmental prerogative to take measures directed at improving the urban environment.” *Develop Don’t Destroy (Brooklyn)*, 59 A.D.3d at 321 (1st Dep’t 2009) (citing *Yonkers*).

Thus, the conditions described by the Legislature in the UDC Act and quoted above “are to be understood ‘liberally’ so as not to unduly constrict the governmental prerogative to take measures directed at improving the urban environment.” *Id.* at 321 (citing *Yonkers*).

In departing from settled New York law, the plurality incorrectly relied on an Ohio case, where courts do not show deference to the legislative determinations of condemning authorities, but instead “apply heightened scrutiny when reviewing statutes

that regulate the use of eminent domain powers.” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 356 (Sup. Ct. Ohio 2006). That court continued, stating: “Applying *that* standard, we hold that Norwood’s use of ‘*deteriorating area*’ as a standard for appropriation is void for vagueness.” *Id.* (emphasis added). The Ohio court also pointed out that the term “‘*deteriorating area*’ ... inherently incorporates speculation as to the future condition of the property to be appropriated rather than the condition of the property at the time of the taking.” *Id.* (emphasis added). In that case, there were no findings of blight nor even a definition of what constitutes blight, but rather findings that blight *might* occur at some point in the future and the court found these future projections to be too speculative to justify the use of eminent domain. The court noted, however, that “[a]lmost all courts, *including this one*, have consistently upheld takings that seized slums and blighted or deteriorated private property for redevelopment, even when the property was then transferred to a private entity, and continue to do so.” *Id.* at 370 (emphasis added).

Unlike the Ohio case, ESDC’s determination was based on its finding that area is blighted today, not that it might become blighted in the future. ESDC’s finding is supported by the substandard and insanitary conditions extensively documented by three consulting firms.

D. *Private Participation Does Not Negate The Public Benefits of The Project*

The fact that the Project would benefit Columbia, a non-profit educational institution, is not unlawful, and does not detract from its public purpose. See *Goldstein*, 13 N.Y.3d at 523-24; *Murray v. La Guardia*, 291 N.Y. 320, 329-30 (1943) (“If, upon completion of the project the public good is enhanced it does not matter that private interests may be benefited.”). The UDC Act itself requires ESDC to “afford maximum opportunity for participation by private enterprise” Unconsol. Laws §6260(c).

In *Yonkers*, landowners and tenants denied that their land was substandard and argued that it was to be taken for private purposes, *i.e.*, to expand the facilities of the Otis Elevator Company, a major employer in Yonkers. This Court explained:

Nor does it undercut the public purpose of the condemnation of the substandard land that Otis’ motives are to serve its own interests. There is nothing malevolent about that. Most sponsors, where urban renewal involves industrial revival, are, as may be expected in our private enterprise economy, nonpublic and, at least in large part, profit motivated. Indeed, that may even be desirable, since, unless there is such a reliable projection of profitability, the soundness and stability of the sponsor’s project may come into question.

Yonkers, 37 N.Y.2d at 482.

In *Waldo’s, Inc.*, 74 N.Y.2d 718 (1989), a landowner challenged a city’s decision to condemn its property to construct a four-way intersection creating access to and from a shopping mall, arguing that the additional access resulted primarily in a private benefit for Wegman’s, the owner of the shopping mall. Notwithstanding that the

condemnation obviously benefited Wegman's, the Court of Appeals soundly rejected this argument, leaving no doubt that "an incidental private benefit will not invalidate an agency's determination so long as the public purpose is dominant." 74 N.Y. 2d at 721 (citing cases). The Court also noted, "[t]hat Wegmans' motives in making the \$1.5 million commitment to the project are not completely altruistic is of no legal consequence. The public good is enhanced by its efforts." *Id.*

POINT II

THE PROJECT QUALIFIES AS A CIVIC PROJECT AND WILL SERVE A PUBLIC PURPOSE

A second independent ground for confirming ESDC's Determination and Findings is that the Project qualifies under the UDC Act as a Civic Project. The UDC Act empowers ESDC to undertake certain enumerated "projects" including a "Civic Project." Unconsol. Laws §6253. ESDC is empowered to exercise eminent domain in furtherance of a Civic Project regardless of whether a project site suffers from blight.¹²⁵

A. *Under The UDC Act, An Educational Project Qualifies As A Civic Project*

A Civic Project is defined as "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for *educational*, cultural, recreational, community, municipal, public service or other civic purposes." Unconsol. Laws §6253(6)(d) (emphasis added). The language of §6253(6)(d) is broad and inclusive. Under §6260(d) of the UDC Act, ESDC is "empowered to undertake the

¹²⁵ Unconsol. Laws §§6253(d) and 6260(d).

acquisition, construction, reconstruction, rehabilitation or improvement of a [civic] project” if it finds:

- (1) That there exists in the area in which the project is to be located, a need for the *educational*, cultural, recreational, community, municipal, public service or other civic facility to be included in the project;
- (2) That the project shall consist of a building or buildings or other facilities which are suitable for *educational*, cultural, recreational, community, municipal, public service or other civic purposes;
- (3) That such project will be leased to or owned by the state 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, and that adequate provision has been, or will be, made for the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project;
- (4) That the plans and specifications assure or will assure adequate light, air, sanitation and fire protection.

Unconsol. Laws §6260(d) (Findings of the Corporation) (emphasis added).

The plurality incorrectly held that the words “or other civic purposes” in §6260(d) “clearly restrict[] the educational purposes qualifying for a civic project to only such educational purposes as constitute a ‘civic purpose.’”¹²⁶ In construing statutory language, “meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning.” N.Y. Stat. §231. If a word is clear, such as “educational,” it is not necessary to explore other rules of construction. N.Y. Stat.

¹²⁶ *Kaur*, 892 N.Y.S.2d at 23.

§232; *Russell Motor Car Co. v. U.S.*, 261 U.S. 514, 519 (1923) (“Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place ... except in the domain of ambiguity. They may not be used to create but only to remove doubt.”).

Under the fundamental principles of statutory construction, “[w]here a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces “other” persons or things, the word “other” will generally be read as “other such like....” N.Y. Stat. §239 (Comment); *see also Garcia v. U.S.*, 469 U.S. 70, 74 (1984) (discussing the principle of *ejusdem generis*). The phrase “or other civic purposes” does not limit or qualify that which is specifically and earlier enumerated, as the plurality concluded; rather, the words “or other civic purposes” should be construed to be of the same nature as the preceding words “*educational*, cultural, recreational, community, municipal, public service.” The statute thus recognizes an “educational” purpose as one type of civic purpose. The plurality interpreted the UDC Act exactly backwards.

Moreover, even if – contrary to established canons – it were proper to restrict the term “educational” by reference to the word “civic” that appears at the end of the statutory definition, the non-profit educational facilities at issue here are “civic” in nature. The term “civic” means “of or relating to a citizen, a city, citizenship, or civil affairs.” *Merriam-Webster’s Ninth New Collegiate Dictionary* at 244. The term “civic

education” generally refers to education needed for well-informed participation in the deliberative processes that comprise our democratic form of government. It cannot be legitimately disputed that the liberal arts and science education offered by Columbia University provides a “civic education” in this sense of the term.

The plurality incorrectly held that the UDC Act mandates that a Civic Project relate only to public educational institutions. The UDC Act, however, contains no categorical (and indeed any) restriction limiting “civic projects” to those undertaken by public institutions. To the contrary, the UDC Act encourages participation in projects by private entities. *See, e.g.*, Unconsol. Laws §6252 (“It is further declared to be the policy of the state to promote the ... sound growth and development of our municipalities through the...redevelopment...of such areas, and of areas reasonably accessible thereto, the undertaking of public and private improvement programs related thereto, *including the provision of educational, recreational and cultural facilities, and the encouragement of participation in these programs by private enterprise....*It is further declared to be the policy of New York State to encourage the development of research and development facilities and high technology industrial incubator space at institutions of higher education located in this state and authorized to confer degrees by law or by the board or regents, or on lands in reasonable proximity to such institutions....”) (emphasis added); §6260(d)(3) (allowing project either to be “leased to or owned by 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....”). Thus, any entity carrying out educational or cultural purposes qualifies under §6260(d)(3); it need not be a public entity. In the Atlantic Yards case, for example, a basketball arena to be built out and operated by a for-profit entity qualified as a Civic Project.¹²⁷ As a matter of public policy, housing a sports team should not be a higher priority than education.

Since ESDC’s mission includes fostering opportunity for private enterprise, it may carry out a Civic Project for educational purposes where a private university is involved. Columbia is a non-profit university accredited by the New York State Board of Regents. The plurality twice refers disparagingly to Columbia University as an “elite” institution, stating that the use of eminent domain to benefit such an institution violates the Takings Clause of the New York and United States Constitutions.¹²⁸ This statement appears to suggest – without any basis– that courts should apply different constitutional standards depending upon the ranking of the institution.

Consonant with the policy articulated in the UDC Act, ESDC has a long history of participation in Civic (and other) Projects involving private entities. For example, the Niagara Falls Convention and Conference Facility Civic Project involved the

¹²⁷ *Develop Don’t Destroy (Brooklyn)*, 59 A.D.3d 312.

¹²⁸ *Kaur*, 892 N.Y.S.2d at 11, 23.

development of a convention center, which was necessary only because the previous convention center was sold for use as a gambling casino operated by the Seneca Nation of Indians. *Matter of Settco, LLC v. New York State Urban Dev. Corp.*, 305 A.D.2d 1026 (4th Dep't 2003).¹²⁹ Another example is the Brooklyn Bridge Park Civic Project, which may include, in addition to the park that is the centerpiece of the project, private residential development, a marina, a hotel, restaurant uses, ancillary office space and private parking. *Brooklyn Bridge Park Legal Def. Fund, Inc. v. New York State Urban Dev. Corp.*, 14 Misc.3d 515 (Sup. Ct. Kings Co. 2006), *aff'd*, 50 A.D.2d 1029 (2d Dep't 2008).

The most recent example of a Civic Project is the Atlantic Yards project, which authorized a private entity to construct and operate an arena for the Nets professional basketball franchise. *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 239 N.Y.L.J. 15 (Sup. Ct. N.Y. Co. Jan. 11, 2008), *aff'd*, 59 A.D.3d 312 (1st Dep't 2009). The petitioners had argued that the project did not qualify as a civic project because the arena would be used primarily by a professional basketball team and operated by a private profit-making entity. Rejecting that argument, the lower court explained that nothing in the UDC Act "draws a distinction between a facility operated by or leased to a non-profit as opposed to a commercial entity...." 239 N.Y.L.J. 15 at *46. The court

¹²⁹ See also, brief of ESDC, 2003 WL 25680867 (4th Dep't Feb. 19, 2003) (referring to the Project as the Niagara Falls Convention and Conference Facility Civic Project).

further explained that “the lease to and operation of the arena by a profit-making entity is consistent with the UDCA’s overall purpose to maximize private participation.” *Id.* at 49. The Appellate Division affirmed, holding that “it is established that a sports arena, even one privately operated for profit, may serve a public purpose.” 59 A.D.3d at 325.

Similarly, here, the mere fact that Columbia is a nongovernmental entity does not disqualify the Project from being a Civic Project under the UDC Act. The Project will serve multiple civic purposes, including educational purposes. Accordingly, ESDC correctly concluded that this educational Project constitutes a Civic Project under the UDC Act.

The plurality incorrectly stated that “2 ½ years into ESDC’s participation project planning [sic], the draft GPP still identified the project only as the ‘Manhattanville in West Harlem Land Use Improvement Project’ even though there was no arguably independent blight study¹³⁰ until May 2008.”¹³¹ The plurality’s reference is to a *proposed draft* GPP drafted by Columbia’s attorneys, not ESDC (and never utilized by ESDC).¹³² ESDC provided that document to Petitioners’ counsel in response to their FOIL requests, and Petitioners’ counsel included it in the Record. The fact that

¹³⁰ The independence and accuracy of the three studies which support ESDC’s blight findings are discussed in Section C below.

¹³¹ *Kaur*, 892 N.Y.S.2d at 16.

¹³² See A-1771 (Tuck-It-Away’s Submission for the Record (on compact disc), Vol. 1, at p. 1353-79); A-116a-17a (Tuck-It-Away Petition, ¶120).

Columbia's proposed draft GPP did not have a complete title for the Project is irrelevant and does not limit the Project's nature, scope or purpose, nor does it represent the agency's position. Unquestionably, the Project's principal focus is and has always been educational, cultural and civic in nature.¹³³

B. An Educational Project Serves A Public Purpose

That private educational institutions serve an important public purpose is reflected in the State's Education Law, which applies to all universities in New York State, both public and private. Educ. Law §214; 95 N.Y. JUR. 2D *Schools* §691 (“[P]rivately endowed colleges in this state are, for all practical purposes, part and parcel of the state system of education prescribed in the Education Law.”). The Education Law applies broadly to the “University of the State Of New York” (referred to as “University”; Educ. Law. §2(3)) and University is defined to include “*all* secondary and higher educational institutions which are now or may hereafter be incorporated in this state....” Educ. Law §214 (emphasis added).

As part of the University of the State of New York, all higher educational institutions are subject to governance by the Board of Regents. The Board of Regents has the authority under the Education Law to set educational policies and establish rules relating to higher education. Educ. Law §207. In setting educational policy, the Board of Regents is responsible for developing master plans to identify the missions and

¹³³ A-158 (FEIS, *Executive Summary*, at S-2) (identifying the objective of this educational Project).

objectives of higher education and to “[i]dentify the needs, problems, societal conditions and interests of the citizens of the state of New York to which programs of higher education may most appropriately be addressed.” Educ. Law §237(1)(b). The Board of Regents may also inspect any such institutions, require reports and even suspend the rights and privileges of any institution. Educ. Law §215.

In addition, the interstate Compact for Education, to which New York is a signatory, provides that “the proper education of all citizens is one of the most important responsibilities of the states to preserve a free and open society in the United States.” Educ. Law §107. This section explains that “the increasing demands of our whole national life for improving and expanding educational services require a broad exchange of research data and information concerning the problems and practices of education.” *Id.* The Compact further states that “[i]t is the policy of this compact to encourage and promote local and state initiative in the development, maintenance, improvement and administration of educational systems and institutions...” *Id.* Colleges and universities, both public and private, “singularly serve the public welfare and morals.” *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593-94 (1986); *Trustees of Union Coll. v. Schenectady City Council*, 91 N.Y.2d 161, 165-66 (1997); *see also, Cochran v. La. Bd. of Educ.*, 281 U.S. 370, 374 (1930) (rejecting claim that levying a tax to raise money for school books for private and parochial school students

constituted a taking of project for private use, stating that “we cannot doubt that the taxing power of the state is exerted *for a public purpose*” (emphasis added).

The plurality cited to a Connecticut case, which held that the Connecticut legislature could not delegate the power of eminent domain directly to a private college. *Conn. Coll. for Women v. Calvert*, 88 A. 633 (1913). The Connecticut court also made clear, however, that a “political subdivision” may acquire property for “private corporations” to administer as “schools” and other uses. *Id.* at 636. Thus, under the holding of that case, a political subdivision in Connecticut could have exercised its power to condemn property on behalf of Connecticut College. Since ESDC is a political subdivision of New York State, this case contravenes rather than supports the plurality’s conclusion. *See* Unconsol. Laws §6254.

Courts in other states have recognized that it is appropriate to exercise the power of eminent domain for a project that will benefit a private university, given the important role that private universities play in providing educational services to the public. In *Craddock v. Univ. of Louisville*, 303 S.W.2d 548 (Ky. 1957), the court upheld the use of eminent domain by a public university for a private teaching hospital. The court agreed with the university that “there has been great elasticity with reference to the definition of ‘public purpose.’” 303 S.W.2d at 551. The court further stated that the university “is not only serving the public welfare of the City of Louisville, but the

entire Commonwealth of Kentucky” and without a training hospital, “no school of medicine could properly perform its public purpose.” *Id.* at 551.

The California Court of Appeals upheld the use of eminent domain for the construction of a library at the University of Southern California, a private university, explaining as follows:

It could not reasonably be urged that the development of public utilities and natural resources or the burial of the dead are more truly public uses than the intellectual development of our citizens. The higher education of youth in its largest implications is recognized as a most important public use, vitally essential to our governmental health and purposes. From the very nature of respondent as an educational institution, with qualities fixed by its articles of incorporation above quoted, it is apparent that the land here considered will be devoted by it to a high public use.

Univ. of S. Cal. v. Robbins, 37 P.2d 163, 166 (Cal. Dist. Ct. App. 1934), *cert. denied*, 295 U.S. 738 (1935).

The use of eminent domain by a local housing authority for Vanderbilt University, a private non-profit educational institution like Columbia, was also upheld in *Adair v. Nashville Housing Authority*, 388 F. Supp. 481 (M.D. Tenn. 1974), *aff'd*, *Gardner v. Nashville Housing Authority*, 514 F.2d 38 (6th Cir.), *cert. den.*, 423 U.S. 928 (1975) even though Vanderbilt University, a private non-profit educational institution like Columbia, would be redeveloping part of the area. In that case, under an earlier federal urban renewal initiative, federal funding was provided “where an area surrounding an educational or hospital facility is a slum or is blighted and such area has

been declared by the local government to be an urban renewal project.” 388 F. Supp at 484. Although Vanderbilt was not publicly owned, the court there held that “[t]he fact that Vanderbilt University shares the benefits of the project with the Nashville Community, and participates in the implementation of the project does not render the project invalid” from a public-purpose perspective. *Id.* at 489. Similarly, Columbia’s participation here does not undermine the public benefits that the Project will provide.

The plurality nevertheless rejected ESDC’s determination that the Project would serve important educational purposes by relying on *Board of Education of Union Free School District No. 2 of Towns of Ossining v. Pace College*, 50 Misc. 2d 806 (Sup. Ct. Westchester Co.), *judgmt. rev’d on other grounds*, 27 A.D.2d 87 (2d Dep’t 1966). But the *Pace College* case supports ESDC’s determination that private universities provide public benefits, stating that “Pace College performs an admittedly useful service to the community and one in which the public has such vital interest that the State undertakes to regulate and control closely those institutions which engage therein.” 27 A.D.2d at 91. The court nevertheless rejected Pace College’s claim that its property was immune from acquisition by eminent domain under the prior public use doctrine because that doctrine applies only to entities which possess the power of eminent domain. The Appellate Division later clarified the *Pace College* decision, explaining that “while land held by Pace College was utilized to confer *a benefit on the public generally through the provision of educational services*, the institution did not possess the power of

eminent domain....” *Westchester Creek Corp. v. New York City School Constr. Auth.*, 286 A.D.2d 154, 158 (1st Dep’t 2001) (emphasis added). As in the *Connecticut College* case, although an educational institution itself may not possess the power of eminent domain, an agency such as ESDC, which does have the power of eminent domain bestowed upon it by the Legislature may condemn property on behalf of that institution.

POINT III

THE *KELO* CASE IS IRRELEVANT TO THIS PROCEEDING BECAUSE
“ECONOMIC DEVELOPMENT” IS NOT THE PRIMARY PUBLIC PURPOSE IN THIS CASE

The plurality held that ESDC’s finding of blight “mere sophistry” and that the proposed Project “is nothing more than economic redevelopment wearing a different face.”¹³⁴ The plurality then concluded that the Project does not comport with *Kelo v. City of New London*, 545 U.S. 469, 488 (2005), because this Project does not share certain elements identified by Justice Kennedy’s concurrence in the *Kelo* case as “ensur[ing] against impermissible favoritism.”¹³⁵

Kelo is inapplicable here because – unlike the only justification for the project at issue in *Kelo* – the primary purpose of this Project is not economic development. ESDC undertook this Project to fulfill traditional public roles of eradicating blight and promoting education. (Although not its primary purpose, the Project will generate tens of thousands of jobs and a wide range of community benefits.)

¹³⁴ *Kaur*, 892 N.Y.S.2d at 16.

Yet, even if *Kelo* were applicable, the Project would satisfy the relevant criteria set forth by Justice Kennedy in his concurrence. The plurality incorrectly concluded that, unlike New London, Manhattanville was not in a depressed economic state, as purportedly evidenced by the 2002 West Harlem Master Plan. The plurality also erroneously stated that the “only purportedly unbiased or untainted study that concluded that Manhattanville was blighted” was the Earth Tech study, which the court points out was not completed until 2008 “the point at which the ESDC/Columbia steamroller had virtually run its course to the fullest.”¹³⁶ Yet, earlier in the opinion, the plurality conceded that the Urbitran study, which was based on 2003 data (and was not commissioned by Columbia or ESDC), “concluded that the area was ‘blighted.’”¹³⁷ The plurality seemed to imply that ESDC could have properly relied solely on the Urbitran study to make its findings rather than commissioning two additional studies.¹³⁸

The plurality also incorrectly concluded that “[u]nlike the City of New London, EDC, in conjunction with ESDC, did not endeavor to produce a comprehensive development plan to address a Manhattanville-wide economic depression.”¹³⁹ This conclusion is belied by the four years of planning for the Project undertaken by the City

¹³⁵ *Id.* at 18-19.

¹³⁶ *Id.* at 19.

¹³⁷ *Id.* at 12.

¹³⁸ *Id.* at 12-13 (“In December 2004, the ESDC, not content to rest on the Urbitran study, noted that it would have to make its own ‘blight findings’ in connection with the Project.”)

¹³⁹ *Id.* at 19.

of New York and ESDC. This comprehensive public planning effort included the Rezoning effectuated by CPC and the City Council, the preparation of a voluminous FEIS (which considered *nine* alternative developments), three extensive neighborhood conditions studies, including engineering studies, participation by the public and by local elected officials, preparation of a comprehensive GPP describing every aspect of the Project, and the issuance of the Determination and Findings.

The plurality also stated that, unlike in *Kelo*, here “no municipal entity in New York committed any public funds for the redevelopment of Manhattanville. Indeed, Columbia underwrote *all* of the costs of studying and planning for what would become a sovereign sponsored campaign of Columbia’s expansion.”¹⁴⁰ As explained above, the City committed substantial resources to the Project in evaluating the Rezoning. Even absent that public participation, it would be absurd to conclude that ESDC could not proceed with the Project since it required Columbia to underwrite all of the costs, rather than burdening the taxpayers of New York State and City with those costs. The fact that the State is *not* paying for the Project hardly establishes the type of “impermissible favoritism” discussed in Justice Kennedy’s concurring opinion.

The importance of education, both private and public, to the State of New York is evidenced by the fact that the State Education Department distributes more than \$26 billion in aid to educational institutions, including “over 7,000 public and private

¹⁴⁰ *Id.* at 19.

elementary and secondary schools, 270 *public and independent colleges and universities*, 359 proprietary (for-profit) schools, nearly 7,000 libraries; 750 museums, the State schools for the blind and for the deaf, and 25 public broadcasting facilities”¹⁴¹ (emphasis added). Among the schools which receive grants from the State Education Department is Columbia University.¹⁴²

POINT IV

THE APPELLATE DIVISION ERRED IN HOLDING THAT PETITIONERS WERE DEPRIVED OF PROCEDURAL DUE PROCESS

The plurality erroneously held that Petitioners’ due process rights were violated because ESDC closed the administrative record before the FOIL requests made by the Tuck-It-Away Petitioners were resolved. Petitioners had a full and fair opportunity to be heard with respect to ESDC’s proposed determination. As explained below, (a) during the extensive public process, Petitioners had the neighborhood conditions studies and other key administrative record documents and took advantage of numerous opportunities to make clear their objections to the Project and to present their criticisms of these studies; (b) there is no authority to support the Appellate Division’s conclusion that Petitioners were denied due process; and (c) Petitioners did not ask either this Court or the Appellate Division to lift the automatic stay and direct ESDC to disclose the requested documents.

¹⁴¹ <http://usny.nysed.gov/grants/>.

As Justice Tom stated in his dissent: "Petitioners' intimation that the administrative determination should have been delayed while the FOIL litigation was completed is without factual or procedural foundation."¹⁴³ The public processes provided by the EDPL and UDC Act "are designed to solicit community involvement in the planning process, not to serve as a vehicle by which public development can be effectively foreclosed." *Leichter v. New York State Urban Dev. Corp.*, 154 A.D.2d 258, 261 (1st Dep't 1989).

Moreover, ESDC's withholding of documents cannot affect whether the Project qualifies as a Civic Project under the UDC Act, which turns on a pure question of law because it is undisputed that Columbia University is an institution of higher education. Thus, Petitioners' procedural due process argument cannot affect whether the Project qualifies as a Civic Project under the UDC Act.

A. *During The Extensive Public Process, Petitioners Took Advantage Of Numerous Opportunities To Make Clear Their Objections To The Project And Were Provided With A Meaningful Opportunity To Submit Supporting Evidence To ESDC*

Due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time.

Mathews v. Eldridge, 424 U.S.319, 332 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The opportunity must be appropriate to the nature of the case.

¹⁴² See <http://www.nysed.gov/COMS/CF050/CF0501?SEDCODE=310500335580>.

¹⁴³ *Kaur*, 892 N.Y.S.2d at 35 (Tom, J., dissenting).

Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 313 (1950). The concept of due process is not a rigid rule unrelated to time, place and circumstances, but rather a flexible concept, which calls for the procedural protection the particular situation demands. *Mathews*, 424 U.S. at 334. In this case, Petitioners had an opportunity to comment on the Project in a meaningful manner (both orally and through written submissions) and at a meaningful time (before ESDC issued its Determination and Findings to acquire their property by eminent domain).

ESDC did not withhold any of the documents that formed part of the administrative record, including the GPP (as adopted by ESDC), the FEIS and the AKRF and Earth Tech neighborhood conditions studies. All of those documents were in the public domain during the EDPL public comment period. In addition, prior to closing the administrative record, ESDC produced more than 8,000 pages of documents in response to the FOIL requests. Thus, Petitioners had the pertinent information upon which ESDC was proposing to rely well before the expiration of the comment period. Petitioners and their counsel once again objected to the Project at ESDC's December 18, 2008 board meeting where the Directors voted to adopt SEQRA Findings, affirm the GPP, and to issue the Determination and Findings.¹⁴⁴

¹⁴⁴ A-3147-48 (listing Messrs. Smith, Siegel, Sprayregen & Ms. Aman Kaur as speakers), A-3168-70 (statement of Mr. Smith), A-3172-77 (statement of Mr. Siegel), A-3182-85 (statement of Mr. Sprayregen), 3193-96 (statement of Ms. Aman Kaur), A-3209-11 (statement of Mr. Siegel), A-3214-21 (statement of Mr. Siegel).

Petitioners participated in the process every step of the way and had their objections well documented before ESDC issued its decision. During ESDC's two-day public hearing, extending over some 13 hours, Petitioners and their respective attorneys appeared and spoke in opposition to the Project.¹⁴⁵ After the respective Petitioners' counsel voiced their opposition to the Project, they were informed that they would be allowed additional time to speak after others in attendance were also given an opportunity to speak.¹⁴⁶ Petitioners' counsel spoke again later.¹⁴⁷ ESDC informed the public both in the hearing notice and at the hearing that the record would remain open for additional written submissions until October 10, 2008.¹⁴⁸ Petitioners submitted two legal memoranda and more than *4,000 pages* of documents in opposition to the Project, including their own "no blight" study and the Ernst & Young economic report.¹⁴⁹ Not only did ESDC review and consider all comments received from Petitioners and others, it also prepared 75 pages of detailed responses to all of the comments before rendering its Determination and Findings.¹⁵⁰ Prior to closing the record, ESDC produced more

¹⁴⁵ A-1135 (listing Ms. Aman Kaur and Mr. Smith as speakers), A-1192-96 (statement of Ms. Kaur and Mr. Smith); A-1417-18, (listing Messrs. Sprayregen, Siegel & van Buren as speakers), A-1483-99 (statement of Messrs. Sprayregen, Siegel & van Buren), A-1569-79 (continued statement of Mr. Siegel).

¹⁴⁶ A-1492-93.

¹⁴⁷ A-1569-79 (continued statement of Mr. Siegel).

¹⁴⁸ A-997, A-1222, A-1412, A-1423-24, A-1589, A-1706.

¹⁴⁹ See A-1732-56, A-1757-70, A-1771-74.

¹⁵⁰ A-2868-2975.

than 8,000 pages of documents to counsel for the Petitioners in response to multiple FOIL requests.

That Petitioners had the material and information that afforded them ample opportunity to comment is graphically demonstrated by their lengthy and detailed submissions. Petitioners' objections to the Project during the EDPL public comment period included extensive criticism of ESDC's neighborhood conditions studies, along with a myriad of other objections to the Project.¹⁵¹ Petitioners alleged, among other things, that ESDC's neighborhood conditions studies are "profoundly biased," that ESDC's reliance on the AKRF study was "an act of bad faith," and that the Earth Tech study "merely reproduces the same biases" as the AKRF study.¹⁵² They claimed that the stated public purposes were pretextual and that the Project was designed solely to benefit Columbia. Petitioners also submitted to ESDC a 36-page report, entitled "Manhattanville Market Study," in which a realty appraiser without engineering, architectural or other relevant expertise evaluated real estate and economic conditions throughout Manhattan.¹⁵³

All of the documentary evidence that formed the basis for ESDC's Determination and Findings is, as required by EDPL §207(A), in the record. Those documents were

¹⁵¹ See A-1732-56 (Tuck-It-Away's Issues, Facts and Objections in Opposition to the Project), A-1757-70 (Tuck-It-Away's Preliminary Findings and Objections to the Finding of Blight in Connection with the Project).

¹⁵² A-1735, A-1758, A-1761.

¹⁵³ A-2789-2867 (Manhattanville Market Study with addenda).

publicly available. Petitioners had copies of those documents and ample opportunity to criticize them. There is no evidence that the record was incomplete. Nor is there any evidence that the substandard and insanitary conditions documented by AKRF or Earth Tech were falsified or distorted. Clearly, Petitioners had the meaningful opportunity to be heard required by due process.

B. There Is No Authority To Support The Appellate Division's Conclusion That Petitioners Were Denied Due Process

The Appellate Division cited no authority in support of its conclusion that the closing of ESDC's administrative record before the FOIL requests were resolved violated Petitioners' due process rights. Nothing in the EDPL requires an agency to provide discovery to interested parties during the course of condemnation proceedings, or to hold open the record while it separately litigates FOIL issues in a different forum.

To the contrary, numerous courts have concluded that the extensive EDPL procedures with which ESDC complied already provide due process. Notably, in *Waldo's*, the Appellate Division rejected an argument that the hearing was invalid because the agency "refused to provide full and complete information concerning the project's funding." 141 A.D.2d at 197-98. The court also rejected petitioner's separate argument that he was entitled to a "trial-type pre-acquisition hearing, concluding that "petitioner was afforded procedural due process by respondent's compliance with each and every requirement of EDPL Article 2." *Id.* at 198, 199-200. Similarly, in *Village Auto Body Works*, the Appellate Division rejected the petitioner's argument that he was

entitled to “prehearing disclosure and a hearing on the issue of bad faith,” particularly because the petitioner had “ample opportunity to raise the claim of bad faith at the public hearing.” 90 A.D.2d at 502, 503. The court explained that “[w]hile there may be certain practical impediments to demonstrating bad faith at a public hearing, a petitioner is not denied a forum nor opportunity to present its views and supporting evidence.” *Id.* at 503.

Similarly, in this case, Petitioners had and took advantage of multiple opportunities to explain in great detail all the bases for their objections to the Project. ESDC considered and responded to each of these objections before deciding to proceed with the Project. Petitioners do not have a due process right to review every scrap of paper in ESDC’s files before ESDC is permitted to issue a decision to proceed with a project. *See Jackson*, 67 N.Y.2d at 422-23 (rejecting procedural challenge to the 42nd Street Development Project on the ground that the documents that ESDC had made available to the public were “sufficient to allow informed consideration and comment on the issues petitioners raise”); *cf.*, *Lawrence v. Baxter*, 2004 WL 1941347, *3, 2004 U.S. Dist. LEXIS 18022, *8-10 (W.D.N.Y. Aug. 31, 2004), *aff’d*, 139 Fed. Appx. 365 (2d Cir.2005) (“There is no property interest in documents requested under FOIL because such documents are an expectation, even if awarded pursuant to court order.”) (internal quotations and citations omitted).

Requiring ESDC to produce every requested document or fully litigate every disputed FOIL issue before proceeding would have indefinitely kept the hearing open and delayed or derailed the Project. Counsel for the Tuck-It-Away Petitioners served their *seventh* FOIL request in November 2009, more than 14 months after ESDC held its public hearing and while ongoing disputes over earlier FOIL requests were still being resolved. Nothing in the history of FOIL supports the Appellate Division's conclusion that ESDC was prohibited from closing the administrative record until the FOIL disputes were resolved.

The Second Circuit has at least twice upheld the EDPL Article 2 provisions ESDC followed here as satisfying due process requirements. *Goldstein v. Pataki*, 488 F. Supp.2d 254, 272 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 55 (2d Cir.), *cert. den.*, 128 S. Ct. 2964 (2008) (EDPL §207 affords condemnees due process.); *Brody v. Vill. of Port Chester*, 434 F.3d 121, 133 (2d Cir. 2005). New York courts have likewise considered and rejected due process challenges to the public hearing and notice requirements of the EDPL. *See Waldo's, Inc. v. Vill. of Johnson City*, 141 A.D.2d 194, 199 (3d Dep't 1988), *aff'd*, 74 N.Y.2d 718 (1989) ("[T]he procedures outlined in the EDPL satisfy both the procedural and substantive due process requirements of the Federal and State Constitutions."); *Vill. Auto Body Works, Inc. v. Vill. of Westbury*, 90 A.D.2d 502, 503 (2d Dep't 1982) (Where a party has an opportunity to raise claims at a public hearing, there is no denial of procedural or substantive due process)), *appeal*

dismissed, 58 N.Y.2d 778; *De Vito v. City of Troy*, 72 A.D.2d 866 (3d Dep't 1979); *First Broad. Corp. v. City of Syracuse*, 78 A.D.2d 490, 494 (4th Dep't 1981) ("The [EDPL] provides for a uniform procedure and requires public hearings, notice, publication of determinations and findings and, of course, judicial review. This is exactly the stuff of procedural due process.") (citation omitted).

C. *Petitioners Did Not Request That Either This Court Or The Appellate Division Lift The Automatic Stay*

Even if petitioners were legally entitled to the documents under FOIL at the time of the hearing, a FOIL violation does not in and of itself establish a due process violation. Due process is violated only if petitioners were deprived of an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. To establish that a FOIL violation rose to the level of a due process violation, petitioners "must show that the withholding of the [documents] caused [them] prejudice." *Adams v. United States*, 673 F. Supp. 1249, 1260 (S.D.N.Y. 1987). They have not made this showing.

The Appellate Division observed that, while the *West Harlem Business Group* FOIL proceeding was on appeal before this Court, ESDC benefited from an automatic stay pursuant to CPLR §5519.¹⁵⁴ As Justice Tom pointed out, however, "petitioners fail

¹⁵⁴ *Kaur*, 892 N.Y.S.2d at 27.

to explain why they failed to bring a motion to vacate the automatic stay...."¹⁵⁵ Justice

Tom explained that

A CPLR 5519(c) application would have afforded the Court with the opportunity to assess whether petitioners could demonstrate the likelihood of success on the merits ... and that such documents were material to ESDC's determination and, thus, essential to affording petitioners procedural due process.... Furthermore, even if such materials are ultimately found by the Court of Appeals to be subject to disclosure under FOIL, there is simply no order concerning a stay of proceedings that is brought up for review (CPLR 5501[a] [1])¹⁵⁶

Petitioners could have sought immediate production of the documents they ultimately received by asking either this Court or the Appellate Division to lift the automatic stay.

As Justice Tom stated, Petitioners failed to explain why they did not seek this relief.

Nor did they establish a right to delay the administrative determination pending the outcome of the FOIL litigation. Accordingly, there was no basis for the majority's holding that Petitioners' due process rights were violated.

¹⁵⁵ *Id.* at 35 (Tom, J., dissenting).

¹⁵⁶ *Kaur*, 892 N.Y.S.2d at 35 (Tom, J., dissenting).

POINT V

ESDC COMPLIED WITH SEQRA

The plurality did not address Petitioners' SEQRA claims. However, Justice Tom, in his dissent, concluded that "ESDC took the requisite hard look at the relevant areas of environmental concern, including the impact of the project's below-grade facility, particularly with respect to flooding issues."¹⁵⁷

The Project was subject to an extensive SEQRA/CEQR public review process as part of the City's Rezoning of a 35-acre section of Manhattanville that includes the Project Site. As lead agency under SEQRA, CPC prepared the FEIS, a 3,190-page document that examines in encyclopedic detail the potential environmental impacts of the Project.¹⁵⁸ CPC also oversaw the preparation of several post-FEIS technical memoranda to examine whether certain limited changes to the Project would result in any new significant adverse impacts.¹⁵⁹

ESDC participated as an "involved agency" in the SEQRA review. After CPC issued the FEIS and the City Council approved the Rezoning, ESDC reviewed the FEIS, obtained additional information from Columbia regarding several environmental issues, and made its own independent SEQRA Findings.

¹⁵⁷ *Id.*

¹⁵⁸ See A-158 (*FEIS*, Foreword, at F-1).

¹⁵⁹ See A-158 (*FEIS*, Technical Memoranda).

Petitioners' claims concerning the FEIS and CPC findings were fully adjudicated in an Article 78 proceeding captioned *Tuck-It-Away Associates, L.P. v. City of New York*, 2008 N.Y. Misc. LEXIS 5740, 240 N.Y.L.J. 66 (Sup. Ct. N.Y. Co. Sept. 24, 2008).¹⁶⁰ The lower court rejected all of Tuck-It-Away's environmental claims regarding the adequacy of the FEIS.¹⁶¹ Petitioners never perfected an appeal of that decision, and the time to do so has long since expired. The doctrine of *res judicata* bars the re-litigation of Petitioners' attacks on the FEIS and CPC's findings.

¹⁶⁰ A-1860-69.

¹⁶¹ A-1864-69.

CONCLUSION

For the reasons explained above, New York State Urban Development Corporation d/b/a Empire State Development Corporation respectfully requests that the Court vacate and reverse the Decision and Order of the Appellate Division, deny the petitions, confirm the Determination and Findings, and grant such other and further relief as the Court deems just and equitable.

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