To be argued by:
NORMAN SIEGEL
(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, LLC,

Petitioners-Respondents

Proceeding
No. 1

For a judgment pursuant to Section 207 of the EDPL
-against-

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

Respondent-Appellant

(For Continuation of Caption, See Inside Cover)

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Date Completed: April 22, 2010

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.

Proceeding No. 2

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

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PRELIMINARY STATEMENT

This case concerns a challenge to Respondent-Appellant Empire State Development Corporation's ("ESDC's") adoption of a plan to use eminent domain to take family businesses, and transfer their property to Columbia University ("Columbia") to help create a new 17 acre campus in West Harlem.

On January 20, 2009, Petitioner-Respondents Tuck-It-Away, Inc., Tuck-It-Away at 133rd Street, Tuck-It-Away Bridgeport Inc., and Tuck-It-Away Associates, L.P. (collectively "Tuck-It-Away," "TIA", or "Petitioners-Respondents") and Parminder Kaur, Amanjit Kaur and P.G. Singh Enterprises, LLC (the "Kaurs", or "Petitioners-Respondents") filed petitions with the Appellate Division, First Department pursuant to Eminent Domain Procedure Law ("EDPL") § 207 opposing the use of eminent domain in this plan. On December 3, 2009, the petitions of Tuck-It-Away and the Kaurs were granted.

The Tuck-It-Away and Kaurs petitions alleged ESDC exceeded its statutory authority and acted unconstitutionally by finding that the area was blighted in bad faith, and as such, the alleged public purpose of remediating blight was a pretext for a pre-existing policy commitment to give the entire area to Columbia. The petitioners alleged ESDC only later added the designation of the project as a "civic project" as a further pretext, unlawfully construing a private university as a "civic purpose", and adding a package of "civic benefits" that were either already required to mitigate

environmental impacts, that did not substantially relate to the facilities proposed to be built, or that inured principally to Columbia's benefit. The petitioners further alleged that by undertaking the project at Columbia's behest, defining the project exclusively around Columbia's needs, without any prior public determination of a public purpose for the use of eminent domain, and in contravention of the prior public planning that was undertaken, the Columbia plan constituted an unconstitutional taking under the decision of the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005).

The petitioners also alleged that the term "substandard and insanitary," or "blighted," in UDCL § 10 and § 3, was unconstitutionally void for vagueness. Tuck-It-Away alleged that their statutory right to be heard and their constitutional right to due process had been violated when ESDC closed the EDPL § 203 hearing record while continuing to withhold records Petitioner-Respondent had sought under New York's Freedom of Information Law ("FOIL") and that two courts had ordered them to release. And both groups of petitioners alleged EDPL § 207 violated due process of law by giving original jurisdiction exclusively to an appellate court rather than to a trial court.

The Appellate Division, First Department annulled ESDC's determination and findings on the ground that ESDC violated Petitioners-Respondents' constitutional and statutory right to be heard. The due process analysis of Justice Richter's

concurring opinion depended on the "confluence of factors here, including the evidence raising questions of bad faith and pretext."[1] Petitioners-Respondents submissions to the record demonstrated that ESDC's determination was made in bad faith, and that its alleged public purposes were pretext for a prior policy commitment to a favored developer.

The opinion of Justice Catterson, which Justice Nardelli joined, went further. Justice Catterson found the evidence in the record persuasive, and annulled Respondent's determination and findings on the grounds of bad faith and pretext, as well as for the due process and EDPL procedural violation.[2] Justices Catterson and Nardelli found ESDC overstepped its statutory authority when it cooperated with the private beneficiary Columbia in generating a basis for finding blight, when it retained Columbia's consultant Allee King Rosen and Fleming, Inc. ("AKRF") to find such blight, and when it cooperated with that consultant to produce a study that was biased in fact. The two justices found ESDC's application of the term "substandard and insanitary" in UDCL § 10 (c), or "blight"[3] was unconstitutionally vague as applied. They also found that Respondent-Appellant's subsequent attempt to invoke an alternative authority under UDCL § 10 (d) and call the Columbia plan a "civic

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[1] *See Kaur et. al. v. New York State Urban Development Corporation ("Kaur v. UDC"*) 892 N.Y.S.2d 8, 30 (J. Richter, concurring).

[2] *See id.* at 28 (J.Catterson for the plurality)

[3] *See id.* at 26 (Catterson)

project" was legally insufficient, and a pretext for a policy already established favoring Columbia as the sole developer of Manhattanville. Justices Catterson and Nardelli consequently found the taking unconstitutional in accordance with *Kelo*, because instead of establishing the public purpose before selecting the private beneficiary, the project was driven by Columbia from the outset, with alleged public purposes only devised after the project was fully conceived and well advanced in planning.

Though this Court is presented, therefore, with a question of due process of law and a violation of EDPL § 204, the surrounding circumstances and Petitioners-Respondents' broader allegations must also be weighed on the basis of the substantial evidence in the record.

This case must be distinguished from *Matter of Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009), in which this Court upheld ESDC's Atlantic Yards project in Brooklyn. In that case, this Court recognized that "there remains a hypothetical case in which we might intervene to prevent an urban redevelopment condemnation on public use grounds -- where 'the physical conditions of an area might be such that it would be irrational and baseless to call it substandard and insanitary.'" *Id.* at 527 (quoting *Kaskel v. Impellitteri*, 306 N.Y. 73, 80 (1953).

The present case is such a case.

The present case is not about a difference of opinion, but about deliberate and documented acts of bad faith. In Manhattanville there was no prior legal designation of an urban renewal area and no de-facto blight condition such as a rail yard. To the extent any conditions were documented that could conceivably be indicative of blight, such as vacancy and limited building conditions, these were caused by Columbia with ESDC's knowledge.

Here, ESDC hired Columbia's consultant AKRF to find a basis for blight, which two courts concluded was a conflict of interest and likely to be biased. And here Respondent-Appellant's late devised alternative bases for participation as a "civic" project are legally unprecedented and padded with other alleged "civic purposes" that are clearly extraneous to the purpose for which the facilities are to be built.

New York courts have in the past given wide latitude to agency discretion in the use of eminent domain, but at some point an outer limit must be defined, so that not any area may be called "blighted" or not any project may be called a "civic project." ESDC's actions in this case exceed that threshold limit.

Most importantly, this case is different in that here, perhaps uniquely in New York eminent domain jurisprudence, Petitioners-Respondents have been able to establish a substantial affirmative record of their own. The record documents ESDC and New York City's favoritism towards Columbia, Columbia's role in driving the

project from its inception, ESDC's consent to design the project exclusively for the benefit of the private beneficiary, and its collusion with that beneficiary in manipulating the planning and approval process.

Petitioners-Respondents have been able to construct this record by exercising the public's right of access to government records under FOIL. They have met fierce resistance, to the point where this Court has found Respondent-Appellant to have violated its duties under FOIL, requiring Petitioners-Respondents to engage in extensive litigation to vindicate the public's right of access to agency records.[4] ESDC's resistance to disclosing records ultimately generated the due process and statutory violation that led Justice Richter to concur with the Catterson opinion on that point. But even the incomplete record Petitioners-Respondents have been able to create establishes the facts to support the findings and conclusions of Justices Catterson and Nardelli's opinion.

The Tuck-It-Away Petitioners-Respondents represent a family-owned business that has been in Manhattanville since 1980, expanding to five of the larger buildings in the area to meet the growing demand for self-storage and moving services for cramped Manhattan residents and businesses. Tuck-It-Away is also the landlord to large retail stores that serve the community. The Kaur Petitioners-Respondents

[4] *See West Harlem Business Group v. Empire State Development Corporation*, 13 N.Y.3d 882 (2009).

represent another long established business in the neighborhood, who have been operating two gas stations since 1985, which constitute the life savings and sole occupation of a hard working immigrant family. Both have made long term investments in the neighborhood, contributing to the steady employment and vital local services the neighborhood has provided to the West Side and West Harlem communities.

ESDC colluded with Columbia to manipulate the planning and approval process, giving Columbia the ability to threaten the use of eminent domain, to induce owners to sell their property to Columbia and to create the aura of inevitability, diverting public review onto a less controversial re-zoning action by another agency, until either condition could be created, or sufficient pretexts could be devised to give the color of lawful authorization to the final move of exercising eminent domain power. ESDC made a commitment to Columbia that relegated the determination of a public purpose for the project, and its own statutory findings, to an afterthought; fixed the facts to drive a preexisting policy; and cobbled together alleged purposes long after the project was fully conceived and planned.

This case is not about preventing Columbia from expanding and building in Manhattanville. Neither the present Petitioners-Respondents, nor the broader community opposition to the current Columbia plan have opposed Columbia building on property it owns. And despite its posture of insisting it must have all or nothing,

Columbia will in fact be able to build a campus in Manhattanville whatever the outcome of this proceeding. Columbia currently owns 76% of the properties in the area. New York City owns another 15%, which it can sell to Columbia through the process of transferring city property provided by New York City's charter. The remaining privately held properties save for one are located on the periphery of the project area. Simply put, eminent domain is neither necessary nor appropriate for Columbia to expand in Manhattanville, or for the realization of most of the alleged benefits of the Project.[5]

[5] Neither ESDC nor Columbia have ever made an offer to Tuck-It-Away, and they have not responded to Tuck-It-Away's offers for a land swap or lease. *See* Tuck-It-Away Petition, A-127a-128a. While Columbia did make an offer to purchase the Kaurs' properties, the offer extremely undervalued the worth of the properties, and Columbia did not respond to the Kaurs' offer for a property swap. *See* Kaur Petition, A-202A.

STATEMENT OF QUESTIONS PRESENTED

1. Whether ESDC's finding of blight was made in bad faith?
2. Whether ESDC's finding of blight was palpably unreasonable and without basis in law or fact?
3. Whether the proposed Columbia project is a "civic project" under the UDCA.
4. Whether the purported "civic purposes" of private education and incidental amenities and benefits are public purposes sufficient to support the use of eminent domain, or whether such designations constitute a pretext for private purposes.
5. Whether ESDC violated Petitioners-Respondents' due process and statutory right to be heard by closing its administrative record while withholding information to which Petitioners-Respondents had a legal right pursuant to the Freedom of Information Law?
6. Whether the EDPL's grant of exclusive jurisdiction to an appellant rather than a trial court violates Petitioners-Respondents' due process rights under the 14th Amendment to the Constitution of the United States and Article 1, Section 6 of the New York State Constitution?
7. Whether ESDC's proposed taking by eminent domain is unconstitutional because the Columbia project did not ensue from a carefully considered plan as required pursuant to *Kelo v. City of New London*?

8. Whether the UDC Act definition of "substandard and unsanitary" is unconstitutional under the "void for vagueness" doctrine as applied and on its face?

STATEMENT OF FACTS

This case presents two differing fact statements that epitomize the divergence between Petitioners-Respondents and Respondents-Appellants on this appeal. For the ESDC, the record on which it relies is the one it presented to the public: the consultant reports to document ESDC's finding of blight, the lists of purported benefits, and the adoption of the General Project Plan ("GPP") that transfers the entire area to Columbia. Yet this record does not tell the full story.

Petitioners-Respondents, through the use of FOIL, and by means of their own pursuit of information and documentation, have shown a very different picture.[6] Even with a recalcitrant ESDC refusing to produce documents under FOIL while rushing to close the public record, Petitioners-Respondents have been able to show a process by ESDC utterly devoid of independent review. Petitioners-Respondents established that ESDC played a subservient role to Columbia, with all documents drafted by Columbia's attorneys and consultants, and the agency imposing no limitation on Columbia's pre-existing plan, but only close collaboration with

[6] Petitioners-Respondents submissions to the administrative record that are cited in this brief may be found on compact disk in Respondent-Appellant's appendix at A-1771-1782. For the convenience of the Court, Petitioners-Respondents have provided them in hard copy in their respondent's appendix, designated in citations as "RA-."

Columbia to devise bases for pretextual findings. Petitioners-Respondents, through their own *No Blight* study, have been able to document not only that the area is not blighted, but that ESDC's consultants implemented an intentionally biased methodology, whereby they could find allegedly substandard conditions on the basis of 76% of the properties that were under Columbia's control, without accounting for Columbia's direct impacts in vacating and running down the property. It is in this context that the legitimacy of Respondent-Appellant's actions under the EDPL must be measured.

The significance of the record in this case is further heightened because of the ESDC's response to Petitioners-Respondents' FOIL requests and the outstanding document production which has been the subject matter of litigation below [7] and in this court as well.[8] In the context of this record, the ESDC's rush to close the record at the same time that it held records ordered to be produced raises clear issues of denial of Petitioners-Respondents' rights to due process and "the right to be heard" under the EDPL as found by the Appellate Division below.

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[7] *See West Harlem Business Group v. Empire State Development Corporation* ("*WHBG v. ESDC*"), Index No. 116839/06 (Sup. Ct. New York County, June 27, 2007), *Tuck-It-Away Associates, L.P. v. Empire State Development Corporation I* ("*TIA v. ESDC I*"), Index No. 116839/06 (Sup. Ct. New York County, August 16, 2007), *Tuck-It-Away Associates, L.P. v. Empire State Development Corporation*, 54 A.D.3d 154 (First Dep't 2008) (affirming in part both *WHBG v. ESDC and TIA v. ESDC I*); *Tuck-It-Away Associates, L.P. v. Empire State Development Corporation II* ("*TIA v. ESDC II*"), Index No. 111652/07 (Sup. Ct. New York County) (*sub judice*); *Tuck-It-Away Associates, L.P. v. New York City Department of City Planning* ("*TIA v. DCP*"), Index No. 111652/07 (Sup. Ct. New York County, October 6, 2008).

[8] *See WHBG v. ESDC*, 13 N.Y.3d 882 (2009).

A. Contention for the redevelopment of the Manhattanville industrial area.

The Manhattanville industrial is located in the West Harlem in New York City, and its core occupies an area from 125th Street to 133rd Street and from 12th Avenue to Broadway. Columbia University has long sought to expand from its Morningside Heights campus into West Harlem. Columbia helped formulate plans as early as 1965 to redevelop the Manhattanville industrial area.[9] After student protests in 1968, Columbia refrained from further plans for expansion in West Harlem until 2000, when it began purchasing property in the Manhattanville industrial area.

In the 1990s the Manhattanville industrial area also attracted the interest of private businesses and developers. The Fairway quality food market was a major success.[10] A New York City Economic Development Corporation ("EDC") request in June 1998 for proposals to develop the city owned waterfront parcels in Manhattanville received at least five proposals, including for hotels, residential condominiums and entertainment complexes.[11]

Outcry from the West Harlem community at having its waterfront taken and

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[9] *See* AKRF, *Neighborhood Conditions Study ("AKRF study")*, at B-3, A-3371; *see also* New York Times article, "Columbia Spurs Massive Renewal North of 125th Street", RA-1-7.

[10] *See* West Harlem Master Plan, RA-53.

[11] *See* Tuck-It-Away Associates, LP, *No Blight* study at 33, RA-1313.

given away to private developers led EDC to abandon its RFP.[12] In 2000, EDC started again with an inclusive and public planning process, culminating in August 2002 with the publication of the West Harlem Master Plan.[13] Phase II of the West Harlem Master Plan proposed the development of the waterfront as a public park.

The West Harlem Master Plan also proposed re-zoning of the "upland" core of the industrial area.[14] In this regard, the West Harlem Master Plan reflected the prevailing community sentiment, as articulated by the local representative body provided for under the New York City Charter, Manhattan Community Planning Board 9 ("Community Board 9"). Aware of growing official and private interest in the Manhattanville industrial area, in 1991, West Harlem Community Board 9 initiated a comprehensive plan for its West Harlem district pursuant to New York City Charter § 197 (a).[15] A principal focus of the § 197(a) plan was the potential of the Manhattanville industrial area to generate new jobs and business opportunities.

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[12] *See* NYC Economic Development Corporation, Harlem Piers Master Plan Request for Proposals, October 2, 2000, at 4(listing as first objective redevelopment of Harlem Piers "in a manner that (1) complements existing neighborhood uses and visions," RA-134.

[13] *See* Harlem-Piers Master Plan, Request for Proposals, October 2, 2000, RA-131-144; See Harlem-Piers Master Plan Contact List, Sign-in Attendance sheet from Working Committee meeting of February 28, 2001, showing 41 persons in attendance, RA-168-173.

[14] RA- 43-44.

[15] Sharing Diversity Through Community Action: A 197(a) Plan for Community Board 9, December 1999 draft, RA-176-177. Community Board 9's 197 (a) Plan was submitted to the New York City Department of City Planning in December 1998 and again on March, 2001, *id.* at b, RA-176a. After update and revision in response to DCP comments, the plan was finalized on June 17, 2005 and certified by the DCP as ready for consideration by the New York City Planning Commission in November, 2005. *See* Final Community Board 9 197(a) Plan, as revised June 17, 2005, RA- 176.

To maximize the extent to which new development could be most beneficial to the existing West Harlem community, the § 197 (a) plan called for re-zoning of the industrial area, increasing the permissible built floor area to lot size ratio ("floor area ratio" or "FAR") as high as 6, while retaining existing manufacturing and commercial uses.[16] With a significant number of stable, longstanding family businesses, full occupancy, rising employment and a growing number of firms through the 1990s, the area was expected to be quickly developed by current owners and new purchasers as soon as the zoning was increased.[17]

Like Community Board 9's 197(a) plan, the West Harlem Master Plan never found the area to be in any way blighted, as indeed, no previous study had ever found the area blighted.[18]

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[16] *Id*. at RA-183-187. The zoning of the area under the 1961 New York City zoning resolution was M-1, M-2 and M-3, with a low rise maximum FAR of 2, though a number of larger buildings had been grandfathered in.

[17] *See* West Harlem Master Plan, at 36, RA-43; *see also id.* at 60; *cf.* 197 (a) plan, RA-200-202, 181, 176a. The West Harlem Master Plan documented the area's development potential, noting the area's desirable location at the intersection of two of Harlem's principal arteries, 125th Street and Broadway, with highway, subway, and possible rail and ferry access, rising rental demand, and rising property values in the area, latent consumer demand and rising incomes in West Harlem, and the near by presence of two academic institutions. *See* West Harlem Master Plan, RA-43; *cf.* Community Board 9 197 (a) Plan, at 45-48, RA-183-186; Ernst and Young Report at RA-222-241 (finding mixed use development potential in latent consumer demand); Summary of Economic Analysis Working Committee, RA-319-322.

[18] In 1984 Harlem Urban Development Corporation ("HUDC"), *Background Study of the West Pier Area* did use the term "decline" in reference to the Manhattanville industrial area, but only in reference to job losses in the meat and food distribution sector resulting from the opening of the Hunts Point Market, RA-328. It did not, however, describe the area as blighted. It described the buildings as being in good to fair condition. Tax arrearage among industrial or commercial properties was found not to be significant or extended. *See id.* at RA-346.

B. New York City and State's Policy to Give the Manhattanville Industrial Area to Columbia

While EDC was giving the appearance of responsiveness to community concerns through its broadly participatory Working Committee meetings, at the same time, as early as the summer of 2001, it was working with Columbia's staff to develop plans for the area.[19] After publishing the West Harlem Master Plan in August 2002, EDC ceased meeting with the community representatives and local businesses, and instead met exclusively with Columbia and its architects to implement the upland re-zoning Phase III of the plan.[20] EDC gave Columbia "lead responsibility" for devising the economic development plan to which the re-zoning would conform,[21] allowing Columbia to tailor the re-zoning to its own "needs", which were stated as a rate of expansion of 200,000 square feet a year over 25-30 years.[22] EDC considered

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[19] October 29, 2001 Letter of Michael Carey, RA-396.

[20] EDC held the fourth and last of its Working Committee meetings on November 12, 2001. *See* November 12, 2001 letter of Jeannette Rausch, RA-397. *Compare* Attendance sheet EDC meetings, June 5 and July 23, 2002, RA-399-400. 10 W. Architecture proposed that the "Working Committee" meet again, possibly in August 2002, and that implementation plans should be presented to it in order to continue to build consensus. W Architecture, Draft Scope of Work, RA-401-404. EDC FOIL disclosures , however, show no record of any subsequent meetings with community representatives in connection with the upland rezoning. *See* FOIL Request of February 16, 2007, item 3, RA-406; January 18, 2008 Letter of Norman Siegel et. al., (appealing of denial in part of FOIL request) RA-410-422 and December 21, 2007 Letter of Judy Fensterman, RA-423-426 (denying appeal in part).

[21] *See* West Harlem Piers/Manhattanville Work Plan, "Teams/Lead Responsibility," June 11, 2002, RA-427; W. Architecture Draft Scope of Work, June, 10, 2002, RA-403, "Here W. Architecture would attend meetings to coordinate efforts with this upland area. The lead would be taken by Columbia."

[22] *See* Excerpt EIS Draft Scope of Work, Draft of July 9, 2004, RA-436.

Columbia plans entailing widely varying uses,[23] but architectural renderings of the various schemes show only one element in common: Columbia's exclusive control of the entire Manhattanville industrial area.[24]

By January 21, 2003, Columbia was preparing a "campus wide master plan," which by August 14, 2003 included a continuous below grade development using land under the city streets.[25] The proposed contiguous "bathtub" became the corner stone of Columbia's definition of its "needs."[26] Community Board 9's 197(a) plan for the industrial area, providing for in-fill development simply through rezoning, was ultimately rejected by the New York City Planning Commission for failure to meet this definition of Columbia's own "needs."[27]

To realize Columbia's plan, EDC offered Columbia the choice of three public

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[23] Karen Backus Real Estate, minutes of Manhattanville Team meeting of December 5, 2002, RA-428.

[24] *See* Skidmore, Owings and Merrill ("SOM"), September 20, 2002 Conceptual Integrated EDC/Columbia University Plan, RA-458-461.

[25] *See* W. Architecture, Minutes of Meeting of January 21, 2003, RA-462-463; Draft List of Needs including relocation of MTA bus depot, relocation of Con Ed substation, and acquisition of (or easements for) land under street beds, RA-464; and agenda of meeting of August 14, 2003 at which it was discussed, RA-465. *See also* draft list of Needs under project title Columbia University Campus Plan, with Bovis Lend Lease cost estimates identified as "Columbia University Master Plan" listing Columbia policy issue priorities of control of land under street beds, relocation of MTA Bus Depot and relocation of Con-Ed Substation, RA-466-471. *See* October 23, 2008 Memorandum of Lorinda Karoff, re Manhattanville meeting of October 24, 2003 RA-472-473.

[26] *See* April 21, 2008 Draft General Project Plan Draft (with track changes) at 16, with below grade facility emphasized from "an important element" to "a critical element". RA-848-850.

[27] *See* October 6, 2008 Letter of Amanda Burden and City Planning Commission report, at 48-50, A.-2085-2087.

actions: a large area project rezoning, a special district rezoning, or an ESDC General Project Plan.[28] Though Columbia considered a GPP the "preferred vehicle" for its project, it chose a special district re-zoning as well.[29] This two track strategy also provided a back up plan should eminent domain fall through.

EDC was well-aware that eminent domain was inappropriate in Manhattanville, as no incentive was needed to attract private developers; indeed, Columbia had already been investing in the area under its own initiative.[30] Columbia began acquiring property in the Manhattanville industrial area in 2000, and by December 31, 2002 had acquired seven out of 67 properties, approximately 11% of the properties in the area.[31] Nonetheless, EDC proceeded to effectuate Columbia's two track strategy.[32] On October 14, 2003 EDC and Columbia met with the Deputy Mayor for Economic Development Daniel Doctoroff and discussed a Memorandum

[28] *See* December 10, 2002 Memorandum of Lorinda Karoff re: minutes of Manhattanville Team Meeting of December 5, 2002, RA-429. *See also* Agenda of meeting of October 31, 2002, RA-474 (Discussing "outreach" to elected officials, with annotation indicating State/C.U. Direct); Agenda of meeting of November 11, 2002 (discussing "State vs. City" Process), RA-475.

[29] EDC first met with Columbia and DCP on September 20, 2002. *See* Agenda of meeting of September 20, 2002, RA-476.

[30] *See* December 10, 2002 Memorandum of Lorinda Karoff re: minutes of Manhattanville Team Meeting of December 5, 2002, where Robert Balder noted "the unusual dynamic it poses where the public and private sector roles have been partially reversed. Instead of the City creating incentives in order to attract private developers to an underutilized and/or blighted area in Manhattanville the private entity is already investing in the area under its own initiative", RA-429.

[31] *No Blight* study, Table I, RA-1364-1369.

[32] *See* Manhattanville Land Use & Environmental Review Schedule, including EDPL proceedings, revised June 25, 2003, RA-477.

of Understanding ("MOU") delineating the respective roles of ESDC and the City, Columbia's current acquisitions, ESDC's use of eminent domain, and selection of a lead agency for environmental review.[33]

Columbia met with ESDC in September 2003,[34] and ESDC began convening regular inter-agency project meetings with Columbia on March 15, 2004.[35] On July 30, 2004 Columbia signed a "cost agreement" with ESDC, by which it would pay for all of ESDC's costs associated with the preparation of a GPP, including hiring lawyers and consultants.[36] ESDC agreed to allow Columbia to draft all project related documents, including the GPP, the City Map Override Proposal, and draft correspondence and certifications by other involved agencies.[37] By August 13, 2004, Columbia's consultant AKRF had drafted an Environmental Assessment Statement

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[33] *See* October 13, 2003 Memorandum of Lorinda Karoff re Meeting minutes of Manhattanville Meeting of October 10, 2003, RA-478; *see also* Manhattanville Memorandum of Understanding Table of Contents, RA-480.

[34] *See* September 5, 2003 E-mail of Lorinda Karroff, RA-481; September 30, 2003 Memorandum of Lorinda Karoff re: Minutes of Manhattanville Meeting on September 26, 2003, RA-482; September 29, 2003 E-mail of Karen Backus to Ann Hulka of ESDC referring to "our meeting with you," and discussing arrangement of a briefing with ESDC chairman Charles Gargano, RA-483.

[35] *See* Agenda of Meeting of March 15, 2004, RA-484; of May 4, 2004, RA-485; Attendance sheet of ESDC meeting of June 15, 2004, RA-486; of July 30, 2004, RA-487; Agenda of meeting of May 5, 2005, RA-488; Attendance Sheet and agenda of meeting of August 1, 2005, RA-489-490; Attendance sheet of meeting of September 12, 2005, RA-491.

[36] *See* Cost Agreement Letter, RA-492-499.

[37] *See* Karen Backus *Memorandum re: ESDC* Meeting Highlights - July 30, 2004, RA-500 (noting agreement Columbia Attorney Martin Gold will prepare a first draft of the GPP); AKRF/Columbia City Map Override Summary of Proposal, RA-501-516; January 19, 2007 Draft MTA letter of agreement and draft MTA letter of review of PDEIS, , drafted by Columbia Attorney Richard Leland, RA-517-520.

("EAS"), a Draft Scope of Work (the "Draft Scope"), and an environmental impact statement ("EIS").[38] AKRF was also coordinating the comments of Columbia's lawyers, ESDC, EDC, and DCP in preparation for commencement of public review on August 27, 2004. Columbia, however, chose to delay the commencement of public review for more than a year, not submitting its EAS and Draft Scope until September 27, 2005, and the DCP finally issued the Notice on October 3, 2005.[39]

C. ESDC delayed in studying area conditions and colluded with Columbia to create a basis for finding blight in Manhattanville.

The problem of how to find blight in the Manhattanville industrial area remained. As of the May 18, 2006 draft of the GPP, the project was designated as only a land use improvement project.[40] Before ESDC can authorize the use of eminent domain in a land use improvement project, blight must be found. UDCA § 10 (c) (1). In referring the project to ESDC, EDC commissioned the consultant Urbitran, Inc., to perform a blight study of the area.[41] After an eleven page draft text

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[38] *See* Interim Targets for August 27 Issuance of Notice of Public Scoping/Positive Declaration, RA-521.

[39] *See* October 3, 2005 Positive Declaration, RA-522; *see also* January 27, 2005 E-mail of Geoffrey Wiener, RA-526 (stating during the relevant time period, "DCP views this as a chance to re-group, and discuss general policy issues, as well as areas of possible text changes."), *contrast* Positive Declaration and Notice of Scoping Meeting already drafted for August 27, 2004, RA-527-533, RA-534-536.

[40] RA-753.

[41] *See* Urbitran Associates, Inc., *West Harlem/Manhattanville Blight Study* ("Urbitran Blight Study"), dated August, 2004, showing first date of survey as October, 2003, A-3323. Despite specific request under FOIL, EDC has disclosed no records indicating any public notice was given, RFP issued, or any other competitive process was employed in procuring the Urbitran study such as were used throughout the West Harlem Master Plan process, and specifically in

with no individual building reports, however, the Urbitran study was abandoned.[42] On December 15, 2004, ESDC questioned one of Columbia's lawyers about the sufficiency of the study, stating that ESDC would have to participate in the study to ensure an adequate basis for a blight finding.[43]

By January 5, 2005, Columbia's consultant AKRF had reviewed the Urbitran study and Columbia's project manager was asking for copies for Columbia's lawyers and others on Columbia's "team", including the consultant AKRF.[44]

On August 1, 2005, ESDC, EDC and DCP also asked Columbia to identify parcels not owned by Columbia and to provide "updates" on properties that are owned by Columbia.[45] As it had done with EDC since early 2003, Columbia provided ESDC with regular acquisition reports showing a rising percentage of the area acquired until by the end of 2006 it had acquired or gained control over 45 out of 66, or 68% of the properties in the area.[46] To induce owners to sell their property,

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retaining Ten W. Architects or Ernst and Young as consultants.

[42] *See* Urbitran Manhattanville Blight Study, Draft of August, 2004, A.-3301-A3348.

[43] December 15, 2004 E-mail of Maria Cassidy, RA-537 ("It is very important that we be included in what the City is drafting since that will form the basis ESDCs finding. We will have to be satisfied that there is sufficient basis for our finding.").

[44] *See* January 7, 2005 E-mail of Lorinda Karroff, RA-538.

[45] *Questions to Be Answered by CU Requested by EDC, DCP and ESDC*, August 1, 2005, RA-540.

[46] *See* Columbia May 19, 2003 Presentation to ESDC seeking "Timely Public support of University's acquisition plan", RA-561-567; A July 30, 2004 Columbia/ESDC Cost Agreement ("Cost Letter"), Figure B, RA-492, 499; Supp. August 2, 2004 Letter of Irene Mikalef and enclosed list of properties owned by Columbia, RA-568-569. For a count of Columbia ownership or control in any given year, see *No Blight* study, Table I, RA-1364-1369. Table I

Columbia's representatives invoked the threat of eminent domain if the owner did not take the terms offered.[47] In properties that Columbia controlled, tenant businesses were induced to leave by refusals to renew leases or perform repairs, relocations to smaller spaces on commercially unreasonable terms, and improperly charging tenants. These tactics rendered 17 buildings vacant.[48] Columbia posted "For Rent" signs with phone numbers at which there was no answer.[49] Columbia left building code violations open, and accumulated new ones.[50]

On August 1, 2005, ESDC, EDC, and DCP also asked Columbia if it had begun work on a basis for finding the area blighted.[51] It was only in late March 2006 before ESDC finally took any steps to determine if the Manhattanville industrial area was blighted.[52]

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shows 67 buildings in the project area as it was defined at the time of the AKRF's surveys in the fall of 2006 - winter 2007.

[47] Comment of Walter South, West Harlem Local Development Corporation transcript of Public Meeting of September 30, 2006, RA-545. On December 13, 2007 Jordi Reyes-Montblanc, Chairman of Community Board 9 was quoted in the New York Sun saying that Columbia must "cease the threat of eminent domain to intimidate owners into selling." RA-554.

[48] *See No Blight* study, RA-1370-1371; *see also* Comment of the Eritrean Community Center, at 2, A-1963.

[49] *See, e.g.,* August 2004 photographs from AKRF's Architectural Resources Survey of August 2004, RA-555-558; *No Blight* study, RA-1312; *see also* Comment of Walter South at September 30, 2006 public meeting of the West Harlem LDC, RA-545.

[50] *See* September 11, 2006 Subcontract Agreement between AKRF and ESDC's retained counsel for the project, Carter, Ledyard & Milburn, LLC, RA-1065.

[51] *Questions to Be Answered by CU Requested by EDC, DCP and ESDC*, August 1, 2005, distributed in connection with August 1, 2005 ESDC/interagency project meeting August 1, 2005, p. 2, RA-540.

[52] *See* Affidavit of Rachel Shatz sworn March 14, 2007, RA-570-571.

D. To establish a basis for finding blight, ESDC's hired Columbia's consultant AKRF.

ESDC retained Columbia's consultant AKRF for its own blight study.[53] AKRF had been involved in the planning of the Columbia project from early 2004.[54] By the spring of 2004, AKRF was already at work preparing an Environmental Impact Statement ("EIS") under retainer to Columbia and attending ESDC project meetings.[55] By June 3, 2004, it was already seeking regulatory approvals on Columbia's behalf.[56]

In its initial outline for the blight study, AKRF proposed to "focus on characteristics that demonstrate blight conditions", and to provide lot profiles "highlighting any physical blight that may be present."[57] On August 23, 2006, before the actual retainer by ESDC, AKRF presented a preliminary report to ESDC, showing only 16 out of 49 (33 %) buildings in the area to be in poor or worse condition. It

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[53] *See id.*

[54] AKRF was considered on a list of consultants under consideration by EDC to prepare an EIS for the "upland rezoning" in connection with the West Harlem Master Plan. *See* Jan. 13, 2004 email of Marilyn Lee in January 16, 2004 Email chain of Alyssa Cobb, RA-572-573.

[55] *See* Sign-in sheet of meeting of June 15, 2004, RA-486; *see also* attendance sheet of meeting of July 30, 2004, RA-487; of September 12, 2005, RA-491; and of September 28, 2006, RA-1079.

[56] *See* August 13, 2004 Letter of Claudia Cooney, at 2, referring to request to Land Marks Preservation Commission for determination on June 3, 2004. RA-576-577.

[57] *See* April 3, 2006 E-mail of Britt Page, RA-581.

discussed methodological options necessary to show the area to be "underutilized."[58] AKRF also expressed concern about issues that could present obstacles to establishing a basis for a finding of blight, such as inadequate statistics to show crime, continuing occupancy of Columbia buildings, open violations in Columbia buildings, and history of Columbia repairs to properties.[59]

AKRF's contract with ESDC specified that AKRF should compare property values and rental rates with near-by areas.[60] AKRF's final study included no such data or analysis. Inconsistent with its prior Atlantic Yards study, AKRF chose to count buildings as vacant if they were only 25% vacant, and offered no explanation for the change.[61] It made no attempt to identify the causes of the vacancy, when 17 out of 18 buildings 50% or more vacant in the area became vacant within two years of Columbia's acquisition or assumption of control.[62] AKRF designated all lots built to less than 60% of the maximum permissible floor area ratio (FAR) as

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[58] *See* AKRF Preliminary Findings presentation and August 28, 2006 cover letter of Susan Robinson, RA-582-655.

[59] *See id.*, at RA-655.

[60] *See* AKRF Proposed Scope of Work, Task 4, RA-1081. ESDC permitted Columbia to control access to buildings, to accompany AKRF's inspectors, to review and to comment on building reports. *See* April 13, 2007 e-mail of Dennis Mincieli, RA-656; May 3, 2007 e-mail of Joseph Ryan, RA-657.

[61] *Compare* AKRF Atlantic Yards Blight study at C-5, RA-1115, *with* AKRF Manahttanville Neighborhood Conditions Study at ii, A-3354.

[62] *See No Blight* study, Tables I, RA-1364-1369; and J, RA-1372-1374.

"underutilized", without regard to the particular zoning of the area.[63] AKRF described building conditions as "deteriorated" almost exclusively on the basis of buildings owned or controlled by Columbia.[64] AKRF's final report provided no such analysis, but merely concluded certain conditions were "longstanding", without any attempt to determine the degree of deterioration since Columbia's assumption of ownership or control.[65] AKRF inferred that buildings did not generate sufficient revenue streams to cover costs of maintenance, but made no attempt to study actual or potential rental income, or to assess the costs of repairs.

In July, 2008, the Appellate Division, First Department found AKRF's relationship with ESDC and Columbia to be "tangled," that even in its work preparing an EIS it served an "advocacy function for Columbia" and that it had an "inherent conflict in serving two masters."[66] Shortly after the December 11, 2007 oral argument in that case, ESDC hired another consultant, Earthtech, Inc., on

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[63] AKRF *Blight* study at A-4, A-3367.

[64] Out of 34 buildings AKRF determined were in poor or worse condition, all but two were Columbia owned or controlled. Of the two that are not Columbia controlled, Block 1996 Lot 1, the "Cotton Club", and Block 1987 Lot 1, belonging to Petitioner-Respondent Tuck-It-Away at 133rd Street's building at 3300 Broadway. In both instances, Petitioners-Respondents strongly object to AKRF and Earthtech's assessments. The Cotton Club property was described as in "poor" condition solely on the basis of the sidewalk and parking lot, which represent a minor fraction of the property's value, and was not ultimately even included in the final 66 lot project area. *See No Blight* study at RA-1663-1667. AKRF and Earthtech's assessment of 3300 Broadway only on the basis of building code violations that had all been cured by the time of the study's publication on July 17, 2008. *See id.* at RA-1384-1395; *see also* FN 268, *infra*.

[65] The bias of AKRF's and Earthtech's methodology is detailed further in Point II below.

[66] *Tuck-It-Away Associates, LP v. Empire State Development Corporation*, 54 A.D.3d 154, 165 (1st Dep't 2008).

February 11, 2008, "to review the AKRF report in order to audit, examine and evaluate the information, data, determinations and conclusions therein set forth, particularly those made by AKRF."[67] Without ever releasing the result of such evaluation, ESDC went on to retain Earthtech "to basically replicate a study of the neighborhood conditions at the project site."[68]

Earthtech followed essentially the same methodology as AKRF, and documented further deterioration in Columbia owned and controlled properties since the AKRF study.[69]

Both the AKRF and Earthtech studies were published on July 17, 2008. ESDC relied upon both studies in making its finding that the area was a "substandard and insanitary area."[70]

E. ESDC belatedly adds alternative "civic project" basis.

In the September 2006 draft of the GPP, Columbia's attorneys first re-designated the project, adding to its title, "Manhattanville Land Use Improvement Project", a further designation: "and Civic Project."[71] Columbia had originally

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[67] Subcontract agreement, RA-711.

[68] Deputy General Counsel Maria Cassidy at the ESDC Board of Directors meeting, July 17, 2008. Transcript of Meeting at 20, line 17-18, A-712.

[69] *See* Earthtech, Inc., Neighborhood Conditions Study. A-5402; *see also No Blight* study at 50-51, RA-1333-1334; *see infra* notes 217-218.

[70] *See* transcript of Meeting of ESDC Board of Directors, July 17, 2008 at A-712.

[71] *Compare* September 2006 Draft GPP, RA-713, *with* May 18, 2006 Draft GPP, RA-753. Under the UDCA § 10, a "land use improvement project" requires that the area in which the project is located is substandard and insanitary." § (c) 1. A "civic project" does not require a

promoted the project to EDC and ESDC as an economic development project, where by assisting Columbia to compete with other universities, New York City and State could reap the economic benefits of job growth, spin off businesses, and regional advantages in biotechnology.[72] Over succeeding drafts of the GPP, Columbia's attorneys added language stressing Columbia's continuing educational function and contribution to the intellectual life of New York City, and to the local community.[73] The November 8, 2006 draft for the first time referenced a "responsibility" of New York State to support higher education.[74] Only at some time after the January 17, 2007, draft was the title changed from the "Manhattanville Mixed Use " to the "Columbia University Educational Mixed Use" project.[75]

Columbia also added to its GPP certain amenities and benefits to the local community as further "civic purposes".[76] Columbia offered a package of funding programs, scholarships, and other benefits conditional upon the final adoption of its

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finding of blight. *See* § 10 (d).

[72] *See, e.g.*, "The Opportunity in Manhattanville", RA-561-566; Draft Scope of Work for EIS draft of July 9, 2004, at 2, RA-432 (listing revitalization purpose ahead of providing facilities for Columbia, and describing Columia as economic generator.)

[73] *Compare* September 2006 Draft GPP at 7-9, "*Neighborhood involvement* [to be expanded]" RA-719-721, *and* November 8, 2006 draft GPP at 12-14, RA-788-790, *with* January 17, 2007 Draft GPP at 8-11, RA-840-843.

[74] *See* November 8, 2006 draft GPP at 9, RA-785; *compare* September 2006 Draft GPP at 6, RA-718, *with* January 17, 2007 draft GPP at 5-6, RA 837-838.

[75] *Compare* January 17, 2007 Draft GPP, RA-831, *with* April 21, 2008 Draft GPP, RA-888 (track changes indicating new title in the October 30, 2007 "November" draft).

[76] *See, e.g.*, January 17, 2007 Draft GPP at 8-11, RA 840-843; October 30, 2007 Draft as indicated from track changes in April 21, 2008 Draft GPP at 17-20, RA-904-907.

GPP.[77] The resulting 48 item list of "civic benefits," for which the facility was purported to be designed and intended, included measures already required under the EIS to mitigate the environmental impacts of the project, pre-existing commitments of Columbia's, benefits that inured principally to Columbia, and programs that did not even use, or made only *de minimis* use, of the facilities to be built.

These changes to the GPP were accepted without comment or discussion with Columbia of why the projects designated purpose was suddenly changed, and the project was no longer only about improving alleged blight conditions in Manhattanville, or the economic development benefit of doing so under Columbia's plan.[78]

F. ESDC withheld documents requested under FOIL while closing the EDPL administrative record.

Petitioner-Respondents Tuck-It-Away made a series of requests to ESDC and other agencies under the Freedom of Information Law ("FOIL").[79] On November 1, 2005, the West Harlem Business Group ("WHBG"), of which Tuck-It-Away and the

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[77] *See* Revised GPP at 40-50, A.-3023-3033. Unable to reach a Community Benefits Agreement with the West Harlem Local Development Corporation, Columbia declared these benefits unilaterally in a "memorandum of understanding."

[78] Under FOIL § 87 (2) (g), communications with and documents shared with non-agency parties are not exempt. All communications with Columbia, its attorneys, consultants and contractors were specifically requested in TIA's FOIL requests of October 13, 2006, at issue in *TIA v. ESDC I*, and of March 15, 2007, at issue in *TIA v. ESDC II.* As noted in Point IV, *infra*, at least 639 records, plus additional boxes of documents admitted to be in the possession of ESDC's attorneys, remain at issue in those cases and were not disclosed to Petitioners-Respondents.

[79] Public Officers Law, Title 6, § 85 ff.

Kaurs/Singhs are members, made a request to ESDC under FOIL for all records related to the Columbia project, and ESDC responded with a limited release of 33 records. When, on June 15, 2006, WHBG made a request for the same scope of records since the first request, ESDC released no further records, saying to do so would impair iminent contract awards, a legal theory it later abandoned.[80] In response to WHBG's administrative appeal, ESDC only reiterated the original denial, without further explanation.[81] After WHBG filed a petition for judicial review under CPLR Article 78, ESDC gradually expanded its search from one to three to four to twenty six employees, ultimately admitting to possessing hundreds of responsive records, and disclosing twenty. On May 4, 2007, however, the Supreme Court, New York County, found ESDC had failed to provide particularized and specific justification for withholding access to the records, and so ordered them all submitted for *in camera* review. The court ordered a number of documents released, including all AKRF related records.[82]

Petitioners-Respondents could not gain access, however, to most of the records

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[80] July 24, 2006, Antovk Pidedjain Letter of Denial, RA-669. WHBG, in its administrative appeal, and Article 78 petition, pointed out the inapplicability of the exemption of FOIL 87 (2) (c) for records which if released would impair present or imminent contract awards to a contract with a single known project sponsor where no party to competitive bidding stood to be unfairly advantaged. ESDC, in its motion to dismiss the petition, shifted its basis for exemption to § 87 (2) (c) for inter and intra-agency material.

[81] June 15, 2006, Anita Laremont Letter of denial of Administrative Appeal, RA-673.

[82] *WHBG v. ESDC*, Index No. 116839/06, Interim Decision and Order, RA 695.

ordered released. On July 5, 2007, ESDC took appeal, invoking CPLR § 5519 to stay the Supreme Court's judgment. Respondents-Appellants were at the same time denied access to further records in a related proceeding, *Tuck-It-Away v. Empire State Development Corporation*, Index No. 107368/07 ("*TIA v. ESDC I*") involving a FOIL request of the same scope for another time period.[83] ESDC took appeal in that case as well.

Concerned that ESDC could commence eminent domain proceedings at any time and close the EDPL administrative record before the Appellate Division decided the appeal, on July 13, 2007 WHBG moved to expedite the appeal.[84] ESDC opposed the motion.[85] Preference was granted. ESDC moved for adjournment.[86] That motion was denied.

On July 15, 2008 the Appellate Division, First Department affirmed the Supreme Court's decisions in *WHBG v. ESDC* and *TIA v. ESDC I* with regard to the AKRF related records and records for which ESDC had failed to provide adequate

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[83] *TIA v. ESDC I*, Index No. 107368/07 (Sup. Ct. New York County, August 16, 2007) RA-939. In response to ESDC's release of no records in response to WHBG's second request, Tuck-It-Away Associates, L.P., on October 13, 2006 made a request of the same scope, only with detailed specification of records known to exist, likely to exist, parties known to be in communication, and specific events in connection with which records were likely to exist. The October 13, 2006 Tuck-It-Away request included the period of both WHBG requests, but also the period since the second WHBG request down to October 15, 2006.

[84] Notice of Motion for Expedite Appeal and Affirmation of PVB , RA-947-953.

[85] Affirmation of Jean McCarroll in Opposition of Motion for Expedited appeal, RA-954-960.

[86] Notice of Motion for Adjournment of Appeal, RA-961-962.

basis for withholding.[87] On July 23, 2008, ESDC moved for reargument or for permission to appeal, thereby obtaining a further stay under CPLR § 5519.[88] By then, however, ESDC, on July 17, 2008, had already adopted Columbia's GPP, and given notice of public hearings for September 2 and 4, 2008, with the record to be closed to public comment on October 10, 2008.[89] ESDC's motion for reargument was ultimately denied, but not until January 27, 2009, three months after the EDPL administrative record was closed by ESDC.[90]

On the basis of its motion for further proceedings, ESDC also sought a stay of proceedings in a third case, *Tuck-It-Away Associates, L.P. v. Empire State Development Corporation*, Index No. 07114035 ("*TIA v. ESDC II*"), involving the same FOIL request, only for subsequent and prior time periods.[91] Here too, ESDC forced petitioner TIA to go to court by offering no further basis for its determination in response to TIA's administrative appeal than it had on its first partial denial of the

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[87] *Tuck-It-Away v. ESDC*, 54 A.D.3d 154 (2008) (also reversed in part with regard to 93 "mundane" records pertaining to scheduling of meetings found to be not factual, and three records found to be not instructions to staff.)

[88] *See* Affirmation of Jean M. McCarroll in Support of Motion for Reargument, or, in the alternative, for Permission to Appeal to the Court of Appeals, RA-963-976.

[89] Notice of Hearing , A-990.

[90] *TIA v. ESDC & WHBG v. ESDC*, Index Nos.116839/06 and 116839/06 (First Dep't, January 27, 2009) Motion Denied. Appendix to this Brief at 153.

[91] *See* FOIL request letter of Norman Siegel, et. al., March 30, 2007, RA-979-984.

request.[92] Here as well, because of Respondent-Appellants failure to provide adequate basis to support its determinations of exemption, the court ordered all records be submitted for *in camera* inspection.[93] Although ESDC's motion to stay proceedings was denied,[94] ESDC was still able to close the EDPL administrative record before the court was able to complete its review.[95]

Between *WHBG v. ESDC*, *TIA v. ESDC I* and *TIA v. ESDC II*, therefore, a substantial number of records were not produced before ESDC voluntarily closed the EDPL record.[96] These records related to the October 15, 2006 through March 15, 2007 period, during which surveys for the AKRF blight study were being conducted, and during which the new "civic project" designation was being added. Except for seven documents from *WHBG v. ESDC*, ordered released by this Court on December

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[92] *See TIA v. ESDC II, Index No.* 07114035 *Affirmation of Philip van Buren* ¶ 30-32, 35. RA-985-991.

[93] *TIA v. ESDC II*, Index No. Index No. 07114035 (Sup. Ct. New York County, October 23, 2008) decision and order, Appendix to this brief at 154.

[94] *TIA v. ESDC II*, Index No. 07114035, Sept 5, 2008, Order denying motion to stay of proceedings. RA-994.

[95] The case remains pending.

[96] ESDC did, on May 22, 2008, release certain AKRF related records related to the blight study, and many of these records provide an important basis for Petitioners-Respondents' allegations of bad faith in this case. After Petitioners-Respondents won a TRO enjoining the closing of the EDPL record, on October 10, 2008, after its own stated closing of the EDPL record, ESDC delivered 2044 pages of AKRF related records in connection with AKRF's work on the EIS. The extreme late date, however, made it impossible to adequately review these records, or to include them in the record.

15, 2009, these records still have not been produced to date.[97]

In a fourth FOIL case, *Tuck-It-Away Associates, L.P. v. New York City Department of City Planning*, Index No. 111652/07, ("TIA v. DCP"), New York City was also able to delay the release of documents past ESDC's closing of the EDPL record.[98] NYC EDC also continued to withhold one particular record, citing ESDC's motion for further proceedings.[99] DCP delayed the release of records in response to a second TIA request, moreover, requiring six months, until August 26, 2008, to respond, and refusing to allow TIA to prioritize or otherwise amend the request to

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[97] These include 139 known records, plus additional boxes of records still at issue in *TIA v. ESDC I*, and 500 records withheld in *TIA v. ESDC II*.

[98] On April 10 ,2008, the Supreme Court ordered all withheld records submitted for *in camera* inspection because of DCP's failure to provide adequate basis to support its determinations of exemption. *TIA v. DCP*, Index No. 111652/07 (Sup. Ct. New York County, April 10, 2008) Interim Decision and Order, RA-995-997. On August 15, 2008, New York City moved to stay proceedings on the grounds of ESDC's motion for reargument in *WHBG v. ESDC* and *TIA v. ESDC* would be dispositive. *See TIA v. DCP*, Index No. 111652/07, Order to Show Cause, August 14, 2008, RA-998-999 The motion was found without merit and denied in that case as well. On October 6, 2008 the Supreme Court, New York County, ordered 41 sets of records to be released. *TIA v. DCP*, Index No 111652/07 (Sup. Ct. New York County October 6, 2008). RA-1003-1008. On October 16, 2008 DCP took appeal to the appellate Division, thereby achieving further stay of proceedings under CPLR § 5519, past the date of ESDC's closing of the EDPL record to public comment. That appeal was never perfected, however. DCP did make a limited disclosure of AKRF related records on November 6, 2008, after ESDC's closing of the record. DCP also moved on November 13, 2008 for reargument. The appeal was never perfected, and the motion to re-argue was denied. *See* Motion for Reargument denied, Appendix to this brief at 159. On July 13, 2009 DCP disclosed the remainder of the records, nine months after ESDC's closing of the EDPL record on the Columbia project.

[99] August 28, 2008 Letter of Judy Fensterman, RA-1009-1010; Letter of Jill Braverman of October 8, 2008, RA-1011-1012. EDC released this record on October 10, 2008, after Petitioners-Respondents won a TRO enjoining the closing of the EDPL record.

facilitate a sooner response.[100] The Office of the Deputy Mayor for Economic Development failed to respond to petitioner-respondent TIA's March 16, 2007 FOIL request, or to its appeal on grounds of constructive denial, until February 26, 2010[101].

G. Petitioners-Respondents move to enjoin ESDC's closing of the EDPL record.

Caught between this concerted resistance to the disclosure of information, and ESDC's October 10, 2008 deadline for closing the record, the TIA Petitioners-Respondents requested ESDC on September 9, 2008 to delay closing the record until it had handed over all records that courts had ordered released, or until the resolution of any further court proceedings sought by ESDC.[102] ESDC denied the request.[103] On September 30, 2008, therefore, the TIA Petitioners-Respondents moved the Supreme Court, New York County to enjoin the closing of the record on the grounds that Petitioners-Respondents statutory and constitutional right to be heard was being violated in both the EDPL administrative hearing, and upon judicial review of the

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[100] *See* Letter of Norman Siegel, et. al.,February 15, 2008, RA-1020-1029; Letter of Wendy Niles, February 26, 2008, RA-1030; Letter of Norman Siegel, February 28, 2008, RA-1031; March 17, 2008 letter of Wendy Niles denying request to prioritize. RA-1032; Letter of Norman Siegel, et. al., August, 13, 2008 RA-1033-1034.

[101] *See* FOIL Request letter of March 16, 2007, RA-1035-1037, August 13, 2008 Administrative appeal letter of Norman Siegel, et. al. RA-1038-1039. Reply of Carol Robles-Roman, RA-1040. (On October 3, 2008 Carol Robles Roman, wrote a further reply promising response "within three weeks". The TRO against the closing of the record was lifted on October 30, 2008. The Deputy Mayor's office did not in fact disclose any records until February 26 , 2010.

[102] September 9, 2008 Letter of Norman Siegel, et. al., requesting record be held open, A-1901.

[103] Denial Letter of John Casolaro, September 23, 2008, A-1903.

agency's determination. Petitioners-Respondents alleged their due process rights were violated if ESDC closed the record while the agency was still withholding documents to which courts had found they had a legal right. On October 3, 2008 a Temporary Restraining Order was granted by the Supreme Court, New York County.[104] On October 30, 2008, however, the TRO was lifted and the motion for a preliminary injunction was denied on grounds of lack of subject matter jurisdiction.[105] Respondent-Appellant closed the record that same day.[106]

On December 17, 2008 ESDC's board of directors adopted a revised GPP for the project, and on December 22, 2008, ESDC published its determination and findings.

On December 15, 2009, this Court decided Respondent-Appellant's further appeal, *WHBG v. ESDC*, finding ESDC had failed to provide the Supreme Court adequate basis to support its determinations of exemption, had violated its duties under FOIL in responding to WHBG's request, and that it had unnecessarily caused the litigation by failing to provide an explanation for the denial of Petitioners-

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[104] *Tuck-It-Away Associates, LP, Tuck It Away Inc., Tuck-It-Away at 133rd Street, Inc., and Tuck-It-Away Bridgeport v. Empire State Development Corporation* ("*TIA et. al. v. ESDC*"), Index No. 113275/08, Appendix to this brief at 160.

[105] *TIA et. al. v. ESDC,* Index No. 113275/08 (Sup. Ct. New York County, October 30, 2008). ESDC did release some records before October 30, 2008, notably the AKRF environmental review records it withheld until after 5:30 PM on October 10th. Appendix to this brief at 162.

[106] As noted by Justice Richter's concurrence below, *see Kaur v. UDC* at 31.

Respondents' request in response to an administrative appeal.

ARGUMENT

STANDARD OF REVIEW

This case is not a case for automatic deference to legislative determinations delegated to Respondent-appellant's agency.

Petitioner-Respondents are not simply disagreeing with Respondent-Appellant as to whether the area is blighted. Petitioner-Respondents also maintain that the process by which Respondent-Appellant reached its finding was corrupted by Respondent-Appellant's actions in knowingly manipulating the process to reach a predetermined result, including abandoning an initial blight study, letting Columbia control the property that was to be the subject of study, hiring Columbia's consultant to study the conditions overwhelmingly in Columbia owned buildings, that Columbia had created, exacerbated or maintained, directing or allowing that consultant to use a biased methodology, and hiring another consultant to "replicate" the first after the first's conflicts of interest were exposed. Under New York law, such an allegation of bad faith does not require deference to the agency's discretion. *See Jackson v. New York Sate Urban Development Corp.*, 67 N.Y. 2d 400, 437(1986) ("as to other questions [than the agency's determination of public purpose] the court should consider substantial evidence."); *cf.* Eminent Domain Procedure Law ("EDPL") § 207 (C) (1-4).

Petitioners-Respondents also allege that the belated, and unprecedented attempt to shoehorn the building of a campus for a private university into the statutory category of a "civic project" exceeded ESDC's statutory authority under the Urban Development Corporation Act ("UDC Act") § 10 (d). Under *Jackson*, this is a matter for the court to consider based upon the evidence of the record. *Id.* This is a question of law requiring interpretation of the meaning of a "civic project" and whether the proposed facilities are to be constructed for such a "civic purposes". The statutory construction of the meaning of a "civic project" is not a question on which the Court is obliged to defer to agency discretion, but instead one for the Court to decide on the weight of substantial evidence.

This project also offers a plethora of inducements, cash benefits to various parties, and promises of the provision of certain services and limited access to Columbia facilities by limited parties. Respondent-Appellants also offers certain amenities, such as limited amounts of publicly accessible, privately owned open space that are either mandated under zoning or required as mitigation for adverse environmental impacts of the project on the area. Whether these constitute "purposes", civic or otherwise, for which the facilities are proposed to be constructed, is also a question of statutory construction in which the court, under *Jackson*, must also weigh substantial evidence.

Petitioners-Respondents additionally allege that Respondent-Appellant's late

formulated "civic" purposes, in so far as they are offered as public purposes to support the use of eminent domain, are in fact a pretext. Because they are not categorically recognized public purposes in support of eminent domain, or are manifestly not the purposes for which the project is proposed, but at best incidental benefits, Petitioner-Respondents maintain they do not qualify as public purposes in support of condemnation, but constitute a pretext.

Petitioners-Respondents' final remaining purpose, the anticipated creation of jobs and generation of payroll taxes, and other economic development purposes of bolstering the city's or state's comparative advantage in higher education or biotechnology, must be considered under the decision of the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 . The U.S. Supreme Court's recognition of economic development as a public purpose was limited to the facts of that case, where the planning process involved public bodies determining the purpose and scope of the project prior to the identification of any developer or other private beneficiaries. To determine whether any comparable "carefully considered plan" can be said to have existed in this case the Court must again review the record for substantial evidence. *See Jackson*, 67 N.Y.2d at 437. Moreover, under *Kelo*, the transfer of private property in this case requires a "heightened standard of review." 545 U.S. at 493. Under EDPL § 207 (3) (1), conformity with the New York or United States constitution is distinctly an "other issue" from public purpose under EDPL §

207 (3).

Petitioners-Respondents raise additional claims under both the New York and United States constitutions: that the concept of blight, as employed under various synonyms in the UDC Act, § 10 and § 3, is impermissibly void for vagueness; that the Respondent-Appellant's closing of the administrative record while withholding information to which Petitioners-Respondents had a legal right under FOIL violated their due process right to be heard; and that the EDPL's grant of exclusive jurisdiction to an appellate rather than a trial court violated Petitioners-Respondents' due process rights. Such constitutional questions must also, under *Jackson*, be evaluated in light of substantial evidence, and be reviewed pursuant to the standards required to meet the elements of due process of law.

POINT I

ESDC's Finding of Blight was Made in Bad Faith

A. ESDC's finding of blight was in bad faith because remediation of blight was neither the dominant purpose nor an actual purpose of the proposed taking.

This case is different from most cases that allege bad faith and pretext, including the case recently before this court, *Matter of Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009), because here the Petitioners-Respondents have been able to create a record documenting the original and dominant purpose of the plan, as well as the deceptive conduct of Respondent-Appellant ESDC, in concert

with other New York City agencies across a span of six years, to mask that purpose and devise a succession of pretextual purposes.

While courts are reluctant to interfere with an agency's exercise of eminent domain power, they may do so "on a clear showing of bad faith. " *Dowling College v. Flacke*, 78 A.D.2d 551, 552 (1980) (*quoting Saso v. State of New York*, 20 Misc.2d 826, 829 (Sup. Ct. Westchester Cnty. 1959)) The term "bad faith" means taking for a purpose other than the purpose stated. *See Saso v. State of New York*, 20 Misc.2d 826, 829 (finding creation of an access road for a private property owner was not within the agency's authority limited to building a highway).

When the stated public purpose is the redevelopment of a blighted area, moreover, this Court has held that it must be the primary purpose of the taking. *See Yonkers Community Development Agency v. Morris*, 37 N.Y. 2d 478, 486 (1975) (noting the unanimity of this Court in *Kaskel v. Impellitteri,* 306 N.Y. 73 (1953) for the proposition that "such clearance must be the primary purpose of the taking, not some other public purpose, however laudable it might be"). Thus, Respondent-Appellant may not pursue the project for economic development or other purposes, and then add the removal of blight as an after-thought.

As the record clearly shows, and the plurality of the First Department correctly found, the policy of giving the entire Manhattanville industrial area to Columbia for a major capital expansion project was reached by agreement between New York City

EDC and Columbia in the summer of 2002, long before "blight" was even mentioned. EDC not only found no blight in the West Harlem Master Plan, it neither mentioned any blight-like conditions, nor discussed the need for eminent domain to remove any impediment to development.[107] EDC even described the topography of the area, the Riverside Drive viaduct, and the historic IRT trestle, as positive elements of the area's character.[108] The area's stock of industrial buildings were described by EDC as "sturdy". EDC's consultant Ernst & Young surveyed the area and found 55 of the 66 lots that Columbia eventually chose as its project area were in good, fair, or excellent condition.[109] Analyzing economic conditions in the surrounding West Harlem community and noting the area's unusually favorable location and transportation access, Ernst & Young found the development potential of the area to be strong.[110] The West Harlem Master Plan proposed to unlock that potential by the simple step of re-zoning.[111] By re-zoning to permit a higher floor area ratio, the West Harlem Master Plan foresaw a transformation of the neighborhood by voluntary "in-

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[107] *See supra* notes 17 - 18.

[108] West Harlem Master Plan, RA-52-53.

[109] *See* Ernst & Young, Appendix 9, RA-309-314. Of the ten in "poor" condition or not rated, five were later rated by ESDC's consultant Allee King Rosen & Flemming as "fair". Two further properties, Block 1999, Lots 29 and 30, residential buildings awaiting gut rehabilitation, were found by Ernst and Young to be in "very poor" condition, but after renovations were completed they were found by AKRF to be in "good" condition. AKRF at D-501, D-504, A-3920, 3923.

[110] *Id.* at 19-30, 61-66, RA-217-236, 261-266.

[111] West Harlem Master Plan at 36, RA-43.

fill" development, building by building.[112]

In publishing the West Harlem Master Plan, EDC engaged in intentional deception. Even as EDC was discussing a development scenario with the community involving a "trade district" that would "build on existing uses", on October 29, 2001 EDC president Michael Carey reassured Columbia that the material distributed to community representatives in the third Working Committee meeting, was only "baseline analysis", and that EDC anticipated that "the final plan will lay the groundwork for concepts that are more consistent with the ideas alluded to in your letter."[113] EDC ceased meeting with community representatives and met with Columbia, to implement the upland rezoning phase of the West Harlem Master Plan and gave Columbia exlcusive reponsibility to prepare the "Institutional and Economic Development Plan."[114] The plan that emerged in September, 2002, contradicted the West Harlem Master plan by giving exclusive control of the entire Manhattanville industrial area to Columbia[115] The plans that EDC ultimately adopted provided for tall buildings along 12th Avenue, disregarding the West Harlem Master Plan's

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[112] *Id*. at RA-43-44, 58-59.

[113] *See* October 4, 2001 letter of Emily Lloyd, RA-1055-1056; *see also* October 29, 2001 reply letter of Michael Carey, RA-1057.

[114] West Harlem Piers/Manhattanville Development Work Plan, RA-427 (assigning Teams/Lead Responsibility for Institutional and Economic Development Plan to "CU" and for Zoning to "EDC/CU").

[115] *See* Skidmore Owing and Merrill, Conceptual Integrated EDC/Columbia University Plan, RA-458-461.

specification that building heights should slope down towards the river.[116]

To effectuate Columbia's campus wide master plan, EDC discussed with Columbia the possibility of an ESDC General Project Plan using eminent domain, even though it was aware of the impropriety of using eminent domain in an area in which a developer was already investing, and clearly did not need an incentive.[117] When Columbia then approached Respondent-Appellant ESDC in September, 2003, it was with a fully formed plan endorsed by EDC which treated area wide acquisition as a given. Prior to the final stages of environmental review in 2007, ESDC never considered any other plan, or any modification of the plan that involved anything less than Columbia's exclusive control over the entire area.[118]

Finding "blight" first emerged on EDC's agenda in October 10, 2003, only after it was decided to involve ESDC for its powers of eminent domain.[119] It was not until that same time that EDC commissioned the consultant Urbitran, Inc., to perform

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[116] Thomas Lunke, Comments on Draft Scope, RA-1044 (pointing out no "stepping down to the waterfront" in the Columbia Plan); Figure 6 from May 4, 2005 Draft Scope, Illustrative massing section looking North, RA-1041, Figure 5 from West 125th Street/West 129th Street Elevation Looking North. Upp. RA-1042; January 12, 2005; *cf.* West Harlem Master Plan, RA-43-44.

[117] *See* December 10, 2002 memorandum of Lorinda Karoff; Comment of Robert Balder, RA-429.

[118] Discussion of the 197-a plan does not appear in the GPP until the draft of October 30, 2007, *see* April 21, 2008 Draft GPP showing track changes on draft of October 30, 2007, RA-901-902; *compare,* GPP draft of January 17, 2007, RA 833-855. Records obtained under FOIL show no discussion of alternatives before this time.

[119] Memorandum of Lorinda Karoff re: Meeting minutes of Manhattanville Meeting of October 10, 2003, RA-479; *see also* Manhattanville Memorandum of Understanding, Table of Contents, RA-480.

a blight study.[120] ESDC did not wait for the results of such a study before contracting with Columbia to produce documents and retain counsel for a GPP, or to cooperating with Columbia's consultant AKRF for an initial August 27, 2004 target for the commencement of environmental review.[121] Despite voicing concerns about the adequacy of the Urbitran study on December 15, 2004, ESDC continued to participate in project planning.[122] ESDC even invited Columbia to provide a basis for a blight finding.[123] Only in late March, 2006, did ESDC first undertake to engage a consultant to perform its own, purportedly neutral, blight study, and it did not formally retain that consultant until September 11, 2006.[124]

The record therefore clearly shows that the Columbia plan was fully formulated, accepted by EDC, and by ESDC, prior to any investigation of any alleged condition of blight in the area and despite the fact that the just completed West Harlem Master Plan process had made findings and announced policies incompatible with Columbia's plan. The effort to find blight in the area only came later, in an attempt to find legal justification for a policy already adopted.

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[120] Earliest date mentioned in Urbitran study is of survey maps dated to October, 2003, A-3323.

[121] *See* Cost Agreement Letter, RA-492-499.

[122] December 15, 2004 E-mail of Maria Cassidy, RA-537.

[123] *See* ESDC, EDC, and DCP, Questions for CU, August 1, 2005, "Additional ESDC Questions", RA-540 ("Has Columbia begun any work on the basis for blight other than the City's draft blight findings so far?").

[124] *See* Affidavit of Rachel Shatz, RA-571.

ESDC undertook to assist in realizing the project, the scope, and even design of which was already specified, without any investigation as to whether the area was blighted.[125] Clearly, a purpose other than the remediation of blight was dominant over this process. That dominant purpose was the perceived economic development benefits of helping Columbia compete against its rivals. Such promises of jobs and spin-off business activity characterize Columbia's approach to EDC, to ESDC, and

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[125] Respondent-Appellant objects to Petitioners-Respondents statement in its petition that the area "had never previously been found blighted" as an allegation that was not properly raised in the hearing. Petitioners-Respondents's *No Blight* study states that in the three planning processes prior to Columbia's current plan - the 1999 Harlem on the River plan, the 1994-2006 Community Board 9 197-a plan, and the NYC EDC 2002 West Harlem Master Plan - no blight, or even blight-like conditions, are described or mentioned, and no need for eminent domain was suggested. Instead, they saw the area as fully capable of redevelopment by unaided market forces if only the zoning limit was raised to higher density. Additionally, the 1984 Harlem Urban Development Corporation, *Background Study of the West Pier Area* study is in the record. RA-323. While noting a decline in the area's employment with the relocation of the food distribution business to Hunt's Point in the Bronx, it also found the area's buildings to be in fair or better condition. RA-332. Petitioners-Respondents' allegation that the area "is not blighted", stated clearly in their "issues facts and objections" submitted at the public hearing of September 4, 2008, encompasses both its prior nominal designation as well as the current physical and economic reality. That the Manhattanville industrial area was never part of a designated urban renewal area is a matter of public record, of which the Court may take judicial notice.

In its brief, Respondent-Appellant attempts once again to bring into consideration certain planning documents, in which Columbia University was involved, dating from the 1950s, that were not part of the administrative record that was before Respondent-Appellant at the time of its determination. These documents, the Affidavit of R. Andrew Parker, sworn to February 13, 2009 to which they are attached as exhibits, as well as the Affidavit of Philip Pitruzzello, sworn to February 2009, were properly excluded from consideration by the plurality opinion of the Appellate Division. *See Kaur v. UDC,* 892 N.Y.S.2d at 20. This Court as well, should disregard this material.

By referring to these documents, Respondent-Appellant attempts to suggests that there had indeed been some previous finding of blight in the Manhattanville industrial area. The attachments to the Parker affirmation, however, do not in fact refer to the Manhattanville industrial area, but instead describe only certain residential areas that have since been redeveloped.

its first presentation to the public at Community Board 9.[126] From New York City and ESDC's point of view, it was the goal of helping Columbia compete in its industry that dictated the size of the project, and that it should involve the use of eminent domain. It was not the need to remove blight. And even as an economic development project, there was no consideration of alternatives to Columbia's plan.[127] Columbia's consistent initiative, and the merely reactive and enabling roles of EDC, ESDC, and DCP, reveal the favoritism that characterized the entire planning process. Given that early and dominant commitment to Columbia, finding blight, as well as other purported public purposes can only be recognized as a protracted attempt to make the facts fit the predetermined policy.

B. ESDC's conduct in reaching a finding of blight was deceptive

New York courts have also entertained allegations of bad faith directed more broadly to "the manner in which respondent proceeded." See *Ranauro v. Town of Owasco*, 289 A.D.2d 1089, 1090 (4th Dep't 2001) (in which petitioner alleged improper motive on the part of an engineer hired by the condemning agency; *Faith*

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[126] *See* Letter of Emily Lloyd, October, 2001, RA-1055; "The Opportunity in Manhattanville", August 2003, RA-561-566; Presentation to Community Board 9, May 19, 2004, RA-561-567; *see also* July 9, 2004 Draft EAS at 2, RA-431.

[127] In response to Petitioners-Respondents' FOIl requests, neither EDC nor ESDC show any record prior to the final stages of environmental review in 2007 of having discussed the alternative of in-fill development which was stated as the City's policy in the West Harlem Master Plan. Tuck-It-Away, JZB Realty and Mid Atlantic Moving and Storage had well enough formulated plans to develop their own properties to submit specific re-zoning proposals to the New York City Planning Commission, but these were rejected in favor of Columbia's plan.

Temple Church v. Town of Brighton, 17 A.D.3d 1072, 1073 (4th Dep't 2005). The Appellate Division, Second Department has allowed for judicial intervention not only for "bad faith" in an agency's final action, but also for "conduct" that was "irrational, baseless or palpably unreasonable." *Dowling College v. Flacke*, 78 A.D.2d 551, 552. Bad faith, therefore, can be found not only in a discrepancy between a final stated purpose and a prior and governing purpose, but it can also be shown in a pattern of deceptive conduct intended to disguise the actual purpose with pretexts. Deceit is also evident when the agency, in seeking a basis for findings, suppresses evidence, employs consultants and methodologies it knows or should know to be biased, and represents their studies as "objective."

The Columbia project was marked by deceit from the outset. EDC cultivated the impression that community concerns were being incorporated into public planning, while simultaneously promising to Columbia a very different policy[128]. When EDC began to meet with Columbia in June 2002 behind closed doors, and turned the promised re-zoning into the effectuation of Columbia's exclusive campus

[128] At the third Working Committee meeting on June 20, 2001, for example, EDC's consultant Ten W Architecture distributed a hand-out illustrating the economic development initiative of a "Trade District between Twelfth Avenue and Broadway that would "build on existing uses such as Pearlgreen Construction, Midway Electric and Skyline Windows".On October 4, 2001 Emily Lloyd, Executive Vice President for Administration of Columbia University wrote to Michael Carey, President of NYC EDC, advocating for a higher scale zoning to accommodate research and technology businesses. On October 29, Michael Carey responded, stating the material distributed at the third Working Committee represented only a "base line analysis", and that EDC anticipated that "the final plan will lay the groundwork for concepts that are more consistent with the ideas alluded to in your letter. RA-1055, RA-1057.

plan, it did so without notice to the public, and evaded inquiries from the public about the status of the upland rezoning.[129]

EDC also engaged in deceptive conduct when it accepted Columbia's two track strategy of seeking both rezoning and an ESDC GPP.[130] Because of ESDC's power to override local law under UDCL § 16 (3), no rezoning would be necessary if there were a GPP.[131] What became Columbia's private re-zoning application was endorsed by EDC, and later by ESDC, only for Columbia's strategic advantage. This approach created the illusion of continuity with the West Harlem Master Plan, to permit environmental review and public review under New York City's Uniform Land Use Review Procedure ("ULURP") under the benign color of a policy for which community consensus had already been established, and to enable elected officials to evade accountability for the true nature of the plan, on the grounds that purportedly no decision had been reached on the use of eminent domain. EDC committed itself

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[129] *See* Point I.A at 41-42, *supra*; *see also* notes 20, 112, 113, *supra* and citations to the record therein. When asked by a member of Community Board 9 about the status of the upland rezoning, EDC evaded the question. *See* W. Architecture minutes of meeting of February 5, 2003 with CB9 Piers and Waterfront Committee, RA-661.

[130] *See* December 10, 2002 memorandum of Lorinda Karoff re: minutes of Manhattanville Team Meeting of December 5, 2002, RA-429; EDC first met with Columbia and DCP on September 20, 2002 *See* agenda of meeting of September 20, 2002 RA-476; Attendance Sheet RA-1058; *See also* agenda of meeting of October 31, 2002 RA-474 (Discussing "outreach" to elected officials, with annotation indicating State/C.U. Direct); agenda of meeting of November 11, 2002, RA-475(discussing "State vs. City" Process).

[131] The Atlantic Yards project in Brooklyn, for example, relied only on ESDC's power to override local law, sought no re-zoning, and did not go through New York City's Uniform Land Use Review Procedure ("ULURP").

to this deceptive strategy in working with Columbia to negotiate with the Deputy Mayor for Economic Development, Daniel Doctoroff, on October 14, 2003, a Memorandum of Understanding that allocated roles to ESDC and city agencies.[132]

EDC also engaged in deceit when in late 2003 it hired the consultant Urbitran, Inc., to perform a blight study, to find a basis for blight that would justify ESDC's exercise of eminent domain. In contrast with the engagement of all other consultants in connection with the West Harlem Master Plan process, EDC issued no public request for proposals, and considered no competing bids.[133] The resulting study used a highly biased methodology to find the area "blighted." For example, inappropriate criteria such as lack of light and air, traditionally associated with densely populated tenement neighborhoods , was used to find the IRT trestle and the Riverside Drive viaduct to be blighting factors for the shadow they cast on the nearest properties at certain times of day, even though a low rise neighborhood like the Manhattanville industrial area can not be meaningfully said to lack light and air.[134] Without actual evidence of any actual impairment of either residential or commercial or industrial

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[132] RA-480.

[133] In response to a Petitioner's FOIL request for all records related to the Columbia Project, EDC disclosed no records of any RFP or receipt of proposals from consultants in connection with a blight study, and certified that no further responsive records exist. *See* FOIL Request of Norman Siegel, et. al., February 16, 2007, RA-1060-1064; January 18, 2008 letter of Norman Siegel et. al., RA-410-422 (appealing of denial in part of FOIL request); December 21, 2007 letter of Judy Fensterman, RA-423-426 (denying appeal in part).

[134] A-3309.

uses, Urbitran cited the presence of seven residential buildings in the extreme northeast corner of the area as "incompatible uses" rendering the area blighted.[135] Several properties are mis-categorized as either parking lots or vacant lots which are in fact lots with occupied buildings.[136]

Urbitran skewed its evaluation of building conditions by using hypersensitive indices. By counting "site conditions" separately from "building conditions", either of which could be triggered by two minute instances of negative conditions, it was able to inflate the number of allegedly blighted properties.[137] By this method, a building in otherwise perfect condition could be rated as blighted for something as slight as a crack in the sidewalk and one broken exterior light fixture.[138] Without producing any individual building reports, or offering any evidence of interior inspection of any buildings, Urbitran pronounced large numbers of lots to be in poor condition without any offer of basis.[139] Thirteen out of the forty properties Urbitran

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[135] A-3307-08. The only two instances of residential buildings within the actual project area that it found were both located on the periphery of the area with no documentation of any actual danger to health or impairment of economic activity.

[136] Figure 2 of the study, which details existing land uses, has one category for both parking facilities and vacant lots combined, thus giving the impression that vacant lots exist, when in fact there are none in the area. A-3320. This map erroneously categorizes 6 out of the 10 lots with this designation in the project area (Block 1987 Lots 7, 9; Block 1986, Lot10; and Block 1997, Lots 1, 34, and 49).

[137] *See* Urbitran at 4, A-3310; Urbitran, Appendix C, Blight Inspection form, A-3329-30.

[138] *See No Blight* study at 2, RA-1279.

[139] Respondent-Appellant's assertion that Urbitran found 40 out of 67 properties in the project area were found to be in either poor or critical building or site condition comes at best from counting lots on two maps provided in the study which distinguish buildings and sites in

rated as in poor condition, AKRF rated as "fair."[140]

ESDC was aware that the Urbitran study did not provide an adequate basis for finding the area blighted. On December 15, 2004, ESDC's Deputy General Counsel Maria Cassidy informed one of Columbia's attorneys of its concern, stating that ESDC would "have to be included in the City's blight finding."[141] ESDC's inclusion, however, did not involve revision or completion of the Urbitran study, but rather its abandonment. ESDC made no attempt to ascertain conditions in the area again until late March, 2006[142], and only commissioned a new study on September 11, 2006.[143] Respondent-Appellant offers no explanation for this substantial delay.[144]

What ESDC did do during this delay, was to invite Columbia to help generate a basis for blight. On August 1, 2005, ESDC, together with EDC and DCP, asked Columbia whether it had begun work on the basis for blight. Between January 1, 2005 and September 11, 2006, Columbia expanded its control from 22% to 64% of

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poor or critical conditions. *See* A-3323-24.

[140] Even the biased AKRF study found 13 of the 40 properties Urbitran designated in poor or worse condition to be in either "fair" or "good" condition overall. *See* AKRF study, Figure 6, Lot Conditions, A-3376, *compare* Urbitran Blight Study, Figure 5, A-3323 and Figure 6, A-3324; *see also No Blight* study, 48-49, RA-1331-1332.

[141] RA-537.

[142] *See* Affidavit of Rachel Shatz, sworn March 14, 2007, RA-570.

[143] *See* Subcontract Agreement between ESDC and AKRF, RA-1065.

[144] Also in the fall of 2004, Columbia suspended its original plan to commence public environmental review on August 27, 2004, and did not recommence it until October, 2005. *See* Interim Targets for August 27 Issuance of Notice of Public Scoping/Positive Declaration, RA-521.

the area.[145] In the buildings it owned, Columbia forced out tenant businesses, ultimately vacating 17 buildings.[146] Columbia let water infiltration go unaddressed in properties it owned, even when minor and economically rational repairs would have arrested deterioration.[147] It left building code violations open, and let tenants use premises in violation of local codes and ordinances by parking cars on sidewalks and obstructing fire exits.[148] Columbia maintained garbage and debris in certain buildings over periods of years.[149] ESDC was aware of Columbia's growing control

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[145] Calculation based on *No Blight* study, Table I, showing dates of Columbia acquisition or contract and occupancy over the 1999 - 2007 time period, RA-1364, RA-1369. By the time AKRF's subcontractor completed its survey by the end of 2006, that percentage had reached 70%.

[146] As Columbia acquired property, it applied pressure to remove all tenants except for the few it intended to incorporate into ground floor retail spaces in its proposed campus. *See* Comment of Philip Van Buren, Transcript of public meeting of September 20, 2006, RA-1066-1073; comment of Eritrean Community Center, A-2683-2687. Columbia refused to renew leases except on commercially unreasonable one year terms, and with provisions effectively providing for summary termination at Columbia's sole discretion. *See* RA-1073. AKRF made no attempt to identify the cause of vacancy it found. Had AKRF reconstructed a history of occupancy in the area, it would have found that all 17 of the 18 vacant buildings in the area had been fully occupied prior to Columbia's acquisition or assumption of control, and that almost all had become vacant within two years of Columbia's acquisition through Columbia's refusal to renew leases. *See No Blight* study, Table J, RA-1372-1374.

[147] *See* Point II.B, *infra*; *see also No Blight* study at 50-56, RA-1333-1339; *No Blight* study, Appendix A, Individual building reports, RA-1384-1717 (in particular, Block 1986 Lot 1, RA-1413-1418 and Block 1996, Lot 14, RA-1668-1673).

[148] *See* Point II.B.2, *infra*.at 83-84; *see also No Blight* study at 49-52, RA-1332-1335.

[149] *See, e.g., No Blight,* Appendix A, Individual building reports, Block 1996, Lot 14, RA-1668-1673; Block 1997, Lots 33, 34, 48 and 64, RA-1620-1625, 1627-1630, 1660; Block 1996, Lots 18 and 20, RA-1690, 1693. *See* corresponding lots, AKRF study, *infra* note 260 at 84. *See, e.g.* Block 1996, Lot 14, Columbia actively uses first 2 floors for office space, while failing to maintain remaining 2 floors allowing excessive garbage and debris, vermin and mold on walls, at least from the time of AKRF to Earthtech, AKRF study, D-92, A-3511; Earthtech study 2,3, A-5624-5625.

over area conditions because of the regular reports from Columbia citing the percentage of the area under its control.[150] On August 1, 2005, ESDC asked Columbia not only for reports on which parcels were not owned by Columbia, but also for reports on the buildings that it owned.[151]

Because ESDC was aware that Columbia's growing control of the area was significantly altering the conditions to be studied, ESDC's assent to the abandonment of the Urbitran study, and the two year delay before commencing a new study, must be viewed as deliberate attempts to bias the outcome. By this delay, the actual condition of the neighborhood was obscured by Columbia's activity and control, and any picture of the neighborhood afterwards purporting to be an "objective" description only presented the distorted picture that Columbia wished to impart. By this delay, ESDC engaged in bad faith conduct and intentionally misrepresented the purpose of the proposed use of eminent domain.

ESDC further acted in bad faith when it finally did undertake to study area conditions again, and the consultant it hired to document alleged blight conditions was none other than Columbia's contractor AKRF. ESDC knew, or should have known, that AKRF was biased in favor of Columbia's interests. AKRF had been

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[150] *See* September 2006, Draft GPP, Figure: Manhattanville Ownership as of September, RA-1074; Figure: Manhattanville, Ownership as of January 16, 2007, RA-1075; *see also* Agenda of March 15, 2004 meeting, RA-484 .

[151] *See* Questions to be answered by Columbia University, requested by EDC, DCP and ESDC, August 1, 2005, RA-539.

deeply involved in project planning since the spring of 2004, preparing documents and seeking regulatory approvals on Columbia's behalf, including not only all phases of environmental review, but also the City Map Override proposal attached to Columbia's GPP.[152] AKRF had already formed an opinion as to whether the area was blighted, when it stated in the August 13, 2004 Waterfront Assessment Statement that the project would revitalize or redevelop "a deteriorated or underutilized waterfront site."[153] As the New York State Supreme Court concluded correctly, AKRF was not only serving as Columbia's advocate, but it also had an interest of its own in ESDC's adoption of Columbia's GPP.[154] The Appellate Division, First Department agreed, finding AKRF's work preparing an EIS served an "advocacy function for Columbia" and that it had an "inherent conflict in serving two masters."[155]

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[152] In sworn affidavits, AKRF and ESDC stated that in retaining AKRF, ESDC had required the erection of a "Chinese Wall" separating employees working on the Blight Study for ESDC from those working on the environmental review for Columbia, and that such separation had been strictly maintained. RA-1077. However, the contract by which AKRF was retained made no provisions for such special separation. RA-1065. On May 19, 2008, ESDC admitted that such a wall had in fact not been maintained. Billing records indicate that as many as six AKRF employees worked on both sides of the alleged barrier. ESDC also made no allegation that it separated employees working on the Blight Study from employees working on other aspects of the project under retainer to Columbia, such as the City Map Override Proposal. *See* RA-501-516.

[153] *See* Coastal Management Form attached to August 13, 2004 draft EAS, RA-579 (Debra Allee of AKRF certifying as applicant's agent).

[154] *West Harlem Business Group v. ESDC*, Index No. 116839 /06 (Sup. Ct. New York Cnty. June 27, 2007) at 5, RA-703-708.

[155] *Tuck-It-Away v. ESDC*, 54 A.D.3d 154, 165 (1st Dep't 2008)

ESDC's shaping of the methodology of AKRF's study also evidenced bad faith. ESDC never sought a neutral evaluation of *whether* the area was blighted. To do so, it would have had to look for evidence that investment and sound growth in the area was in fact impaired, or that area conditions were in fact impairing investment and sound growth in neighboring areas. Instead, ESDC, asked AKRF to find only evidence *that* the area was blighted. ESDC specified that AKRF was to "highlight" such blight conditions as it found, and it was to prepare individual building reports "focusing on characteristics that demonstrate blight conditions."[156] ESDC originally specified that AKRF should study real estate values and rents,[157] but in the final AKRF report, upon which ESDC relied in making its findings, no such evidence or analysis was included. If it had, it would have shown strong market conditions and would have shifted attention to Columbia's responsibility for creating vacancies and deteriorated building conditions.[158] ESDC thus sought not only to exaggerate evidence showing blight, but also to suppress evidence that contraindicated blight.

Bad faith was also present when ESDC represented that the AKRF study was "objective."[159] When AKRF's conflict of interest was first raised in FOIL litigation,

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[156] *See* April 3, 2006 E-mail of Britt Page, RA-581.

[157] *See* July 28, 2006 Proposed Scope of Work, RA-1081; *cf.* AKRF study, A-3349-5398.

[158] *See* Leitner Group, Manhattanville Market Study, RA-1721-1798; *see also No Blight* study at 28-35, A-1305-1315.

[159] *See, e.g.*, Excerpt from Memorandum of Law of ESDC in opposition to the petition, in *TIA v. ESDC*, Index No. 07/107368, RA-1015-1020; *see also* Statement of Maria Cassidy at ESDC Director's Meeting, July 17, 2008, A-712, line 11.

ESDC represented that AKRF had created a "Chinese wall" separating employees working on the blight study from those working on other aspects of the Columbia project.[160] Such a representation shows ESDC was concerned about the appearance of bias. As the Supreme Court found, however, a Chinese wall may suffice to preserve confidentiality, but it does nothing to address AKRF's conflict of loyalty in simultaneously representing both a public agency, and a private party seeking the benefit of the public agency's decision.[161] This Chinese wall, moreover, was not in fact maintained, as ESDC admitted on May 19, 2008.[162]

Finally, after AKRF's independence was questioned by the Appellate Division in oral argument in *WHBG v. ESDC* on December 11, 2007, ESDC again acted in further bad faith in hiring another consultant, Earthtech, Inc.. ESDC initially hired Earthtech to "evaluate" the AKRF study.[163] But ESDC never disclosed the result of such evaluation, which in itself may be taken as an admission of the bias of the AKRF study. Instead, ESDC commissioned Earthtech to "replicate" a study of the

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[160] *See* Affidavit of Dennis Mincielli, sworn March 14, 2007, RA-1077.

[161] *See WHBG v. ESDC*, Index No.116839/06, Decision, Order and Judgement, June 27, 2007, at 5, RA-707; *see also TIA v. ESDC*, 54 A.D.3d 161.

[162] *See* May 22, 2008 Letter of Norman Siegel, et. al. replying to the May 19, 2008 Letter of Jean M.McCarroll to the Appellate Division, First Department, reporting discovery of breach in Chinese wall, and disclosing AKRF blight project related records. A-1775 (on compact disc), Tuck-It-Away submission, V. V, Bates Nos. 5119-2120.

[163] *See* Subcontract Agreement between ESDC and Earthtech, February 11, 2008, RA-710-712.

area,[164] using essentially the same biased methodology.[165] Predictably, Earthtech came up with the same result.

In finding blight in Manhattanville, therefore, ESDC knowingly skewed the gathering and interpretation of facts, and colluded with Columbia in manipulating the facts themselves. When exposed, ESDC attempted to cover up such bias with a duplicative study using essentially the same methodology, reflecting a concern only

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[164] *See* Transcript of ESDC Directors meeting of July 17, 2008, at 20, line 17, A-712.

[165] *See* Tuck-It-Away et al. Verified Petition, ¶ 108, 109, 110, A-112a-114a. Like AKRF, Earthtech avoided any study of real estate values, rental demand or market conditions, or analysis of demand for existing Manhattanville industries and land uses. Without critical analysis or comment, Earthtech used AKRF's same 60% standard to measure underutilization. *See* Earthtech study, 2-30, A-5449 ("confirming" AKRF's findings using 60% standard). Earthtech cited the same building code violations without critical analysis or comparison to surrounding areas. *See* Earthtech study, 2-30-31, A-5449-5450. Earthtech also cited the same speculative "Phase I environmental concerns" based on current and past use and the existence of any kind of tankage, and "Phase II" physical evidence consistent with background soil conditions throughout New York City that AKRF did. *See* discussion *infra* at 88 and corresponding notes 270-271. As with the AKRF, study, Earthtech avoided any inquiry into the cause of vacancy and failed to reconstruct any history of occupancy. In its overview of the history of the area it cited declines in employment and in its assessment of neighborhood conditions pointed to the frequency of shuttered buildings and diminished street activity as indicies of negative neighborhood character, as if these were inherent or longstanding features of the area, and not the result of Columbia's vacating its properties. *See* Earthtech study, 2-29, A-5448; *see also No Blight Study* at 66, RA-1370 and Table I, RA-1364-1369 (demonstrating vacancies caused by Columbia). Earthtech also followed AKRF's methodology in extensive photographic documentation of every crack and defect in each Columbia owned building. In the process, it noted evidence of further decay in the time between AKRF's survey and its own. *See infra* note 224 at 71; 249 at 82, and 258 at 83. But like the AKRF study, Earthech avoided evaluating the degree of Columbia's responsibility for such conditions. Like the AKRF study, Earthtech did not assess the likely condition of buildings prior to Columbia's acquisition of them or prior to Columbia's commencement of aggressive acquisition in the area. *See infra* note 224 at 71-72. Like the AKRF study, Earthtech documented the same conditions maintained by Columbia, such as the pile of garbage in the basement, or the tenant obstructed fire exit, without any recognition that such conditions were fully under Columbia's control. *See e.g., infra* note 255 at 82; *see also* discussion *infra* at 83-84. Earthtech went to even further length than AKRF in finding minute conditions it could elevate to "health" or "safety" conditions. *See e.g., infra* note 229, 230 at 74-75.

for appearances. This deliberate manipulation of the basis for its purported public purpose in using eminent domain, as well as the basis for its statutory authority to participate in the Project, is clear evidence of bad faith, and warrants the Court's intervention and annulment of the agency's determination and findings.

POINT II

ESDC's finding of blight was palpably unreasonable and without basis in law or fact.

In *Matter of Goldstein v. New York State Urban Dev. Corp.*, this Court reserved the possibility of intervening to prevent an urban redevelopment condemnation on public use grounds where "the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary." 13 N.Y.3d 511, 527 (2009) (citing *Kaskel v. Impellitteri*, 306 N.Y. at 80).

Manhattanville represents a very different set of conditions from the Atlantic Yards area in Brooklyn, where a train yard and a designated urban renewal area made up a majority of the area.[166] It is unlike the area cited in *Kaskel v. Impellitteri*, where the area could be found blighted by a glance at photographs or mere external inspection.[167] And it is not like the defunct Coliseum site in *Jo and Wo Realty*, where

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[166] Respondent Appellant's allegations concerning the IRT trestle allegedly "isolating" the area are not comparable to the superblock of train yards in Brooklyn, and are not proposed to be in any way altered by Columbia's project.

[167] *Compare* lot photographs, *No Blight* study, RA-1384-1636; Ernst & Young study, 355-363, RA-308-316.

a negative effect on the surrounding area could be reasonably predicted.[168] Conditions within Manhattanville do not inhibit growth and development in the area or its surroundings, and any sub par conditions are due to Columbia's intentional acts, in which ESDC colluded.[169] Petitioners-Respondents' dispute with ESDC's findings is not just a "reasonable difference of opinion," but a refutation of Respondent-Appellant's finding of blight as being irrational, for the following reasons.

If an agency relies on an arbitrary methodology in reaching its determination, the agency's action lacks rational basis. *See In re Fresh Meadows Assoc. v. New York Conciliation and Appeals Bd.*, 92 Misc. 2d 519 (N.Y. Sup. Ct. Spec. Term 1997) (Rent guidelines found to have no rational basis where comparability sample was arbitrarily narrowed in underlying studies.); *In re Jonathan Allen*, 116 A.D.2d 35, 38 (3rd Dep't 1986) (agency determination that physician had overcharged Medicaid rejected because sampling method was arbitrary and capricious when adequate records for the total audit period were available but were not reviewed).

When an agency relies upon a study conducted by a third party, and the methodology of that study is deficient, the lack of rational basis is imputed to the agency. "Where an agency fails or refuses to undertake the necessary analyses, improperly defers or delays a full and complete consideration of the relevant areas of

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[168] *Compare*, Leitner Group, *Manhattanville Market Study*, at 29-36, RA-1752- 1759.

[169] *See* Leitner Group, *Manhattanville Market Study*, at 29-36, RA-1752- 1759.

environmental concern, or does not support its conclusions with rationally based assumptions and studies, the SEQRA findings statement approving the FEIS must be vacated as arbitrary and irrational." *In the Matter of County of Orange v. Village of Kiryas Joel, et al.*, 44 A.D.3d 765 (2d Dep't 2007).

The AKRF and Earthtech studies were based on an unreasonable and biased methodology. The reams of photographs in the AKRF and Earthtech studies, because of their selective focus, do not constitute objective evidence of the condition of whole buildings, much less the whole area. The conclusions of those studies result from arbitrary and manipulated thresholds, the mere tabulation of minute instances without accounting for relative severity, and false inferences of causality by suppression of contrary evidence. There never was a reasonable investigation to determine *if* the area was blighted. Because the facts represented were driven by a predetermined conclusion, and other available facts were ignored, the studies upon which ESDC relied lack rational basis.

Even granting agencies wide latitude in finding blight, they may not engage in conduct that is irrational, baseless or palpably unreasonable. *See Dowling College v. Flacke*, 78 A.D.2d 552. When the plurality of the Appellate Division concluded that "the blight designation in the instant case is mere sophistry," *Kaur v. UDC,* 892 N.Y.S.2d 8, 16, it was addressing ESDC's reliance on biased studies, and not just expressing a difference of reasonable opinion as to whether the area was blighted.

See id. at 21-22.[170] In relying on biased studies, ESDC crossed the line into unreasonableness.

This Court's statement in *Matter of Goldstein v. New York State Urban Dev. Corp.* that the parties' difference in opinion as to the existence of blight offered just "another reasonable view of the matter," was a finding based only on the record presented in that case. 13 N.Y.3d 511, 526 (2009). The record in this case is dramatically different. The petitioners in *Goldstein* did not submit a factual record. Petitioners-Respondents in this case have submitted a substantial record of documents and communications exchanged between ESDC and other agencies and Columbia and its attorneys and consultants, showing the original specification and the timing of the

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[170] Justice Catterson also did not rely on Petitioners-Respondents' expertise or testimonial evidence of Counsel, as Respondent Appellant alleges. Respondent-Appellant's Brief at 36-37. Rather, he alluded only to Petitioners-Respondents' setting forth of "the factors AKRF and Earthtech should have considered, but did not, to arrive at any conclusion that Manhattanville was, or was not blighted." *Kaur v. UDC* at 30. In preferring the approach of the *No Blight* study, and finding that a different conclusion should be reached, Justice Catterson was addressing the methodology of the studies upon which ESDC relied, and the bias resulting from that methodology.

Petitioners-Respondents' *No Blight* study compared AKRF, Thornton Tomassetti, and Earthtech studies and building reports, pointing out their selective use of data, consideration of inappropriate criteria, contradictory findings, application of arbitrary and inconsistent standards to show how they were biased by their methodology. It also argued against their conclusions on the basis of publicly available data. The team that produced the study included a certified urban planner, Mafruza Kahn.

It should be further noted that Justice Richter's concurring opinion, though limited to ESDC's violation of Petitioners-Respondents' right to be heard, in assessing the risk of error in its due process analysis, cited evidence that suggested ESDC's finding was made in bad faith. *Kaur v. UDC* at 49-50. She specifically mentioned the possibility of AKRF's methodology being flawed and biased, and that any such flaws or bias would necessarily have been carried over to the Earthtech study. *Id.* at 50.

AKRF and Earthtech studies, studies and reports showing the unblighted condition of the area prior to Columbia's assumption of control, and evidence of economic and market conditions that AKRF and Earthtech excluded from consideration. On *this* record, Petitioners-Respondents' have shown that, because of the intentional and systematic bias with which they were designed and implemented, Respondent-Appellant's finding and the studies on which it is based, are patently unreasonable and utterly without basis.

A. AKRF and Earthtech's studies were biased because of a methodology that infers causal relationships between factors without basis, and excluded evidence that contraindicated blighted.

In its fullest discussion of the concept of blight, this Court noted that blight "'is something more than deteriorated structures," it "involves improper land use." *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 483 (internal citation and quotation marks omitted). The UDCA, in its statement of legislative findings and purposes, specifies that a number of conditions "hamper or impede proper and economic development of [substandard and insanitary] areas and arrest the sound growth of the area, community or municipality, and the state as a whole." UDCA § 2. Individual conditions are not blight *per se*, unless they occur in sufficient concentration, combination, and severity as to arrest and impede sound growth in the area.

The statute nowhere states that the presence of a single one of the listed conditions is sufficient to make the area blighted. The list only describes those

conditions that might be found in blighted areas.[171] It does not, therefore, offer a check list whereby by the occurrence of any such conditions in 51% of the properties in the area necessarily makes the area blighted. As this Court put it in *Yonkers Cmty. Dev. Agency*, when it comes to blight, "[m]any factors and interrelationships of factors may be significant," and "the combination and effects of such [factors] are highly variable." 37 N.Y.2d at 484.

AKRF and Earthtech employed a methodology by which the significance of the particular combinations of factors was unstated, the actual effect of factors was not demonstrated, and the interrelationship between factors was simply assumed without rational foundation or affirmative evidence. Despite the ready availability of data directly bearing on these assumptions, AKRF and Earthtech excluded from their analysis such critical facts as the history of Columbia's relationship with each building, terms and conditions under which buildings were transferred to Columbia,

[171] "It is further found and declared that there exist in many municipalities within this state residential, nonresidential, commercial, industrial or vacant areas, and combinations thereof, which are slum or blighted, or which are becoming slum or blighted areas because of 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, traffic congestion hazardous to the public safety, lack of suitable off-street parking, inadequate loading and unloading facilities, impractical street widths, sizes and shapes, blocks and lots of irregular form, shape or insufficient size, width or depth, unsuitable topography, subsoil or other physical conditions, *all of which hamper or impede proper and economic development of such areas and which impair or arrest the sound growth of the area, community or municipality, and the state as a whole*." UDCA § 2.

market data including rising land values and commercial and industrial rental demand, as well as evidence of investment and demand in the surrounding area.

1. Vacancy and the appearance of abandonment.

One important factor on which AKRF concluded the area was "substantially deteriorated" was "high vacancy."[172] While it only counted one lot as blighted solely on account of this one factor,[173] this factor hangs heavily over AKRF's characterization of the area, describing the area as "bleak", characterized by rolled down gates and devoid of street life or pedestrian traffic.[174] AKRF could only make this suggestion of economic depression because it ignored the actual evidence of area economic conditions, which show high demand for commercial and industrial space and rising real estate values, [175]a history of growing and competing developer interest in the area,[176] and the absence of any tax delinquencies usually associated with vacancy and abandonment.[177]

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[172] AKRF study at viii, A-3360.

[173] ESDC claims that vacancy was not a controlling factor in its determination that the are was substandard and insanitary, but in the AKRF study one recently renovated residential building was in fact added to AKRF's count of lots with substandard and insanitary conditions solely on account of its having one out of four floors (25%) vacant. *See,* AKRF study at viii, A-3360; AKRF Figure 2, A-3353 (noting Block 1999, Lot 29 as 25% or more vacant).

[174] *See* AKRF study at A-3354, A-3360 - A-3361.

[175] *See* Leitner Group, *Manhattanville Market Study*, at 29- 36, RA-1752-1759.

[176] *See No Blight* study at 32-34, RA-1312-1314.

[177] AKRF also did not show any tax delinquency in the area, or any other evidence of burden upon public services. *No Blight* study at 68-69, RA-1375-1376. Even Urbitran failed to find significant tax delinquency in the area. *See* A-3325.

AKRF alleges lack of demand for existing space in the area because buildings are "obsolete" and undesirable for office uses.[178] Despite admitting to the growing trend of small industrial users, AKRF asserts that the condition of the buildings render them unattractive to such users. AKRF shows no evidence for this inference, however.[179] AKRF showed no history of vacancy, much less any anecdotal evidence of current businesses or potential renters declining leases on grounds of inadequacy of buildings for their purposes. AKRF also ignored the fact that no buildings have been available for rent since Columbia began buying up the area in 2000, and in 1999, almost every property in the area was occupied.[180] Not only does the evidence of vacancy, taken out of context, fail to show blight, it does not account for the fact that of the 18 vacancies in the area, 17 occurred in Columbia owned buildings within two years of Columbia's acquisition or assumption of control.[181]

2. Underutilization and Recent Development.

AKRF used underutilization as one of its factors of what made the Manhattanville industrial area substandard and insanitary.[182] Underutilization is

[178] *See* AKRF study at A-3360.

[179] *See* AKRF study at vii-viii, A-3359-A-3360.

[180] *See No Blight* study, Table I, showing 59 out of 67 lots occupied based on reverse phone directory data, with three others known to be in continuous occupancy, and of the remaining five, all showing occupancy in succeeding years.

[181] *See No Blight* study at 64-68, RA-1362-1375; *see also,* Table I, RA-1364-1369; Table J, RA-1372-1374.

[182] AKRF study at viii, A-3360.

normally understood as an indicator of blight because it reflects depressed economic conditions, or reflects the presence of some other condition that make it impossible for owners to make profitable use of the full development rights to which they are entitled under the zoning. *See, Gallenthin Realty Development, Inc. V. Borough of Paulsboro*, 924 A.2d 447, 463: *c.f.*, *Horoshko v, Town of East Hampton,* 90 A.D.2d 850 (A.D. 2 Dept. 1982) (affirming taking of vacant lots rendered unbuildable by set-back requirements).

AKRF's arbitrary standard of counting any lot built to 60% or less of the maximum allowable FAR as underutilized, allowed it to designate nine properties in the area as substandard and insanitary solely on that basis.[183] AKRF, however, offered no rational basis for the use of this criterion in the context of Manhattanville, much less for its use of the 60% figure. Respondent-Appellant argues this is the same percentage AKRF used in its Atlantic Yards study. Because the areas in question are zoned differently, however, a standard that does not account for such differences is inherently unreasonable.[184] A 60% standard in an area zoned for a maximum FAR of 2 effectively means that single story structures are categorically blighted, much less lots with partial coverage, even though the area is zoned for uses for where such configurations represent the most efficient use.[185] In fact, of the nine properties

[183] *See* AKRF Figure 2 at A-3353.

[184] *See No Blight* Study at 39-42, RA-1320-1326

[185] The difference between AKRF's 60% standard and the *No Blight* study's 40% standard amounts to the difference between 39% of the area, and 20% of the area being counted as

AKRF cites solely on the grounds of alleged underutilization, three are gas stations, one is a Con Edison trunk-line cooling facility, and three are single story structures, all uses for which the zoning of the area, with its maximum FAR of 2, was intended.

In AKRF's methodology, underutilization is not explicitly used to show insufficient demand, or other obstacles to full use of development rights. Instead, AKRF sole justification for the use of underutilization as a blight indicator is the novel argument that smaller buildings may not generate a sufficient income stream to support the cost of maintenance.[186] Since AKRF did not evaluate the costs of maintenance and repair for any buildings, this hypothesis is unsupported. Moreover, AKRF's argument defies logic, as smaller buildings are typically less expensive to operate and maintain.

The absence of any rational grounds to connect underutilization to any other factors demonstrating blight indicates that its use by AKRF is to create another arbitrary criterion by which lots can be checked off to reach the desired conclusion of 51% substandard and insanitary. AKRF's methodology of tabulating each lot as a unit of underutilization also gives disproportionate weight to the smallest, when they do not represent the character of the area. Indeed, the area viewed as a whole shows that four out of five blocks are actually *overbuilt* with a FAR of greater than

"underutilized." *See No Blight* study at 41, RA-1322; *see also* Point V, *infra*.

[186] AKRF study at vii, A-3359.

2.[187] AKRF's peculiar use of underutilization as a blight factor appeals to a preference for larger buildings over smaller buildings. Such a policy can be readily accommodated through the simple and unintrusive public action of re-zoning, as the City stated in the West Harlem Master Plan.

AKRF and Earthtech also cite the limited amount of new construction in the area in recent decades as a factor demonstrating blight. They suggest that lack of development has been due to lack of developer interest, on account of the alleged blighted condition of the area.[188] But they fail to acknowledge pre-existing industrial zoning requirements, and the fact that the area is for the most part fully utilized within that zoning. With a maximum FAR of 2, there is little to be gained in tearing down a one story building in profitable use to build a two story building. The prior low rise zoning of the area is not blight, but a deliberate policy choice to preserve for the benefit of the wider city economy the character and customary uses of the area.

AKRF and Earthtech also attribute the limited new development in the area in recent years to small lot sizes and diversity of ownership, another traditional blight factor.[189] Again, a connection is merely assumed; AKRF and Earthtech ignore readily available evidence showing that lot size does not in fact prevent the assemblage of sufficiently large parcels to attract investor interest. The obvious fact that Columbia

[187] As AKRF itself pointed out in its Preliminary Findings Presentation of August 28, 2006. *See* RA-592.

[188] *See* AKRF study at vi, A-3358.

[189] AKRF study at vi, A-3358.

has been successful in assembling all such small lots is also ignored. All the remaining lots but one are on the periphery of the area, and Columbia has made no offer for it.

3. "Disinvestment."

AKRF alleged that the poor structural conditions they found were due to "disinvestment," but AKRF never defines the term.[190] "Disinvestment" is loaded with prejudicial negative connotations, implying abandonment, lack of demand, and a depressed local economy; none of these conditions exists in Manhattanville. There has been no decline in demand, no vacancy, no fall in land values, no non-payment of taxes, no failing businesses, no decline in employment, or any instance of abandonment of property. Instead, Manhattanville is a busy industrial area in full use, and the area as a whole is built beyond the maximum permissible zoning.[191] Had AKRF used a sample of area conditions that was independent of Columbia, and examined only non-Columbia owned buildings, it would have found almost all of them in good condition, with substantial investment in repairs and renovation, and substantial new construction.

"Disinvestment" suggests a net decline in value. But if AKRF had considered

[190] *See* AKRF study at ii, A-3354.

[191] ESDC claims that vacancy was not a controlling factor in its determination that the are was substandard and insanitary. *See* AKRF study at viii, A-3360. In fact, one recently renovated residential building was added to AKRF's count of lots with substandard and insanitary conditions, solely on account of its having one out of four floors (25%) vacant. *See* AKRF Figure 2, A-3353 (noting Block 1999, Lot 29 as 25% or more vacant).

the actual sales price at which owners sold their property to Columbia it would have found owners had experienced growth comparable to other investments in New York real estate. What AKRF appears to imply by "disinvestment" is no more than the suspension of maintenance and repairs in a number of buildings, all of which are owned or controlled by Columbia. In some cases, maintenance may have been deferred in anticipation of sale to Columbia, or out of reasonable expectation since the 1990s that the area would soon be rezoned, but such expectations alone do not create blight.

The only explanation AKRF offered for this supposed "disinvestment" was an alleged "isolation" of the area.[192] The alleged isolation, however, is unsubstantiated by facts. The IRT testle, high overhead, from below 125th Street to above 133rd Street, provides continuous pedestrian and vehicular access below along the entire eastern side of the area, and the West Harlem Master Plan emphasized the area's extraordinary transportation access. Earthtech, on the other hand, hypothesized that disinvestment was due to the existence of certain automotive uses in the area, but provides no evidence to substantiate such a causal connection. AKRF hypothesized that certain small buildings do not generate enough revenue to support their own maintenance, but never looked at rental data, or costs of repairs to support their theory. It also alleged that because of age, some of the buildings cost more to

[192] *See* AKRF study at iv, A-3356.

maintain, but provided no specific basis for that generalization.[193] AKRF ignored the actual near term history that preceded their snapshot in time, but ventured forth unsupported and untested hypotheses of blight in the area.

Again, the evidence AKRF studiously avoided was the fact of Columbia's ownership and control. Petitioners-Respondents have determined, based on information documented in the reports, that but for Columbia's failure to properly maintain and make economically feasible repairs, 35 of 51 buildings owned by Columbia would not have suffered unnecessary deterioration from water infiltration, and had economically feasible repairs been performed 15 buildings would still be in "fair" condition.[194] Columbia left drains clogged, neglected broken sky lights and windows, failed to repair roof membranes, or otherwise address sources of water infiltration.[195]

In connection with the West Harlem Master Plan, Ernst & Young found 54 of the 67 properties in the area, including 42 of the 51 buildings Columbia eventually

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[193] *See* AKRF study at i, A-3351.

[194] Block 1987, Lots 7, 9; Block 1998, Lots 1, 10, 24, 57, 61; Block 1997, Lots 9, 14, 33, 34, 52; Block 1996, Lots14, 21; Block 1995, Lot 31. One lot was in fair condition, but Columbia's non-maintenance as made conditions beyond repair (Block 1996, Lot 15). Six Columbia owned buildings have suffered unnecessary deterioration from Columbia's failure to make simple repairs to abate water infiltration, but these buildings were still rated as "fair." (Block 1998, Lots 13, 16, 6; Block 1986, Lot 6; Block 1997, Lots 27, 47). *See No Blight* study, Building Reports, RA-1384- 1636 (comparing data provided within the reports).

[195] *See, e.g.,* AKRF study at D-429, A-3848 (left drains clogged causing ponding and damaging the roof); D-11, A-3430 (over four years Columbia left panes of skylight open and failed to re-attach metal flashing when it came out of place).

acquired or over which Columbia assumed control, were at the time in "good", "very good" or in "fair" condition.[196] Ernst and Young identified only nine buildings out of 66 properties in the entire area to be in "poor" condition. The only two they found to be "very poor" were vacant residential buildings awaiting a gut-rehabilitation, which were fully renovated by the time of the AKRF study and found to be in "good" condition.[197] Of the nine buildings that were in "poor" condition, five were rated "fair" by AKRF in 2007,[198] leaving only four buildings of the 51 eventually owned or controlled by Columbia that had previously been found to be in "poor" condition by Ernst and Young in 2002.[199]

AKRF made no attempt to rationally assess the state of building conditions prior to Columbia's ownership and control. It merely made conclusory statements that in 15 buildings, conditions were a result of "long-term" or "prolonged" water infiltration, and offered no explanation or evidence to assess how much of the condition was standing since when, and how much of it dated since Columbia's

[196] *See* Ernst & Young at 355-363, RA-308-363.

[197] *See* Ernst & Young at 357, RA-310 (Block 1999, Lots 29, 30), *compare* AKRF study at D-501-505, A-3920-3924.

[198] *See* Ernst & Young, Site Summaries, 354-363, RA-308-316 (Block 1997, Lot 61; Block 1998, Lots 6, 13; Blocks 1999, Lots 31, 32), *compare* AKRF study at D-371, A-3790; D-412, A-3831; D-429, A-3848; D-506, A-3925; D-512, A-3931.

[199] Block 1987, Lot 9; Block 1996, Lot 36; Block 1997, Lot 34; Block 1998, Lot 10. Note that Block 1997, Lot 21, rated "critical" by AKRF, was not rated by Ernst & Young at all.

acquisition.[200]

AKRF also did not make any rational attempt to evaluate the effect on prior owner decisions or knowledge, as far back as 2000, of Columbia's interest in acquiring property and expansion in the area. Nor did it consider the effect of prior owners' awareness of the City's interest in the area over the last decade and various planning efforts announcing imminent re-zoning of the area. AKRF and Earthtech should not confuse an owner's choice to defer maintenance under such circumstances with inherent blight in the area.

This deliberate turning of a blind eye to the overwhelming dominance of Columbia over the neighborhood, and their characterization of conditions that Columbia created, maintained or exacerbated as representative of the area, constitutes the core of the inherent bias tainting both the AKRF and Earthtech studies.

4. Social Conditions and Crime.

AKRF also cited crime as an indicator of blight, but the evidence it offered was insufficient to show any actual elevated incidence of crime. AKRF based its conclusion of elevated crime on police precinct reporting sectors in which almost the entire populations are located in separate residential areas of such different

[200] *See* AKRF study at D-3, A-3422; D-11, A-3430; D-49, A-3468; D-60, A-3479; D-108, A-3527; D-116, A-3535; D-126, A-3545; D-170, A-3589; D-207, A-3626; D-233, A-3652; D-240, A-3659; D-249, A-3668; D-345, A-3764; D-393, A-3837; D-418, A-3837. In their *No Blight* study, Petitioners-Appellants found, on the basis of Thornton Thomassetti, AKRF and Earthtech's descriptions, in 8 out of these 15 buildings, damage from water infiltration was significantly exacerbated by Columbia's failure to address economically feasible repairs. *See No Blight* study, building reports, RA-1384 - 1636.

population and land use as to make statistics from those sectors meaningless for any assessment of crime rate within the Manhattanville industrial area.[201] The methodological inadequacy of this attempt was so transparent that Earthtech simply dropped the chapter.[202]

By failing to show causal relationships between factors, by relying on unsupported inferences, and excluding contraindicative data, the AKRF and Earthtech studies merely made conclusory assertions of the existence of a syndrome of blight without a rational basis. Contrary to this Court's warning in *Yonkers Cmty. Dev. Agency v. Morris*, AKRF and Earthtech fail to account for any of the underlying conditions in Manhattanville, and justify their case for blight on little more than "deteriorated structures." 37 N.Y.2d 483.

B. AKRF and Earthtech's studies were further biased by cumulative tabulation of unweighted evidence, use of arbitrary thresholds, use of inappropriate evidence

In their portrayal of "deteriorated structures", moreover, the AKRF and Earth tech studies present a distorted picture of conditions that actually exist. They do so through a series of methodological choices.

AKRF established a methodology by which any property containing a single instance of an alleged blighting condition, was deemed to count towards the majority

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[201] *See No Blight* study, Figure 2, RA-1358a.

[202] *Compare* Earthtech study, Table of Contents at I, A-5400, *with* AKRF study at C-8, C-9, A-3387-3390.

"character" of the area.[203] After discounting all the buildings deemed blighted solely on account of vacancy, and all but two it deemed blighted solely on account of underutilization, it becomes apparent that AKRF's characterization of the area relies almost entirely upon its designation of 34 buildings as being in "poor" or worse condition, a bare 51% of the 67 lot area it surveyed.[204] The determination that individual buildings fell on one side or the other of the critical "fair" or "poor" divide, moreover, was substantially affected by the use of unweighted and unquantified evidence, that discern no rational standard for how various conditions affect the rating of a building.

1. AKRF and Earthtech relied on cumulative tabulation of unweighted instances.

To meet its contract mandate to "highlight" conditions that might indicate blight, AKRF listed as many instances of any possible negative condition as it could,

[203] "The widespread presence of one or more of these factors can also demonstrate the need for revitalization and redevelopment of an area." AKRF study at A-3, A-3366.

[204] Out of 48 buildings AKRF deemed "substandard and insanitary conditions," nine were deemed substandard exclusively on grounds of underutilization alone, of which three gas stations, a Con-Edison trunkline cooling station, and three single story industrial buildings are in high uses intended in the low rise zoning of the area. Only two are parking facilities without structures. *See* AKRF Figure 2 at A-3353; *see also* Earthtech Table 2 at 2-21, A-5436-5437 (Block 1996, Lot 23, Block 1997, Lot 17). Four are deemed substandard and insanitary on the basis of vacancy alone, of which three are Columbia owned and the fourth, a recently renovated residential building, is only vacant by virtue of AKRF's 25% vacancy standard. One single story industrial building was deemed substandard on grounds of both vacancy and underutilization, but no other grounds. This leaves only two lots deemed-substandard and insanitary beyond the 34 that AKRF deemed blighted by virtue of building conditions, and even they were in actual *use* at 50% of the maximum permissible FAR, as parking facilities. It should be stressed that there are no vacant lots in Manhattanville.

regardless of their severity. Each adds a sentence of text, and each adds half a page photograph, even when the photographs are duplicative, or show a close-up of a relatively minor condition.[205] The effect of this sheer quantity of photographs is disorienting, and creates a misleading impression of generalized deterioration in the area, when in fact they exist in particular, Columbia owned buildings, and relate to specific circumstances and practices for which Columbia bears substantial or complete responsibility.[206]

As with AKRF's treatment of underutilization, AKRF's choice to tabulate building conditions by lot, and not weight them by built square footage, also misrepresents the over-all area character, focusing attention on a number of small

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[205] In addition, Earth Tech uses bulleted lists of health and safety concerns, separately listing the same condition when it appears in more than one location and occasionally repeating the same condition to make it appear as though the conditions are severe. *See e.g.,* Earthtech study at 2-3, A-5715-5716 (same debris in the basement is listed twice with 3 photos; stair conditions are listed three times and three lines describe a decorative sill which "if not fixed...may lead to local collapse."); Earthtech study at 3, A-5862-5862 (spalled surface of stair treads is listed under two categories with three photographs even though under Earthtech's rating system it would not present a safety hazard; height of a parapet and the allegedly haphazardly mounted cords in the office receive two bullet points, but these conditions do not present safety hazards).

[206] In the Atlantic yards study, AKRF averaged approximately three photographs per building. In Manhattanville, it averaged approximately ten, as much a measure of AKRF's necessary reliance on "deteriorated structures" for lack of other plausible indices blight, than a rational measure of typical area conditions. *See*, AKRF Atlantic Yard Blight Study, Individual Building Reports, on compact disk at RA-7784-7920, pdf pages 514-650.

Earthtech, replicating AKRF's methodology, similarly exaggerates the number and severity of conditions by, in some instances, providing as many as 50 photographs per building, devoting as many as five photographs documenting cracks in basement floor slab. *See* Earthtech study at 6-30, A-5866-5890. Block 1986 lot 65, rated overall as "fair" by Earthtech, receives 18 pages with 36 photographs which in sum indicate only "some local substandard" conditions. *See* Earthtech study at 5-22, A-5529-5546.

lots, even when those conditions relate to only a small percentage of the total economic activity, employment, or even street frontage of the area. The emphasis on the sheer volume of close-up images of poor conditions, without a commensurate number images detailing fair and good conditions, creates a false impression that the conditions focused upon are widespread throughout the area. Such conditions, however, are concentrated in Columbia owned buildings that Columbia has vacated, and they are conditions that Columbia has substantially contributed to.

Within individual buildings, AKRF used a similar cumulative tabulation of unweighted instances, piling on minute conditions for graphic effect, but without rationale as to how such minor conditions affect the overall grade of the building. Because of this essentially unweighted tabulative method, secondary conditions are given more attention than the primary conditions that caused them. The effect of this microscopic focus is to distract attention from responsibility for the primary cause. Thus, a water damaged ceiling is cited, peeled up flooring and efflorescence in the bricks are all cited as separate instances of deteriorated conditions, when they all result from a single roof condition. These minor maintenance issues resulting from Columbia's neglect were documented by AKRF, and cited as evidence of "disinvestment" in the neighborhood.

Many of AKRF's and Earthtech's evaluation of conditions also relied upon future speculation, usually couched in hypothetical language, for example: The

"absence of waterproof coating in this location *may* cause water infiltration, which *could possibly* lead to structural distress of the building's foundation,"[207] water infiltration "*could potentially*" lead to localized failure of wall,[208] "further deterioration *may* lead to structural collapse"[209] of cornice. Such speculative assessment was often explicitly based on the assumption of continued non-maintenance and repair, finding the potential hazard only "if left unaddressed." [210] Such uncertain projections do not provide a rational basis for any assessment of what the building's condition and prospects would be in the hands of any other owner without Columbia's interest in creating the appearance of blight.

Earthtech offered a table purporting to provide a grading system for some of the individual building components and conditions it cited, but the table only begs the question of the relative weight of conditions in the final grading of a building.[211] For example, it is not stated whether a "wider than 1/8" crack in a floor slab is sufficient to render the building poor over all when all four other structural components would

[207]AKRF study at D-152, A-3571.

[208]AKRF study at D-92, A-3511.

[209]Earthtech study at 2, A-5958.

[210]*See e.g.,* AKRF at D-11, A-3430 ("*If left unchecked*, this water intrusion will eventually lead to local failure of the skylight framing"); AKRF at D-147, A-3566 ("if the damage at the base of the fence posts is *left unchecked*, local collapse of the fence will eventually result"); AKRF at D-49, A-3468 (stains on the underside of concrete slab on second floor has the "potential to compromise the structural integrity of the concrete slab *if not maintained correctly*").

[211]Earthtech study at 3-3 to 3-5, A-5468 to A-5470 (Overall Condition Rating checklist).

qualify as "fair", or even "good."[212] As each category of components is potentially tipped by a single condition, single categories can tip whole buildings.[213] No basis was offered for the why a single "poor" exterior condition, such as a cracked sidewalk or uneven parking lot warrants rating the whole property "poor", when the building, representing a far more substantial part of the lot's value was rated as fair.[214] Earthtech ultimately urges reliance on "professional opinion."[215] But as the Court is no doubt aware, professional expert opinions are highly variable, depending on the interest of the client. The alleged "professionalism" of the consultant does not address the problem of consistent bias on the margins.

When, as here, the finding of blight is based predominantly, if not exclusively, on "deteriorated structures," and no evidence of depressed economic conditions is provided and no plausible cause of the alleged blight is identified, then bias on the margins plays a critical role. Based on observation contained in the reports, grading conditions for severity, distinguishing between primary causes and secondary effects, and by accounting for conditions attributable in whole or significant part to Columbia, Petitioners-Respondents' *No Blight* study determined that 15 buildings that AKRF and Earthtech rated in poor or critical condition would, but for their

[212]A lot can be deemed "poor" overall if any one of the following is rated poor: building structural system, exterior building conditions or interior building conditions. *See, id.*

[213]*See,* Earthtech, *Methodology* at 3-1 to 3-2, A-5466 to A-5467.

[214]*See* Block 1996 Lot 1, A-5612-5614.

[215]Earthtech study at 3-2, A-5467.

biased methodology, have been graded "fair."[216] This conclusion does not offer simply another reasonable opinion. It demonstrates the effect of the bias in AKRF and Earthtech's methodology.

2. AKRF and Earthtech's bias is especially apparent in their assessment of alleged threats to safety and health.

The distorting effect of AKRF and Earthtech's cumulative tabulation of unweighted instances, arbitrary thresholds, and speculative assessments is especially apparent in their assessment of purported hazards to safety and health. Dramatic and prejudicial language invoking "threats" to safety and health appears 14 times in AKRF's page and a half summary of building conditions and eight times in its conclusions on building conditions in its executive summary.[217] On closer examination, however, such ominous language is unsupported by any measured review of the facts.

Of the eight safety hazards alleged by AKRF to be created by falling exterior masonry or other materials, five were said only "may" be, or have the "potential" to be, a hazard to the public.[218] Of the remaining three, two related conditions cured or

[216] *See, No Blight* study, Building Reports, RA-1384 - 1636. These lots include: Block 1987, Lots 7, 9; Block 1998, Lots 1, 10, 24, 57, 61; Block 1997, Lots 9, 14, 33, 34, 52; Block 1996, Lots 14, 21; Block 1995, Lot 31.

[217] Earthtech dramatically cites each wall that mold appears on, referring to "mold" six times under Physical Concerns and providing four photographs, even when it does not consider the condition to be a health concern. *See,* Earthtech study at 1-2, A-5483 (description); 8, A-5490 and 10, A-5492 (photographs).

[218] AKRF study at D-20, A-3439 (sagging lintel and cracked masonry above center door has "potential" for local structural failure); AKRF at D-45, A-3664 (corroded, loose, defective

not found by Earthtech and a third poses no hazard to persons on the sidewalk.[219] Four of the five buildings with alleged potential hazards to the public were under Columbia's control, and the fifth, Petitioners-Respondents strongly dispute.[220]

Of five buildings where AKRF alleged a safety hazard of floor collapse, in three it stated only that support "may" be inadequate, or was "potentially" unsafe, and in two, it only asserted beams would collapse "if water infiltration continued unaddressed."[221] In one of those, the risk of collapse was not so great as to lead Columbia to refrain from renting the space for a high traffic restaurant use ever since acquiring the building in 2004.[222]

Of twenty exterior sidewalk conditions purportedly a hazard to pedestrians cited by AKRF, half were instances of cars parked on sidewalks, but in all ten instances AKRF's photographs show ample clear passage.[223] AKRF arbitrarily

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window frames and potential for falling bricks); AKRF at D-267, A-3686 (crack near parapet and spot of missing mortar create "potential" hazard); AKRF at D-188, A-3607 (tilted awning and damaged sign are "potential" hazards); AKRF at D-322, A-3741 (tilted awning "may" be hazard). Only 2 were also identified by Earthtech as a potential hazard. *See*, Earthtech study at 3, A-5977; 2, A-6048 and 3, A-6049, *see also* Photograph1997-48-Y, at 17, A-6063, shingles and letters are on western facade, facing the adjacent roof rather than the street.

[219] AKRF study at D-308, A-3727; D-443, A-3862; and D-170, A-3589, respectively.

[220] *See,* AKRF study at D-20, A-3439; D-267, A-3686; D-188, A-3607; D-322, A-3741. In regard to Block 1987, Lot 1, *see* FN 266.

[221] AKRF study at D-188, A-3607 ("may eventually"); AKRF at D-116, A-3535 ("may no longer be adequate"); AKRF at D-162, A-3581 ("may be inadequate", "potentially unsafe"); AKRF at D-380, A-3799 ("will eventually...if water infiltration not addressed"); AKRF at D-70, A-3489 ("potentially unsafe", "will eventually..if water infiltration left unchecked").

[222] Block 1995, Lot 31, under lease to La Floridita Restaurant.

[223] Earthtech later confirmed seven of the ten instances cited by AKRF along with five additional occurrences. For the five sidewalk parking conditions not observed by AKRF,

designated electrical wiring as "hazardous" and "unsafe" in nine buildings, although allegedly "haphazard" low voltage phone wires in two buildings clearly posed no safety risk.[224] The three instances cited by AKRF where "water infiltration is close to exposed electrical wiring"[225] were in buildings where Columbia failed to address the primary cause of water infiltration, exacerbating secondary conditions.[226] In four buildings Columbia maintained electrical equipment in "areas prone to flooding and infiltration,"[227] though risk and damage from rust and moisture on electrical equipment varied significantly,[228] or the assessment relied only on uncertain future speculation.[229]

Fire code violations were similarly cited based on arbitrary thresholds which

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Earthtech only provides two photographs of instances where pedestrians may not have a clear passway, *see* Earthtech study at 2, A-6076 and 3, A-6089, none of which were in areas where traffic was alleged to be anything but light.

[224] *See,* AKRF study at D-162, A-3581; D-117, A-3536. Using arbitrary thresholds, Earthtech cited 6 *additional* electrical "safety hazards" in Columbia owned buildings from "haphazard" wires which pose little if any threat and with minimal effort can be made code compliant where deficient. *See,* Earthtech study at 2, A-5505; 2, A-5526; 3, A-5656; 3, A-5716; 3, A-5863; 2, A-5976. Two additional hazards were also identified in buildings with water infiltration that Columbia failed to address creating hazards such as these. *See, No Blight* study, RA-1627 (Block 1997, Lot 34) and RA-1404 -1412 (Block 1987, Lot 9); *see also,* EarthTech study at 2, A-5581; at 3, A-5991. Despite only evidence to the contrary, Earthtech blames one problem on "tenant behavior." *See,* Earthtech study at 5, A-5993.

[225] AKRF at ii, A-3354; D-70, 3489; D-139, A-3558; D-250, A-3669.

[226] *See* AKRF study at D-250, A-3669; D-139, A-3558; D-70, A-3489; *see also, No Blight* study at RA-1697, RA-1610.

[227] AKRF at C-2, A-3377.

[228] AKRF at D-380, A-3799; D-401, A-3820.

[229] AKRF at D-92, A-3511; D-486, A-3905.

lead to the characterization of a condition as a safety hazard, even when access was not actually impeded, as in the instance of a ladder stored in a hallway leading to a fire exit, an air conditioner protruding onto a fire escape, or boxes stored on part of stair in vacant building.[230] In two buildings, mere rusting of staircases was cited as a hazard, though the structural integrity of the stairs was not shown or even stated to be in any way compromised.[231] Interior conditions that were cited as a hazardous to occupants included two instances of "collapsed ceilings", both in Columbia owned buildings, one posing no risk to occupants as it was vacant, and the other posing little risk, as a ceiling panel rotting out from water damage is not a sudden condition and occupants would have ample notice.[232]

These alleged safety and health conditions, in contrast to some instances of

[230] *See, e.g.*, AKRF at D-4, A-3423 (ladder against wall in corridor cited as "potential tripping hazard in emergency situations"); AKRF at D-101, A-3520 (air-conditioning unit); AKRF at 3, A-6162 (boxes). Also, while AKRF shows a photograph of a shopping cart and tables in a room (AKRF at D-112, Photograph 1996-16-E), after the tenant is vacated, Earthtech documents a safety hazard as similar shopping carts have been placed inside the exit door with similar tables propped against the wall (Earthtech study at 11, A-5686, Photograph 1996-16-N). Earthtech describes this as "additional careless behavior" (Earthtech at ES-3, A-5405) which reflects neglect of maintenance and cumulatively characterizes Manhattanville as blighted, but the "additional careless behavior" is clearly Columbia's.

[231] *See* AKRF study at D-277, A-3696(one heavily rusted fire stair in predominantly unoccupied 5-story building); D-61, A-3480(slight rusting and cracking of concrete tread pan).

[232] AKRF at D-240, A-3659 (AKRF cites as deficient physical condition, Earthtech elevates to safety concern, at 2, A-5920; AKRF at D-276, A-3695 (AKRF cites "potential" for falling plaster in stairwell as physical deterioration; Earthtech elevates to as potential safety concern, at 2, A-5990). Earthtech additionally cited hazards inside the building at 5 lots, even though Block 1996, Lot 15, Block1997, Lot 18 and Block 1986, Lot 30 are vacant and Columbia exacerbated the conditions leading to ceiling collapse in Block 1987, Lot 7 and Block 1996, Lot 18, neglecting to maintain the property although it continued to be occupied.

longer term water infiltration, were almost all Columbia's exclusive responsibility. As owner, Columbia bears full legal responsibility for code compliance, and cannot blame previous owners for its ongoing tolerance of a deficiency. Furthermore, Columbia controls the activities of its tenants through its lease terms, and can require them to comply with local law and ordinances. Parking of cars on sidewalk, blocking or locking fire exits and spray painting[233] are things Columbia has effectively permitted and to which it has constructively consented.

Similarly, the alleged threats to health are predominantly due to conditions under Columbia's control. All seven buildings cited for hazardous accumulation of garbage or debris were in Columbia owned buildings.[234] As owner, it is Columbia's duty to remove any garbage or debris that poses any nuisance to the public or neighbors. In the twelve instances where evidence of vermin was cited, all were in Columbia controlled buildings and four of those buildings were in conjunction with

[233] AKRF generally cites spray painting in connection with auto repairs as a health hazard to the "workers, customers and pedestrians" from what it deemed to be inadequate ventilation, in 5 Columbia controlled buildings**.** *See,* AKRF study at D-50, A-3469 (no indication of hazard); D-486, A-3905 ("appears");D-117, A-3536; D-227, A-3696; D-354, A-3773. Yet AKRF did not assess the amount of painting occurring in the building, and no actual exposure risk was documented. Nowhere did AKRF actually establish that the painting was illegal, and not within the *de minimis* amounts provided by the New York City Building Code's provisions for auto repair, as opposed to auto body shops, and within the one quart per day *de minimis* spray painting permitted by the New York City Fire Department.

[234] Accumulation of garbage and debris is considered "unsanitary" health hazard associated with vermin in three Columbia owned buildings. *See,* AKRF study at D-92, A-3511; D-322, A-3741; D-380, A-3799, a health concern without vermin in two Columbia owned buildings. *See id.* at D-127, A-3546; D-267, A-3686, and a safety hazard in two Columbia owned buildings. *See id.* at D-117, A-3536; D-D-277, A-3696.

Columbia maintained trash.[235] Mold was cited as a health concern in ten buildings, all of which were Columbia owned; and in six of these buildings mold conditions were due to Columbia's failure to abate water infiltration.[236]

3. AKRF and Earthtech add in their evaluations uncertain and unweighted building code violations data and speculative and unquantified "environmental" concerns without rational basis.

Both AKRF and Earthtech used open building code violations in their evaluation of building conditions, but without rational evaluation of the relevance or significance of individual citations. Open building code violations, and ECB violations are not a reliable indicator of building conditions, as AKRF admitted in its Atlantic Yards study, "because building code violations vary widely in date of issuance and type of violation, making it difficult to make meaningful comparisons in data across lots."[237] The total of all violations were cited, even though most pertain only to the annual filing of boiler and elevator inspection certificates and many more were obsolete, for example, finding a twenty year old violation for an electric sign erected without permit, when the sign no longer exists.[238]

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[235] *See id.*

[236] The following are buildings where health concern is attributable to Columbia's failure to maintain: Block 1998, Lots 1, 10; Block 1996, Lots 14, 15, 20 and 21. Additional Columbia owned buildings cited for mold include: Block 1997, Lot 18, 21, 55, 64. *See No Blight* study, Lot Profiles, RA-1384-1636; *compare* AKRF study, Lot Profiles, Chapter D, A-3422-3941.

[237] AKRF, Atlantic Yards Blight Study, at C - 5, FN 2, RA-1115.

[238] *See* Earthtech study, Table A-1, A-6366- 6379. Petitioners-Respondents count violations prior to 2000 as obsolete due to propensity of violations to linger on the records long after the condition has been cured and no further violations were issued since then. Many violations Respondent-Appellant cites extend as far back as the 1970s and 80s, and some even

Among the 410 building code violations that Earthtech cited, at most 13 of these are likely to reflect any current deficiency in building condition or failure to maintain any part of a building.[239] Another 175 violations are obsolete, dating from before 2000 and showing no reoccurrence since then.[240] The remaining 22 violations indicate readily curable and mostly minor conditions not reflecting any deterioration of the structure, such as obstructed passageways, non-illuminated fire exits, burnt out lights, and posting requirements for elevator certificates.[241] Of the violations that might actually indicate a defective condition or failure to maintain any part of the

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older. Violations remain open because owners have little incentive to pay to clear them, even when condition has been cured to avoid repeat citation. Open violations include, for example, the only two violations for 638 West 132nd Street date from 1932 and 1965; the only violation for 3233 Broadway is from 1913; at 3291 Broadway, six out of seven violations are for conditions that were cured years ago in a major building rehabilitation, with the seventh only a failure to submit a boiler inspection report. All five violations at 2321 12th Avenue are from 1976 or earlier, when a different building occupied that site.

[239] 148 violations were purely administrative in nature, for failure to submit annual boiler or elevator inspection reports, and do not indicate any deficiency in actual condition. Another 56 are for other boiler or elevator issues not involving failure to maintain and with "severity" listed as "not applicable." *See* Earthtech study, Table A-1, A-6365-6379; *see also, No Blight* study, for full analysis of Earthtech's building code violation table, at RA-1339-1356.

[240] Two violations relate to work permits and contractor practices no longer existing, and not to any actual condition of the building itself, three are for violations of certificate of occupancy, or failing to post such certificate. Four refer to conditions that were cured prior to the publication of the AKRF's study. Violations remain open because owners have little incentive to pay to clear them, even when condition has been cured to avoid repeat citation. Open violations include, for example, the only two violations for 638 West 132nd Street date from 1932 and 1965; the only violation for 3233 Broadway is from 1913; at 3291 Broadway, six out of seven violations are for conditions that were cured years ago in a major building rehabilitation, with the seventh only a failure to submit a boiler inspection report. All five violations at 2321 12th Avenue are from 1976 or earlier, when a different building was in the site.

[241] *See* Earthtech study, Table A-1, A-6365-6379.

building, Petitioners-Respondents own only one of these.[242] Neither AKRF nor Earthtech compared this data to other comparable areas to show that such numbers or patterns of purely administrative violations and obsolete violations are in any way atypical.[243]

Finally, both AKRF and Earthtech devoted a separate section of each building report to alleged environmental "concerns", but this data as well was not rationally analyzed. 33 buildings were cited as having environmental concerns only on the speculative basis of current or historic use as an auto-related business, and seven only

[242]As an example of the possibilities for misrepresenting actual conditions and exaggerating safety and health conditions, the court should consider closely Respondent-Appellant allegations that the Tuck-It-Away building at 3300 Broadway poses a threat to health and safety on the basis of multiple violations. Of the alleged safety violations cited, 4 for window frames were in fact cured. *See,* Reliable Windows and Doors contract at RA-1799.

To the extent the building was cited on June 10, 2008 for parking uses contrary to its certificate of occupancy, it was documented as cured shortly thereafter on June 30, 2008, and was no longer being used as a parking garage at the time either of the publication of ESDC's blight studies, or of ESDC's December 17, 2008 finding the area to be substandard and insanitary. *See,* June 30, 2008 Letter of Michael Avramedes, Architect, certifying condition cured, RA-1800. It was promptly rescinded as to the ground floor use as a department store. The vacate order also much bore no relationship to two columns that were displaced approximately two inches, which were cited in a 1996 violation. These were never identified as any threat to life or safety or any risk of collapse. *See,* June 10, 2008 Vacate Order at RA-1801. Neither AKRF nor Earthtech inspected the interior of the building, on July 10, 2008. *See,* Letter of Architect Neil Wexler certifying the building as "structurally stable."RA-1802-1827. The violation of the 1970 Certificate of Occupancy in not using the building for school for adults and whole sale storage does not reflect any structural issues for the building, apart from roof top parking, as its 1928 Certificate of Occupancy specified automotive uses as a garage and repair shop throughout. *See,* 1979 Certificate of Occupancy, RA-1828; *compare* 1928 Certificate of Occupancy, RA-1830.

Other building code violations in Tuck it Away buildings relating to exterior walls or posing any hazard have long since been cured. *See*, MB Contracting facade contract, RA-1832; Grand Contracting Co. sidewalk replacement contract, A-1778 (on compact disk) Tuck-It-Away submission V. VIII at Bates No. 7962.

[243]Petitioners-Respondents's *No Blight* study showed that in comparison to near by commercial and manufacturing Block 1982, the rate and pattern of open code violations is similar. *No Blight* study, Table H, RA-1353-1354.

on the basis of having either an above ground or below ground (i.e. any kind of) storage tank, including fuel tanks for a boiler.[244] Where actual physical ("Phase II") sampling was undertaken, in 15 out of 19 the results showed only ground water, like all ground water in New York City not meeting New York State drinking water standards, and contaminates associated with urban fill, also a ubiquitous condition in New York City.[245] Neither AKRF nor Earthtech attempted to quantify these environmental "concerns," either by documenting pathways of exposure or by cost of remediation, and in no case did they show by any rational basis that costs of any required remediation were sufficient to deter or burden re-use or redevelopment.

Because of this narrow focus principally on "deteriorated structures", and methodology designed to find as many ways as possible to assign negative ratings to every conceivable instance of any condition that could ever be remotely associated with blight, AKRF and Earthtech accomplish the task that was designed for them by ESDC and Columbia: to marshal every scrap of available evidence to support a pre-determined conclusion, that the area is blighted. Using this inherently biased methodology, there are few buildings and areas that could escape the blight inspector. This is not a methodology designed for any neutral determination of whether the area

[244] *See,* Earthtech study, Table A-2, A-6380-6383.

[245] *See,* Earthtech study at 2-27, A-5446. AKRF acknowledged that the contaminants identified in soil and groundwater do not pose a threat to human health unless they are disturbed. AKRF at A-3360. *See also*, Earthtech study at A-5450 ("Phase II soil sampling indicated relatively few exceedances of standards, and these were most likely caused by the presence of urban fill, rather than specific past or current uses.").

is or is not blighted. If an agency's determination is to stand as rationally based, it cannot rely upon such intentionally biased methodology.

POINT III

The Columbia project is not a "civic project" and the purported "civic purposes" are both legally insufficient to support the taking and constitute further pretext for dominant private purposes.

As a last-ditch fallback position – in the event that an absence of a blight finding precluded the use of eminent domain – ESDC sought to re-characterize the project as a "civic project" under the UDCA, so as to avail itself of an alternative means to exercise eminent domain over the area in question. In support of this effort, ESDC, in a September 2006 GPP draft, tacked onto the project's title the obligatory language "civic project," and suddenly began to reference the project's alleged educational and public benefits, ultimately stating in its Determination and Findings that the project qualified "separately and independently" as a "civic project" pursuant to the UDCA § 10 (d).[246]

Yet the record clearly demonstrates that the project was never originally intended or designed to advance educational, civic, or public purposes, but, rather, had always been envisioned as an economic development project. This late-breaking attempt to rescue the project – which lacked any prior basis or analysis – was simply an after-the-fact attempt by ESDC to hedge its bets and ensure that it would be able

[246] Determination and Findings at 2, A-2.

to exercise eminent domain. Moreover, as the plurality opinion of the Appellate Division correctly found, this belated redesignation is legally insufficient as a basis for eminent domain under UDCA § 3(6)(d) because, as a matter of New York law, neither private higher education nor private scientific research constitutes a civic or public purpose justifying eminent domain.

A. Private education is not a civic purpose under the UDCA.

A project involving a private university has never been held to constitute a "civic project" or serve a "civic purpose" in New York. The UDCA defines a "Civic project" 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.

UDCA § 3(6)(d).

Respondent-Appellant makes much of UDCA § 3(6)(d)'s reference to "or other civic purposes," arguing that under the doctrine of *ejusdem generis*, such language broadens the types of projects that qualify as "civic projects." *See* R.-A.'s Brief at 52-53. However, this argument misconstrues the doctrine.

The plurality opinion of the court below correctly found that the phrase "or other civic purposes" limited the educational purposes for which an ESDC project may be designed and intended to only such educational purposes as constitute "civic

purposes."[247] This holding correctly applied the doctrine of *ejusdem generis*, which states that a general term following a series of specific terms cannot be broadened in meaning beyond the subject-matter disclosed in the phrases with which it is connected. *See Schulman v. People,* 10 N.Y. 2d 249, 256 (1961) (citing N.Y. STAT. LAW § 239 (b) (1942)). In other words, in the instant case, the "other civic purposes" language does not broaden the types of plans that may qualify as civic projects beyond those that provide "facilities for educational, cultural, recreational, community, municipal, public service."

Using this logic, New York courts have held that a statute prohibiting the employment of persons under 18, in places where alcohol is served, as "hostesses, waitresses, waiters or in any other capacity," did not expand its employment prohibition beyond the category of persons whose job duties might require them to serve alcholic beverages, such as "hostesses, waitresses, waiters," or similar occupations such as busboys or bartenders. *See People v. Cooney*, 194 Misc. 668, 670 (N.Y. Mag. Ct. 1949). Notwithstanding the "any other capacity" language, the statute did not extend to grocery clerks, because the prohibition "must necessarily be limited to retailers who sell alcoholic beverages for *consumption on the premises*." *Id.* at 671 (emphasis in original). In so holding, the court concluded that the rule of

[247] "The petitioners correctly contend that within the definition of Uncons. Law § 6253(6) (d) (UDCA § 3(6) (d)), a private university does not constitute facilities for a 'civic project.' The statutory definition does refer to educational uses, but the final clause "or other civic purposes," clearly restricts the educational purposes qualifying for a civic project to only such educational purposes as constitute a 'civic purpose.'" *Kaur v. UDC*, 892 N.Y.S.2d at 23.

ejusdem generis may only be used to limit the application of a final general term in a statute, not to broaden the use or definition of specific terms preceding the general term.

Furthermore, the term "educational," as it appears in UDCA § 3(6)(d), namely, "educational, cultural, recreational, community, municipal, [and] public service," is not actually a specific term. As New York courts have stated:

> In applying the rule of *ejusdem generis,* care must be taken to see that the words supposed to be particular or specific, and which precede the general term or terms really are an enumeration of individual things; for if the preceding terms are general, as well as that which follows, there is no place for this rule to apply.

People v. Gravenhorst, 32 N.Y.S.2d 760, 772 (N.Y. Spec. Sess. 1942).

Here, the term "educational" admits of a broad range of meaning that encompasses anything instructive, including instruction that is clearly not "civic" in nature, such as employer-specific employee training or religious instruction. Indeed, if all educational purposes are "civic" in nature, as Respondent-Appellant proposes, so too, under the terms of UDCA § 3(6)(d), must all recreational facilities be deemed to serve civic purposes, including facilities such as private country clubs and social clubs. All cultural purposes would have to be defined as "civic" as well, and would thus encompass private art collections and commercial film productions. Given this, it is apparent that the doctrine of *ejusdem generis* does not broaden the reach of UDCA §3(6)(d), as Respondent-Appellant argues, but rather, simply clarifies the

types of educational and other facilities that qualify as civic projects under the UDCA.

Moreover, the cases interpreting this provision have never held that a private university or private school project constitutes a "civic project," or serves a "civic purpose," any more than a project related to a private recreational club or private cultural activity would. Rather, projects deemed to constitute "civic projects" under the UDCA have all envisioned significant public use of project's facilities. For example, in *Brooklyn Bridge Park Legal Def. Fund, Inc. v. New York State Urban Dev. Corp*., 14 Misc. 3d 515 (N.Y. Sup. Ct. 2006), *aff'd* 50 A.D.2d 1029 (2d Dep't 2008), the civic project in question would have created a public park, with a small fraction of the project being devoted to private development. Significantly, the proposed public park comprised "no less than 80% of the project." *Id.* at 523. Again, in *Matter of Settco, LLC v. New York State Urban Dev. Corp.,* 305 A.D.2d 1026 (4th Dep't 2003), the civic project involved the construction of a convention center for utilization by the public, including – but not limited to – the general business public.

Finally, in *Matter of Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp,* the Appellate Division, First Department held that a professional sports arena qualified as a civic project under UDCA § 3 (6) (d) because it provided a "needed recreational venue" that would serve "recreational…or other civic purposes." 874 N.Y.S.2d 414, 424 (1st Dep't 2009). The primary beneficiaries of the recreational

arena would be the general public, with the only limitation on public use being the price of a game ticket. In support of its finding that a privately-controlled facility could serve such a public need, the First Department cited this Court's decision in *Murphy v. Erie County,*, which held that a privately-owned sports stadium fulfilled a civic purpose because:

> [T]he county's residents will be obtaining the full benefit for which the stadium is intended, the ability to view sporting events and cultural activities.

28 N.Y.2d 80, 87 (1971).

Indeed, even in cases not involving the UDCA, New York courts have held that the term "civic purpose" implies actual public participation, public control or public use. Thus, the Third Department has held that an armory allowed for civic use because it served as a polling place during elections. *Strassman v. State* 6 A.D.2d 962 (3d Dep't 1958). And, the U.S. Court of Appeals for the Second Circuit has stated that under New York law, civic uses of public school facilities must be open to and addressed to the general public. *See Bronx Household of Faith v. Bd. of Educ. of City of New York*, 492 F.3d 89, 92 (2d Cir. 2007) (noting that under N.Y. EDUC. LAW § 414 (1), public school facilities used for civic purposes "shall be non-exclusive and open to the general public.") Thus, as a matter of law, there is simply no precedent for designating a private university's project a "civic project," either under the UDCA or otherwise.

The legislative findings and purposes of UDCA also undermine Respondent-Appellant's theory that the UDCA authorizes the taking of property and the development of facilities for the exclusive use of private educational institutions. Section 2 of the UDCA declares New York's policy of "undertaking of public and private improvement programs related thereto, including the provision of educational, recreational and cultural facilities," but only where the improvement programs "related" to the remediation of "substandard, insanitary, blighted, deteriorated or deteriorating conditions."[248]

This policy – of allowing for the development of civic facilities in connection with the rehabilitation of blighted areas – reflected the prevailing theory of urban renewal at the time of the UDCA's passage, when blight was considered the result of deficient planning. *See*, *e.g.*, *Yonkers Cmty. Dev. Agency v. Morris,* 37 N.Y.2d 483 (noting that blight involved "improper land use" and resulted from "unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic" (internal citations omitted)). Indeed, in the landmark case *Berman v. Parker*, 348 U.S. 26 (1954), which established the constitutionality of taking non-

[248] "It is further declared to be the policy of the state to promote the safety, health, morals and welfare of the people of the state and to promote the sound growth and development of our municipalities through the correction of such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation 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." UDCA § 2 (emphasis added).

blighted property if the property is located within a blighted area, the U.S. Supreme Court justified such actions:

> [S]o that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

348 U.S. at 34-35.

Thus, it is clear that New York's policy, as expressed in the UDCA, of allowing for educational, recreational, and cultural facilities as part of "public and private improvement programs" relating to the remediation of blight, does not encompass facilities intended solely for the use of private educational institutions. Rather, the UDCA reflects New York's overarching goal of encouraging integrated planning to create well-functioning public communities, and, in support of this goal, allows for the development of civic facilities for use by the redeveloped community as an adjunct to, or part of, said larger plan. *See*, *e.g.*, UDCA § 3(6)(d) (defining a civic project as "a project, or part of a project").

Respondent-Appellant's claim, that the reference in UDCA § 2 to "the encouragement of participation in [improvement] programs by private enterprise" lends authority for using eminent domain on behalf of projects exclusively controlled by private schools, is unavailing.[249] The plain language of UDCA § 2 simply encourages private enterprise to participate in blight remediation programs – it does

[249] *See* Respondent-Appellant's Brief at 55.

not require private participation to satisfy the requirements for a "civic project." *See* UDCA § 10(d).[250] Tellingly, in the past, ESDC has argued that a project qualified as a civic project not because it maximized private participation, but rather, because it *minimized* this. *See Brooklyn Bridge Park Legal Def. Fund, Inc. v. New York State Urban Dev. Corp.*, 14 Misc. 3d at 517 (ESDC promoted project as a civic project because it devoted "no less than 80%" of the project area to a public park).

Finally, contrary to Respondent-Appellant's suggestion, the policy statement at the end of UDCA § 2 encouraging "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 of regents, or on lands in reasonable proximity to such institutions," does not in fact provide for the exclusive private university use of civic facilities. Such research and development facilities are explicitly limited to those intended for the "cooperative use" of at least one educational institution and one private business corporation.[251]

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[250] Indeed, the only time that the UDCA requires "maximizing private participation" is in land use improvement projects. *See* UDCA § 10 (c) (3).

[251] The paragraph further provides:

> (i) in the case of research and development facilities such facilities are for the cooperative use of one or more such institutions and one or more business corporations, research consortia or other industrial organizations involved in research, development, demonstration, or other technologically oriented industrial activities; and
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> (ii) in the case of high technology industrial incubator space, such space shall be for rental to business concerns which are in their formative stages and which are involved in high technology activities, including but not limited to business concerns initiated by students, employees of such institution, including faculty members and other persons or firms academically associated with such

Here, the Columbia GPP specifically provides that the proposed facilities will not be used for commercial research,[252] thus rendering impossible any such "cooperative use." In sum, as a matter of both law and policy, the UDCA has never allowed for the use of eminent domain in furtherance of a "civic project," where the sole intended beneficiary of the project is a private educational institution, and not the surrounding community. Any expansion of the definition of "civic project" or "civic purpose" under the UDCA to authorize state-sponsored takings for the benefit of private educational institutions, recreational clubs, or fraternal or ethnic organizations would open the door for all manner of abuse and favored treatment for the well-connected.[253]

Accordingly, in light of the plain language in the UDCA, the legal precedent requiring that "civic projects" be for the primary benefit of the public, the use of the term "civic" in New York law generally, and the demonstrated policy goals sought to be furthered by the UDCA, this Court should not expand the meaning of "civic project" beyond its original legislative intent, to wit: to provide the public with facilities such as public schools, libraries, swimming pools, and even sports arenas

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institution.

UDCA § 2.

[252] *See* Modified GPP at 24, A-2546 ("Columbia would not permit occupancy of the Project Site for the conduct of scientific research as a commercial enterprise...")

[253] For example, any private school or club could therefore decide to expand and request the use of eminent domain from ESDC to take over an adjacent building.

as part of a well-integrated plan to benefit the community in which the project is located.

B. Under New York law, private education and private research are not public purposes sufficient to support the use of eminent domain.

Beyond the fact that Columbia's project does not satisfy the statutory requirements for a "civic project," it also does not constitute a public "use, benefit or purpose" enabling the exercise of eminent domain in New York. While the use of eminent domain for the construction of public schools is long established, *see Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 482, it has never been used on behalf of a private school, college, or university.

Respondent argues that education serves an "important public purpose" as a general matter and that, accordingly, Columbia's plan constitutes a public benefit.[254] Yet New York law has long recognized that any public purpose in the provision of private education is of a very different character than the public purposes necessary to exercise eminent domain. As the highest New York court of equity at the time noted, "[c]olleges and academies are altogether of a public nature, and property is necessary for their establishment; yet they have never had conferred upon them the power of taking private property for their accommodation." *Beekman v. Saratoga and Schenectady R.R. Co.*, 3 Paige Ch. 45 at 54 (Chancery Ct. 1831).

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[254] Respondent-Appellant's Brief at 59.

This distinction between public and private educational institutions reflects the rationale behind the use of eminent domain on behalf of public schools, to wit, to support the government's provision of public education. This rationale is not supported by the use of eminent domain on behalf of private educational institutions. Indeed, the distinction between public and private education (and institutions generally) is further reflected in New York's tax law, which does not grant private schools or religious institutions tax exemptions as a matter of right because such institutions are not carrying out the functions of the state. *See Grossner v. Trustees of Columbia Univ.*, 287 F.Supp. 535, 549 (S.D.N.Y. 1968) ("[N]othing supports the thesis that university (or private elementary) 'education' as such is 'state action'"). Tax exemption for such institutions is neither the recognition of any fundamental right, nor "the result of an implied compact whereby the State bargained away its sovereign power to tax in consideration that the one thus freed of the burden would discharge a part of the State's function and policy in the matter of education." *Application of Thomas S. Clarkson Memorial College of Technology*, 274 A.D. 732, 735 (3d Dep't 1949).

Respondent-Appellant suggests that a private university is serving a governmental function because under N.Y. EDUC. LAW § 214, it is a "member institution" of the University of the State of New York and is thus, in effect, an arm of the state. Yet this argument is a red herring. All New York secondary schools,

colleges, and universities are "institutions of the University of the State of New York," but they do not serve the directly-delegated function of the public State University of New York ("SUNY"). A private university's budget, hiring, tenure and admissions policies are not governed by the State, nor are its capital expansion projects planned by the State. Indeed, a private school can, if it so chooses, dissolve itself and cease to serve any beneficial public purpose, without any State interference. Thus, the "governance" of the Board of Regents, to which all secondary schools, colleges, and universities are subject, is very limited, amounting to a mere regulatory and licensing function.[255] In this way, private schools are no more an extension of the State's power to govern and care for its citizens than private doctors are.

This critical distinction between public and private educational institutions was discussed in *Connecticut College for Women v. Calvert*, 88 A. 633 (Conn. 1913), in which the Connecticut Supreme Court found a private college could not constitutionally be delegated the power of eminent domain. In so holding, the *Calvert* Court noted that a private college's autonomy deprived the public of its

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[255] Respondent-Appellant's citation of the interstate Compact for Education is similarly misplaced. Though the compact states New York State has a responsibility to educate all its citizens, and that colleges and universities, both public and private "singularly serve the public welfare and morals," N.Y. EDUC. LAW § 107, the compact in fact establishes no mandate bearing on private schools or colleges. The Commission on Education the compact establishes is empowered only to formulate suggested policies and plans only for the improvement "of public education as a whole, or any segment thereof, and to make recommendations with respect thereto available to the appropriate governmental units agencies, and public officials." N.Y. EDUC. LAW § 107, Art. IV.5. The only other mention of private education the compact in fact makes is as a subject of research into educational methods. *Id.*

common and equal right to the benefit of the taking, because, since a private college can decide for itself whom it wants to admit, access to a private college was not "free from unreasonable discrimination." *Id.* at 636-638. The Court concluded:

> [I]if we should grant that the Legislature had constitutional authority to delegate the right of eminent domain in favor of private corporations because their purposes were high and charitable, although the public had no common right on equal terms to the benefit promised, we should be logically unable to restrain the exercise of the same authority in favor of private corporations operated for profit and administering purposes governmental in their nature for the exclusive use of their own members and selected beneficiaries. As we said in the recent case of *Beach v. Bradstreet*, 85 Conn. 344, 359, 82 A. 1030: 'The right of private property should, and does, rest upon a firmer basis than this.'

Id. at 640.

Respondent-Appellant cites two instances where other states have upheld the use of eminent domain for a private university, *Craddock v. Univ. of Louisville*, 303 S.W.2d 548 (Ky. 1957), and *Univ. Of S. Cal. v. Robbins*, 37 P.2d 163 (Cal. Dist. Ct. App. 1934), *cert. denied* 295 U.S. 738 (1935). Yet in both cases, there was explicit statutory authority for the use of eminent domain. *See Craddock,* 303 S.W.2d at 550 (Kentucky state legislature explicitly granted power of eminent domain to a municipal university controlled by political appointees); *Robbins,* 37 P.2d at 164 (California state legislature explicitly delegated the power of eminent domain to all tax-exempt institutions). As the plurality of the court below noted, where other states have authorized the use of eminent domain on behalf of a private college or

university, it is only by an act of that state's legislature, and the New York legislature has never chosen to confer such power to private educational institutions.[256]

C. Other purported "Civic Benefits" cited are not purposes for which the facilities are to be constructed.

In its Determination and Findings, ESDC set forth a lengthy list of purported "Civic Benefits" that ostensibly render the project either a "civic project" or one with a public purpose. However, these alleged civic and/or public benefits are illusory; rather, these purported benefits are either environmental mitigations required by the EIS, constitute pre-existing obligations on Columbia's part, do not actually use the facilities proposed to be built, and/or are *de minimis* in value.

1. Environmental mitigations are not purposes or benefits of the project.

Under the New York State Environmental Quality Review Act ("SEQRA"), an agency "may not approve an action unless it makes an explicit finding that adverse impacts will be minimized or avoided." ECL 8-0109 (8). Mitigation measures specified in an EIS, therefore, are not purposes for which the project was designed, but are at most incidental to those purposes. They also do not constitute a net benefit to the public, but instead, compensate the public for losses suffered through negative environmental impacts.

[256] "Were we to grant civic purpose status to a private university for purposes of eminent domain, we would be doing that which the legislature has explicitly failed to do: as in California and Connecticut, that decision is solely the province of the state legislature." *Kaur*, 892 N.Y.S.2d at 25.

The "publicly accessible open space" that the project would create constitutes a mitigation and not a benefit, because the additional population the project would introduce to the area results in a net decrease in the ratio of open space per resident or employee, creating a significant adverse impact on total open space resources.[257] Accordingly, ESDC's technical memorandum to the City Planning Commission identifies such proposed open space as only a partial mitigation of the Project's adverse impact on existing open space resources.[258] Similarly, Columbia's offer to provide $500,000 initially, and 3% more annually for a period of 25 years, to subsidize the operation of the West Harlem Piers Park beyond the operating budget already approved by the City, is also described in Chapter 25 of the FEIS as a partial mitigation of the project's adverse impact on open space in the area.[259]

As well, Columbia's establishment of a $20 million fund to develop or preserve affordable housing and fund anti-eviction/anti-harassment legal services was explicitly recognized in the FEIS as a measure to help mitigate the "significant

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[257] FEIS, Open Space, at 23-6 6-35-36, RA-1118-1120.

[258] *See* RA-1122. (acknowledging also a further reduction of open space by 6,300 sq. ft. since the FEIS). Futhermore, it should be noted that ESDC's description of open space to be provided by the project as "much needed" does not offer any rational basis in support of a finding of need in the area for such open space under UDCA § 10 (d) (1). In fact the FEIS notes that in the ½ mile radius of the project area, current "passive open space ratios are all above the City's open space guidelines," *id.*, which guidelines describe "benchmarks that represent areas well served by open space." The only regard in which the area falls short of city guidelines is in "active open space", meaning active recreational uses, such as ball fields or playgrounds, and the project does not create any new active open space. FEIS, Open Spaces, Introduction, RA-1123.

[259] FEIS, Unavoidable Impacts, RA-1126.

adverse indirect residential displacement impacts" on the surrounding community, based on the expected "upward pressure on market-rate rents."[260] As with the above examples, the FEIS noted that these measures would only "partially" mitigate the significant adverse indirect residential displacement impact."[261]

Finally, the requirement that Columbia upgrade the escalators at the 125th Street subway stop is also described as "mitigation measures for the 'significant adverse transit impacts'" causing the station's escalators to "operate above their capacity."[262] Columbia's one-time funding of enhancements to the playground of Intermediate School 195 is also described in the FEIS as a "partial mitigation" for shadows from the proposed buildings that "are expected to result in a significant adverse impact on the I.S. 195 Playground,"[263] the direct mitigation of which could not be achieved.[264] The provision of 5,000 feet of space for artists, for 25 years, should also be considered a partial mitigation, as the project would displace larger

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[260] FEIS, Unavoidable Impacts, Socioeconomic Conditions at 25-1, RA-1125.

[261] *Id.* This fund is meant "to address the impact of the Project," Modified GPP item 4.b, A-2571, which is estimated as indirectly displacing people from 1,318 housing units from the immediate surrounding area, would cover only a small fraction of the cost ($18,018 per unit) to provide an anticipated 1,110 units of housing, and instead presumes majority funding through "subsidies available through existing City-sponsored housing assistance programs." *See* FEIS Appendix P.1, Mitigation Correspondence, memo from Joseph Ienuso of Forsyth Partners at 2.

[262] FEIS, Mitigation, Traffic and Pedestrian, RA-1131.

[263] FEIS, Open Spaces, Introduction, RA-1124.

[264] *See* FEIS, Mitigation, Open Space, RA-1130.

aggregate artist studios which currently exist in three buildings located within the project site.[265]

2. Pre-existing obligations of the developer are not public or civic purposes.

Apart from mitigation measures required by the FEIS, a number of the "benefits" and "civic purposes" alleged by ESDC represent pre-existing legal or contractual obligations for Columbia. In *49 WP LLC v. Village of Haverstraw*, the Second Department found that a purported benefit created by a project could not constitute a public purpose justifying the use of eminent domain if the developer was already obliged to create such a benefit. 44 A.D.3d 226, 243 (2d Dep't 2007). In this case, 24,000 of the 94,000 feet of open space provided for in the project would not result from the GPP, but is required by zoning laws to take the form of widened sidewalks and street walls.[266] Columbia's commitment to subsidize the operating budget of the West Harlem Piers Park is also a pre-existing obligation that Columbia agreed to take on in exchange for the approval of its rezoning application.[267] Similarly, Columbia's obligation to provide rent-free land for 49 years for New York City to build a secondary school for math, science and engineering is the result of an

[265] *See* FEIS Unavoidable Impacts, Shadows, 25-2, RA-1126.

[266] *See* Letter of Amanda M. Burden to Robert G. Wimers, October 6, 2008, transmitting a copy of the City Planning commission's Report on the General Project Plan, A-2132-33.

[267] *See* FEIS, Mitigation, Open Space, RA-1130.

October 2005 agreement which provided that Columbia would donate the use of such land, regardless of whether the GPP was approved or not.[268]

Finally, in exchange for Manhattan Borough President Scott Stringer's support of the rezoning plan, Columbia agreed to provide an affordable housing and legal services fund, to subsidize the West Harlem Piers Park, to fund the I.S. 195 playground, to extend Columbia's small business retail strategy and commit between 4 and 18 percent of retail space in the project site to local entrepreneurs, to enact construction safety mitigation procedures and provide construction jobs for minorities, to provide meeting space and offices for Community Board 9, and to provide unspecified community access to Columbia's proposed facilities.[269] The City Planning Commission's recommendation also refers to Columbia's commitment to develop a mind, brain and behavior public outreach center.[270] Given that all of these provisions are already required of Columbia, irregardless of the adoption of the GPP, they can hardly be considered public benefits justifying the use of eminent domain.

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[268] Agreement between Columbia and City of New York, RA 1133-1134; *see also* Environmental Impact Statement Final Scope of Work, Agreement with City to build public school, RA-1135.

[269] A-2070-72.

[270] A-2074.

3. Features that principally benefit Columbia are not public purposes or benefits.

Additionally, several of the purported "civic purposes" and "civic benefits of the project" are not even primarily public in nature. Columbia itself would be the principal beneficiary and user both of the supposedly "publicly accessible" open space created by the GPP and of the West Harlem Piers Park. Though the central campus open space would be nominally open to the public, it would be surrounded exclusively by Columbia buildings and thus function more like a traditional academic quadrangle. The open space in question would only be "open" to the public until 8:00 PM from November 1 through April 14,[271] in contrast to most city parks, which are open until 11:00 PM, thus significantly inhibiting evening use of the space by West Harlem residents unaffiliated with Columbia. As a practical matter, the West Harlem Piers park would also be isolated from the Manhattanville and West Harlem communities, and the placement of Columbia's privately controlled and patrolled campus between the overall West Harlem community and the waterfront would more likely obstruct the community's access to the park.[272] In essence, the Hudson Piers Park, trumpeted in the NYC EDC's 2002 West Harlem Master Plan as the fruit of wide community participation, would effectively become Columbia's private

[271] Letter of Amanda M. Burden to Robert G. Wimers, October 6, 2008, transmitting a copy of the City Planning commission's Report on the General Project Plan, A-2138.

[272] A City Planning Department official acknowledged on May 16, 2003, "the open green space … could be perceived as an interruption of access to the river and as an enclave for Columbia." Memorandum of Lorinda Karoff, May 19, 2003, RA-1137.

backyard. Finally, other alleged civic and public benefits of the project, such as electricity for lighting improvements and campus-wide wireless Internet service, would also inure predominantly to Columbia's benefit.

These required mitigation measures, zoning requirements, and pre-existing obligations cannot be considered public benefits and do not constitute "civic purposes," even if some may be described as "civic" in nature, since they were not the GPP's intended purpose. Moreover, many of the alleged public benefits would primarily inure not to the public, but to Columbia, with only incidental use of and benefit to the wider community. Accordingly, these benefits cannot properly be called "civic" or "public" and do not justify the use of eminent domain.

4. Additional "Civic Purposes" do not use facilities the project proposes to build.

The remaining alleged "civic benefits," as well as most of the mitigation measures and prior commitments discussed above, do not render the Columbia project a "civic project" because they are not "purposes" for which the facilities to be constructed were "designed and intended," as required by the UDCA. *See* UDCA § 3(6)(d).

Because ESDC maintains that the project qualifies "separately and independently" as a civic project, the "facilities" whose purpose should be considered are the facilities provided by the project as a whole. ESDC explicitly is not claiming that the civic project is only "part of another project". *Cf.* UDCA § 3 (6) (d). The

project as a whole was created for the purpose of giving Columbia a contiguous campus consisting of the entire Manhattanville industrial area. The renderings of the September 2002 Conceptual Integrated EDC/Columbia University Plan clearly demonstrate this, but tellingly, none of the three schemes included the provision of central open space.[273] Any provision of central open space was thus distinctly subordinate to the dominant purpose for which the facilities are intended: to give Columbia a campus occupying the entire Manhattanville industrial area.

Similarly a number of alleged "civic benefits" and alleged "public purposes of the project" cannot be said to be purposes for which the project was providing facilities, as they do not actually make use of any facility in the project area, among them the operating subsidy for the West Harlem Piers Park, the affordable housing fund, the school playground enhancement, the subway escalator upgrade, viaduct lighting, bus service for the elderly, funding for various Harlem non-profits, proposed job training programs, and payments to ESDC's subsidiary, the Harlem Community Development Corporation. The land proposed to be provided to the New York City Department of Education rent-free for 49 years would not be in the project area,[274] nor would the proposed demonstration school to which Teachers College has committed

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[273] *See* Skidmore, Owings and Merrill, Illustrations from Manhattanville Development Plan, Conceptual EDC/Columbia University Plan, September 20, 2002, RA-458-461.

[274] *See* Agreement between Columbia and City of New York, RA-1133-1134; Environmental Impact Statement Final Scope of Work, Agreement with City to build public school, RA-1135.

to provide in-kind services.[275] Even the scholarship fund and proposed undergraduate admission for certain area residents will not make use of the facilities proposed in the GPP, but rather, implicate Columbia's 116th Street undergraduate campus.

5. The remaining alleged "civic purposes" are *de minimis* in value.

ESDC does list some alleged civic purposes that would actually use facilities created by the project. These include the Mind, Brain, Behavior Public Outreach Center, limited use of a swimming pool, limited access to some Columbia facilities for a limited number of "community fellows" and students from a proposed high school, offices and meeting space for Community Board 9, the small artist space, and a "Retail Strategy" commitment to give local entrepreneurs preference in as little as 4% of the project's retail space.[276] Because ESDC alleges the project qualifies "separately and independently" as a civic project, however, ESDC's statutory authorization to participate in this project as a civic project cannot be based on certain minor "portions" of the project being designed and intended for "civic purposes," because in fact, the overwhelmingly majority of the project is designed and intended for other (private) purposes.

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[275] *See* Modified GPP item 3.n, A-2567.

[276] *Compare* Modified GPP item 3.x (committing 12,000 sq. ft. for local entrepreneurs and existing businesses), A- 2569; *with* Modified GPP, Exhibit G (proposing maximum provision of 300,000 sq. ft. for total retail space), A-2593.

Moreover, these "benefits" are *de minimis* in value and bear no rational relationship to the scale, uses or design of the entire project. Thirty-six of the 39 items described as "benefits" in the GPP expire within 25 years. As such, they are not intrinsic uses of the project and will expire soon after the project is fully built. Some of the proposed benefits, such as minority hiring and workforce training programs, explicitly apply only to the construction phase of the project, and not the actual ongoing use of the project. Such temporary uses cannot be considered the purposes for which the project is built and add *de minimis* public value.

D. The purported "civic purposes" constitute further pretext for the dominant private purposes of the project.

ESDC's denomination of the Columbia project as a "Civic Project" is a belated attempt to bolster its statutory authorization to participate in the project, as well as a belated piling on of pretextual purposes for eminent domain after the difficulty of establishing a basis for a blight finding became apparent. As late as May 18, 2006, two and half years into ESDC's participation project planning, the draft GPP still identified the project only as the "Manhattanville in West Harlem Land Use Improvement Project". It was not until September, 2006 that the project had "and Civic Project" added to its title.

It is noteworthy that by September 2006, the Urbitran blight study had been abandoned. By this time, Columbia, through its consultant AKRF, had been studying the shortcomings of that study; ESDC had asked Columbia to provide a basis for

blight; ESDC had resorted to Columbia's blight finding; and ESDC had received a preliminary report from AKRF indicating the marginality of alleged blight conditions.[277] The desirability of a fall-back statutory basis for ESDC's participation, and for further pretextual public purposes, was apparent at this point.

Respondent-Appellant alleges that because the May 18, 2006 draft GPP was "only a draft", and was prepared by Columbia's attorneys, it should not be seen as indicative of ESDC's thinking about the project. All the drafts of GPP, however, were prepared by Columbia's attorneys, as were, together with Columbia's consultants, the drafts of all other project related documents,[278] including purported to be official responses to public comments.[279] Respondent-Appellant alleges the May 18th, 2006 draft GPP "was not used," but in fact, together every draft after it, each served as the basis for the succeeding draft. Each draft represents what was on the table and being considered by the agency as of that date. In all of Respondent-Appellant's FOIL disclosures, there is no evidence of a "civic project" being considered at any date prior to September 2006. In Columbia's early plans for taking over the whole area, which involved such non-educational uses as a hotel, conference

[277] *See* August 28, 2006 AKRF Preliminary Findings presentation and cover letter of Susan Robinson, RA-582-655 (showing the great majority of buildings surveyed to be in good or fair condition, discussing methodological options in finding blight, and seeking more data to establish alleged crime, which allegation was eventually dropped in the Earthtech study).

[278] *See* FN 37, *supra.*

[279] AKRF prepared responses to public comments on the EIS.

center, and offices, it appears that educational uses were neither the dominant nor the principal purpose of the development.[280]

ESDC and Columbia also added the supplemental "civic" purposes and benefits to the project after the prior purpose of giving the entirety of the Manhattanville industrial area to Columbia was established, and most of them not until after the re-designation of the project as a "civic project." Alleged "educational" purposes were only added subsequent to earlier uses including a hotel, conference center, and offices.[281] Only later were the alleged public "benefits" of certain open spaces and subsidy of operations for a nearby park added. Most of the later offered benefits were absent from the "Initial List of Public Amenities Associated with Columbia University Development" discussed at ESDC's first major project meeting on March 15, 2004, including the donations of rent free lands and in kind services for certain possible future public schools, or the lengthy list of minor and time limited financial contributions and services.[282] As late as the May 3, 2007 draft of the GPP, none of these uses were included in the GPP section N except "supporting of economic development."[283] The GPP adopted on July 17, 2008,

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[280] *See* Skidmore, Owings and Merrill ("SOM"), September 20, 2002 Conceptual Integrated EDC/Columbia University Plan, RA-458-461, including substantially commercial "Research Scheme."

[281] See July 9, 2004, EIS Draft Scope of Work, University Development Area at 8, RA-437.

[282] *See* RA-1237; *compare* Adopted GPP at 39-47, A-655-663.

[283] Draft GPP, Project Overview and Goals (May 3, 2007), RA-1238

stated that some of these benefits were added "Consistent with the agreement identified in the Memorandum of Understanding between Columbia University and the West Harlem Local Development Corporation (WHLDC), dated December 19, 2007".[284]

Because an exclusive private university does not qualify as a "civic purpose" as an end in itself, because most of the alleged "civic purposes" purported to be served by the project are not purposes, but arise from preexisting obligations, and because the remaining alleged civic purposes are extraneous to the project's purpose or actual use and *de minimis* in value, the Columbia project is not a "civic project" under UDCL § 3(6)(d). ESDC consequently exceeded its statutory authority in designating the Columbia project as qualifying "separately and independently" as a civic project, as well as in making its finding under UDCA § 10 (d) (3) that the entity to which will own the project "is carrying out a community, municipal, public service or other civic purpose." These alleged "civic purposes" do not by themselves constitute adequate public purposes to support the use of eminent domain, but are instead pretextual and unrelated to the actual purpose and use of the project, to give the entire Manhattanville industrial area to Columbia for it to create a private university campus.

[284]Adopted GPP at 47, A-663.

POINT IV

Respondent-Appellant violated Petitioners-Respondents' due process and statutory right to be heard by closing the administrative record while withholding information to which Petitioners-Respondents had a legal right under FOIL.

The point on which a majority of the Appellate Division concurred, and the basis on which it annulled ESDC's determination and findings, was the finding that ESDC had violated Petitioner-Respondents' statutory and constitutional right to be heard.[285] Because Respondent-Appellant evaded its legal obligations under FOIL, and gamed its procedural rights under the CPLR to impair even Petitioners-Respondents' limited right to be heard under the EDPL, their conduct worked an undue burden on Petitioners-Respondents' right to due process of law, in violation of both the 14th Amendment to the U.S. Constitution and Article 1, Section 6 of the New York State Constitution.

A. Deliberate acts to restrict Petitioners-Respondents's access to information to which they are legally entitled impairs Petitioners-Respondents' right to be heard.

Both the plurality opinion and Justice Richter's concurrence stand on firm ground of precedent. Justice Richter applied the three factor analysis of *Matthews v. Eldridge,* 424 U.S. 319 (1976), as reflected in New York law in *Matter of Zaccaro v. Cahill*, 100 NY2d 884, 890 (2003), weighing (i) the private interest at risk of

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[285] *Kaur, et al. v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 26, 29 (1st Dep't 2009).

deprivation, (ii) the risk of erroneous deprivation of that private interest including the probable value of additional safeguards, and (iii) the state's interest, including the interest in avoiding administrative burdens.[286]

Justice Richter found the private interest – not having Petitioners' business and property taken by eminent domain – substantial.[287] The risk of error, she found high, because the petitioners had shown evidence suggesting ESDC's findings of blight and civic purpose were made in bad faith and pretextual,[288] and serious legal questions existed as to whether the proposed development constitutes a "civic project" under the UDCA.[289] And the public interest in avoiding delay weighed in the petitioner's favor, because there was no allegation of negative impact on a 25 year project from a relatively short delay in the hearing pending the resolution of the FOIL litigation.[290] The public interest in not having every project held up by petitioners commencing FOIL actions was also modest, because it is rare that a case will present such a confluence of bad faith, pretext, and an agency refusal to keep the record open while benefitting from a stay of judgment under CPLR § 5519.[291]

Justice Richter also noted, following the progeny of *Matthews*, that "[a] due

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[286] *Id.* at 29 (J. Richter concurring).

[287] *Id.* at 29.

[288] *Id*. at 32.

[289] *Id*. at 30.

[290] *Id*. at 31.

[291] *Id.* at 31-32.

process right to be heard requires an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Kaur,* 892 N.Y.S.2d at 31 (quoting *Rao v. Gunn*, 73 N.Y.2d 759, 763 (1988)). If a petitioner is denied the ability to evaluate the records and information to which they have a right, and enter such documents into the EDPL record, and the Appellate Division may not, in turn, consider such facts in reviewing the agency's determination, then the hearing the petitioner receives may not be considered "meaningful" within the spirit of due process. *Id.*

Due process mandates that, after a determination in an administrative hearing, both an "intelligent challenge" by the party aggrieved and an "adequate judicial review" must be possible. *Goohya v. Walsh-Tozer*, 292 A.D.2d 384, 385 (2d Dep't 2002) (Granting petition and annulling determination where, inter alia, adequate judicial review was not possible as hearing officer "merely reiterated the parties' testimony and other evidence submitted at the hearing" and improperly "denied the petitioners request for disclosure of … medical records…"); *see also Simpson v. Wolansky*, 38 N.Y.2d 391, 396 (1975) (Case remanded where, pursuant to a review of an administrative determination, an intelligent challenge by aggrieved party and adequate judicial review was not possible as petitioner was not provided with all the information used at hearing to terminate his employment).

The constitutionality of the limited procedural provisions of the EDPL has been

upheld by New York as well as Federal courts.[292] *Matter of Waldo's v. Village of Johnson City,* 141 A.D.2d 199 (1988); *Brody v. Village of Port Chester*, 434 F.3d 121 (2005). In *Brody*, the lack of a neutral arbiter at the administrative level prior to the determination was justified by the assurance of such neutral arbiter on Judicial Review. 434 F.3d at 134. The limitation of such review to the record, with no further ability to develop facts through discovery or cross examination, was justified in light of a minor risk of erroneous deprivation, given the narrow scope of review. *Id.* at 135. The *Brody* court did not consider, however, how the balance of due process analysis tips if the agency puts its thumb on the scale by withholding public information to which the public has a legal right. *Cf. Kaur,* 892 N.Y.S.2d at 32. In the present case, Petitioner-Respondents started to exercise the public's right of access to government records under the Freedom of Information Law ("FOIL") three years prior to the agency's final action. Respondent-Appellant ESDC resisted Petitioners-Respondents' information requests with a consistent, continuous and protracted pattern of evasion and obstruction.

Respondent-Appellant exercised its every opportunity for discretion and its

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[292] The issue of the EDPL's giving exclusive jurisdiction to an appellate court, and not a trial court, however, has not been previously considered. By not allowing review by a trial court with the judicial resources to evaluate an extensive record, sufficient time for full hearing of complex issues, and a right to a jury trial, EDPL § 207 and § 208 violates Petitioners' due process rights under the 14th Amendment to the Constitution of the United States and Article 1, Section 6 of the New York State Constitution. *See* Petitioners' Verified Petition, ¶¶ 280 - 285, A-159a-160a. The EDPL does not provide for the "careful and extensive inquiry" that Justice Kennedy relied upon in finding no pretext for private purpose in *Kelo*.

every procedural right to keep as many records as possible away from Petitioners-Respondents, for as long as possible. But as it conducted cursory searches for responsive records, made arbitrary determinations of exemption, invoking unfounded legal claims, and consistently refused to meet its burden of proof, these discretionary acts worked an undue burden on Petitioners-Respondents rights under FOIL. This Court has already found in regard to one of these FOIL requests, that respondent-appellant ESDC violated its duties under the statute, and that "the access officer's initial determination was superficial, at best." *WHBG v. ESDC*, 13 N.Y.3d 882, 885 (2009). By denying the existence of hundreds of documents responsive to the request, ESDC compelled Petitioners-Respondents to file a petition to get Respondent Appellant to look in the files of more than a single employee. *Id.* at 885. By giving only cursory denial of administrative appeals merely "parroting" the language of the original denial letter, this Court found that Petitioners-Respondents were "compelled to bring suit to obtain either the documents or explanation of ESDC's denial, the very information it should have received during the administrative appeals process." *Id.* Respondent-Appellant chose to respond to FOIL requests in a manner that exacerbated the cost and delay inherent in litigation, thereby unduly impairing Petitioners-Respondents' access to information to which they had a right.

In *WHBG v. ESDC*, and in response to TIA's two succeeding requests covering successive and prior time periods, ESDC refused to provide a particularized and

specific factual basis to support its determinations of exemption, and similarly failed to provide such basis upon administrative review.[293] Petitioner-Respondent TIA was again forced to go to court twice to get either the documents or explanations of denial that it should have received in the administrative appeal.[294]

Once Petitioners-Respondents sought relief from the courts, ESDC aggressively pursued every procedural right to delay prompt resolution of the FOIL request, thereby impairing Petitioner's right to be heard. For example, even though their procedural motions were finally denied, Respondent-Appellant was nonetheless able to stay the order of the Appellate Division and the Supreme Court's orders in both *WHBG v. ESDC* and *TIA v. ESDC I* until January 27, 2009, three months after the closing of the EDPL administrative record.[295]

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[293] *TIA v. ESDC I* was decided "in accordance" with *WHBG v. ESDC*. *See* RA-939. In *TIA v. ESDC II,* all withheld records were ordered to be submitted for *in camera* inspection because of Petitioner Respondent's continuing failure to provide particularized and specific grounds for their claims of exemption. *TIA v. ESDC II*, Index No. 07/114035, Decision/Order, October 23, 2008, Appendix to this brief at 154.

[294] It was not until Petitioners-Respondents' fifth and sixth requests, of February 14, 2008 and June 15, 2008, that ESDC began to be more forthcoming in releasing documents. By this time, Petitioners-Respondents had demonstrated their willingness to defend their rights under FOIL, and after oral argument before the Appellate Division in *WHBG v. ESDC* and *TIA v. ESDC*, ESDC began to appreciate the risks of its posture of resistance to disclosure. In response, ESDC produced approximately 6,000 of the approximately 8,000 pages that were eventually produced prior to the closing of the record. These more voluminous later disclosures still left out the critical earlier periods: when ESDC first took up Columbia's plan; when it began looking for a basis to find the area blighted; and when it later added its thinly attested designation of "civic project" to the general project plan.

[295] *TIA v. ESDC* and *WHBG v. ESDC*, Motion Denied, January 27, 2008, Appendix to this brief at 153.

Although Respondent-Appellant claims it was always acting within its rights,[296] when the exercise of one party's rights comes in direct derogation of the rights of another party, courts should decide whose rights take precedence. The risk to Petitioners-Respondents of losing their businesses due to the inability to put in the record facts demonstrating bad faith and collusion on the part of the agencies concerned, should outweigh Respondent-Appellant's right to pursue unmerited motions for reargument that cite no new law, or motions seeking reconsideration on allegations that it had not presented to the court of first instance. The court below correctly decided that Respondent-Appellant's refusal to keep the EDPL record open cost Petitioners-Respondents their right to be heard.

B. Such withheld records as were ultimately released contained significant evidence corroborating Petitioners-Respondents allegations of bad faith and pretext.

Respondent-Appellant argues that the records withheld made no practical difference, and that "Petitioners had the material and information that afforded them ample opportunity to comment."[297] Such an assertion is fundamentally at odds with due process of law. It is not for the Respondent-Appellant, the adverse party, to decide which documents are important and which are not. Fundamental to the right to be heard, is a party's right to make its own case and determine for itself what

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[296] Respondent-Appellant's Brief at 71.

[297] *Id.*

evidence is relevant.

Respondent-Appellant points to the volume of Petitioners-Respondents submissions as evidence that they had all the evidence they need. Although the records obtained under FOIL allowed Petitioners-Respondents to learn of the abandoned Urbitran study, the conflicting roles of AKRF, ESDC's collusion in tailoring of AKRF's methodology to omit contraindicative evidence; but in fact, Petitioners-Respondents' submission to the record remains incomplete, for a substantial number of records remain unknown and undisclosed. The present record can only hint at the breadth of the corroborating evidence that would have been available, but for Respondent-Appellant's resistance to disclosure.

Respondent Appellant also minimizes the number of records at issue. The number of records withheld past the date for the closing of the record went far beyond the seven records that Respondent-Appellant ultimately appealed to this Court. First, in the WHBG case, Respondent Appellant released some of the AKRF records related to the blight study on June 2, 2008, but other records, including AKRF records related to the environmental review, were withheld until the evening of October 10, 2008, after ESDC's announced deadline for the submission of public comments had lapsed.

Second, in *TIA v. ESDC I,* though the case was decided "in accordance with *WHBG v. ESDC*," Respondent continues to withhold records for which there remains

a dispute as to whether Respondent-Appellant provided an adequate basis for such withholding, including 139 records it identified in logs, and multiple records of additional responsive records that were discovered in its supplemental search of 22 additional employees, a search which was in settlement of the issue of diligence of search in *WHBG v. ESDC*.[298]

Third, Respondent-Appellant also continues to withhold records from a third case, *TIA v. ESDC II*, for which it failed to provide adequate basis to support its determinations. Those records were ordered to be submitted for *in camera* inspection, and the case is still pending before the Supreme Court.[299]

Fourth, other agencies coordinated with ESDC to withhold records on the basis of ESDC's motion for reargument in the Appellate Division. DCP, when ordered to submit records for *in camera* inspection, moved to stay proceedings based on ESDC's motion for reargument.[300] On the basis of ESDC's motion for reargument, EDC continued to withhold the conclusion to the Urbitran study that it had shared with AKRF in the fall of 2004.[301]

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[298] On March 30, 2010 Respondent-Appellant released one additional record from *TIA v. ESDC I* in response to this court's decision in *WHBG v. ESDC*, and stating a willingness to grant access to certain legal bills after redaction. It refused, however, to grant access to the vast majority of records for which there remains a dispute as to whether it failed to provide an adequate basis for such withholding.

[299] *TIA v. ESDC II*, Index No. 07/114035, Decision/Order, October 23, 2008, Appendix to this brief at 154.

[300] *TIA v. DCP*, Index No. 111652/07, Order to show Cause, August 14, 2008, RA-998-1002.

[301] Letter of denial of Jill Braverman, October 8, 2008, RA-1011.

Fifth, beyond the records of various agencies that were withheld in court proceedings, there were also a large number of records that were withheld until the last minute. On August 26th, 2008, after ESDC had already initiated EDPL proceedings, DCP disclosed thousands of pages, where six month's earlier, it had refused to let Tuck-It-Away amend or prioritize its request to facilitate a speedier response.[302] On September 25, 2008 ESDC disclosed records in response to Tuck-It-Away's fourth request.[303] Under pressure to prepare comments and submissions for the EDPL record whose 36 day comment period was already running, Petitioners-Respondents were not afforded a reasonable time to review this flood of late disclosed material.

Respondent-Appellant asserts that once the determination of public purpose is made on an objective basis, the subjective intent of the agency is unimportant.[304] This confuses the issue, because it is precisely the "objectivity" of the Respondent-Appellant's finding of blight and public purpose that is at issue in the documents requested under FOIL, which Respondent-Appellant has deliberately kept out of the EDPL record.

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[302] *See* March 17, 2008, letter of Wendy Niles denying request to prioritize FOIL request, RA-1032.

[303] *See* Disclosure letter by Antovk Pidedjian, September 25, 2008, RA-1263-1264; *see also* August 21, 2008, Reply Letter of Antovk Pidedjian, in response to FOIL request of June 20, 2008, RA-1265 (citing "literally thousands of potentially responsive documents").

[304] Respondent-Appellant's brief at 41-42.

C. Petitioners' failure to seek vacatur of the CPLR § 5519 stay does not prejudice their due process claims.

The Appellate Division correctly concluded that respondents' appeals and re-argument motions, which triggered the automatic stay under § 5519, were the "sine qua non" of their efforts to frustrate petitioners' FOIL requests.[305] Accordingly, respondents' calculated pattern of non-compliance with FOIL worked a denial of due process on petitioners. Respondents' brief offers no support for the view that petitioners' failure to pursue a motion to vacate the automatic stay upsets this conclusion.

Petitioners' decision to pursue other legal channels rather than move to vacate the stay should not be held to prejudice their due process claims, because petitioners have at all times acted expeditiously and in good faith to preserve their rights. As Justice Richter pointed out, petitioners have diligently pursued and timely filed all FOIL requests for documents held by the ESDC.[306] Moreover, Justice Richter correctly noted that the decision not to seek vacatur of the stay has no bearing on the analysis as to whether the ESDC's subsequent closing of the record denied petitioners' due process.[307] Instead of moving to vacate the stay, which would have entailed costly litigation and expenditure of judicial resources, by requesting the

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[305] *Kaur v. UDC*, 892 N.Y.S.2d at 31.

[306] *Id.* at 31 n.6.

[307] *Id.* at 31.

ESDC to adjourn the condemnation hearing pending resolution of the FOIL appeals, petitioners acted in the interest of judicial economy and efficiency. Petitioners' efforts were "vigorously rebuffed by the ESDC," which resulted in a violation of their due process rights."[308]

Instead of cooperating with petitioners' request, which would have furthered the public interest in having a full and informed determination of the issues at the condemnation hearing, the ESDC summarily rejected the adjournment request. As Justice Richter correctly observed, the ESDC has failed to provide a satisfactory reason for its denial of the petitioners' request for adjournment.[309] Furthermore, petitioners also sought a temporary restraining order to enjoin the ESDC from closing the record that was initially granted, but then ultimately denied on the basis that exclusive jurisdiction over the process and the record under the EDPL resided with the Appellate Division.[310] Therefore, no argument will lie that the petitioners failed to adequately pursue their due process claims.

Petitioners-Respondents have, in good faith, sought adjournment of the condemnation proceedings under the EDPL. They pursued a reasonable option provided for under the law, one which was expedient and which would have given

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[308] *Id.* at 27.

[309] *Id.* at 31.

[310] *See*, *TIA et. al. v. ESDC*, Index No. 113275/08, TRO, Appendix to this brief at 160; *TIA et. al. v. ESDC*, Index No. 113275/08, (Sup. Ct. New York County October 30, 2008) Opinion and Order, Appendix to this brief at 162.

them the relief sought. Respondent-Appellant's appeal motions that triggered the automatic stay under § 5519, coupled with the ESDC's summary dismissal of Petitioners-Respondents' request for adjournment, fall neatly into a continuous pattern of tactics designed to delay and frustrate a just resolution of the issues. Thus, Petitioners-Respondents should not be held to account for failing to pursue every conceivable avenue for relief. For these reasons, Petitioners-Respondents' failure to seek vacatur of the automatic stay is immaterial to the under-lying due process violation worked on them by ESDC's premature closing of the administrative record.

D. The Appellate Division's holding represents a balanced, practical policy.

Respondent-Appellant's argues that the Appellate Division's holding would allow any petitioner to delay EDPL proceedings indefinitely by making an endless succession of new information requests. This misconstrues Petitioners-Respondents's position. Petitioners-Respondents requested ESDC to keep its record open only so long as it continued to withhold records to which Petitioner-Respondents had a right under FOIL.[311] This limitation of Petitioners-Respondents' request does not permit a petitioner to delay EDPL proceedings indefinitely, as Respondent-Appellant alleges, because the right of access to any particular record does not attach until the record can be shown to exist, and until the agency has determined it to be exempt

[311] *See* Tuck-It-Away Verified Petition at ¶ 279, A.-158a, *see also id.,* ¶ 273, A-157a.

without articulating a legal or factual basis.[312]

In fact, Petitioners-Respondents do not base their claim of a due process violation on any request made after ESDC's adoption of the Columbia GPP on July 17, 2008, much less once EDPL proceedings commenced on August 3, 2008. Petitioners-Respondents' cause of action in their EDPL petition, related either to records where their legal right of access had been established by specific court order, such as the records in *WHBG v. ESDC* that the Appellate Division had affirmed must be disclosed, or to records which met criteria ordered by the courts in relation to the same parties and the same subject matter, such as the documents at issue in *TIA v. ESDC I*. In *TIA v. ESDC II* and *TIA v. DCP*, Respondent-Appellant and cooperating agencies continued to withhold records that met criteria specifically adjudicated by courts, such as AKRF related records and those records ESDC and DCP continued to withhold without any particularized and specific justification.

Requiring an agency to disclose records to which petitioners have a legal right before closing the record on which judicial review will be based is a reasonable rule. It does not deny the agency the right to appeal or otherwise vigorously defend its rights in court. It only recognizes that the right of an agency to pursue further discretionary proceedings must be balanced against the cost to the petitioner's right

[312] A legal right of access to a record could attach where a known record qualifies as non-exempt, such as when EDC continued to withhold the conclusion to the Urbitran blight study, even after having shared it with AKRF. Requests for specific known documents, however, do not cause substantial delay.

to be heard. The balance of the three factors in the *Matthews* due process analysis is significantly skewed when, premised on ESDC's motion for reargument that proved to be meritless, three agencies involved in four different legal proceedings avail themselves of the automatic stay under CPLR § 5519. When weighed against the risk of erroneous deprivation of private property resulting from an undue burden on petitioner's right to be heard in EDPL proceedings, the public agency's interest in pursuing unfounded legal claims must submit to the petitioner's due process rights.

POINT V

ESDC's proposed taking is unconstitutional because the Columbia project did not ensue from a "carefully considered plan".

The First Department's plurality opinion framed its decision, in part, around *Kelo v. City of New London,* 545 U.S. 469 (2005), a case that centered around a public/private project with economic development as a public purpose. Having found that ESDC's blight designation was made in bad faith, without factual basis, and unconstitutionally applied, the plurality opinion concluded:

> [T]he blight designation in the instant case is mere sophistry. It was utilized by ESDC years after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia. Indeed, it is nothing more than economic redevelopment wearing a different face.

Kaur v. UDC, 892 N.Y.S.2d at 16.

The plurality was thus left with ESDC's remaining claims to public purpose:

those of economic development. Columbia and EDC had always promoted the project as a boon to economic development: that it would create jobs and develop a biotech industry in New York City, that it would help Columbia compete against other private universities, and that it would maintain New York's place as a center for higher education.[313] The record in this case amply demonstrates a longstanding policy commitment to a unitary Columbia plan, and only a convoluted, complex and late conceived statement of public purpose. Because *Kelo* devoted special attention to the issue of favoritism and pretext in public/private development projects, *Kelo* provides a highly appropriate framework of analysis for this case.

Although the U.S. Supreme Court held in *Kelo* that the taking of property from one private party to give to another for purposes of economic development could sometimes be permissible under the Fifth and Fourteenth Amendments to the U.S. Constitution, *see* 545 U.S. 469, 478 (2005), four justices dissented on the grounds that the determination of incidental benefit lacked any practical limitation. As Justice

[313] *See* Determination and Findings at 5-6, A-5-6. Aiding particular economic sectors in which a locality maintains a comparative advantage is a well established economic development strategy. *See, e.g, Fisher v. New York State Urban Dev. Corp.*, 287 A.D.2d 262 (1st Dep't 2001) Columbia, in its own promotion of the project, alleged it would attract other businesses and firms to the area, cause new business start-ups and produce secondary economic benefits through purchases of goods and services. *See*, *e.g.*, Technical Memorandum, Insert 19, RA-1241-1242; Modified GPP at 4-6, A-2526-528; *see also* January 7, 2005 email of Lorinda Karroff, RA-538; Manhattanville-West Harlem Economic Development Impacts authored by Columbia, RA-1252. The participation of the New York City Economic Development Corporation, and the Deputy Mayor for Economic Development was presumably based on their official responsibilities for economic development, not education. ESDC also entered into the record a study of the economic significance of Independent Colleges and Universities in New York State. A-2481-503. The bolstering of strategic economic sectors ultimately comes back to the same fundamental purpose of creating or preserving jobs and tax revenues.

O'Connor wrote for the dissenters, "if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power." *Kelo*, 545 U.S. at 501 (emphasis added). The minority in *Kelo* was also concerned that reliance on merely secondary benefits from the activities of private transferees made it impossible for the traditional test to distinguish between dominant public or private purposes.[314] "The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing." *Kelo*, 545 U.S. at 502.

Because Justice Kennedy was the deciding vote in *Kelo*, and in so far as his concurrence distinguished itself from the plurality, his qualification limits the precedent of the majority. *See Horton v. California*, 496 U.S. 128, 131, n.2. Writing separately as to the problem of improper motive and pretext, Justice Kennedy cited the planning process from which a proposed taking emerges. He concurred with the plurality that in the specific case of New London, the taking was constitutional, but did so only because the original planning process ensured there was no favoritism. Kennedy's vote with the majority in *Kelo* thus rested on the fact that in New London,

[314] As Justice O'Connor recognized in dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Kelo*, 545 U.S. at 503.

the city determined the need for the use of eminent domain *before* it identified most of the private beneficiaries. 545 U.S. at 491, 493. It did so through a public process, to the extent of appropriating funds for the purpose. Only *after* this initial public process was the developer selected, and it was selected through a competitive process, presumably on the basis of which a developer and plan was selected that best met the previously determined public need.[315] *Id.* at 492.

Under *Kelo*, therefore, in the absence of a valid blight finding or a facility for actual public use, where the purported public benefits are only indirect in the form of jobs, tax revenues or other stimulus to economic development, then a "carefully considered plan" must be in place to insure against favoritism and pretext. The Columbia project is a diametric opposite to the "carefully considered plan" upon which the U.S. Supreme Court relied in *Kelo*. As Justice Catterson concluded: "The contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumble could not be more dramatic." *Kaur v. UDC* at 19.

The Columbia plan did not arise from any acknowledged and certified pre-existing condition of economic distress. In 2002, New York City was riding the crest of a wave of economic growth, with soaring real estate values, a construction boom,

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[315] Justice Stevens in the plurality also affirmed that New London's plan's having been "carefully considered" ruled out the possibility of "illegitimate purposes." *Kelo*, 545 U.S. at 478. He too emphasized that at the time the plan was adopted, the identities of the private beneficiaries were not known. *Id.*

and high demand for land and commercial real estate.[316] Far from finding any depressed conditions in Manhattanville, the 2002 West Harlem Master Plan stated that Harlem in general was experiencing a new renaissance of development. The plan found great development potential[317] and numerous advantages of location and transportation access,[318] which could be easily unlocked through a re-zoning[319] that enjoyed widespread community consensus.[320]

The Columbia plan was never comprehensive in the sense given by Justice Kennedy, because it was never intended to meet the needs of the residents or businesses of Manhattanville or West Harlem, and was conceived without their participation. It was never formulated independently of Columbia's interests. EDC dismissed the public participants in the 2002 West Harlem Master Plan, abrogated its stated policies in its published plan, and secretly gave Columbia the lead in developing a re-zoning plan tailored exclusively to Columbia's interests.[321] EDC further abrogated its responsibility for comprehensive planning by quietly

[316] Respondent-Appellant cites the Urbitran study, dating from the end of 2003 and 2004 as evidence of prior depressed conditions, but the superficiality and inherent bias of the study make it unreliable. See, p. 49, supra; FN 138, 139 and 140. More fundamentally, it dates from not before, but *after* the conception and policy commitment to the Columbia plan; in fact, it was commissioned to support the Columbia plan when EDC solicited ESDC's participation.

[317] RA-67-68.

[318] RA-69.

[319] *See* Community Board 9 197-a Plan (Jun. 17, 2005), RA-183-195, *see also* RA-58-60.

[320] *See* RA-19-20; *see also* Resolution in favor of CB9M 197-A plan, TIA Submission, Vol. VII at 7051, A-1777 (on compact disc).

[321] *See* TIA Verified Petition, ¶ 15, A-86a.

acquiescing to Columbia's desire to have eminent domain used on its behalf, by secretly enlisting ESDC's cooperation in such a plan, and together with Columbia, ESDC, and other New York City agencies, by devising an intricate two-track strategy that was not legally required, but politically advantageous in circumventing community opposition.[322] Under this two-track strategy, no public body went through the degree of public exposure and review required for the commitment of public funds, allowing the project to avoid public review until it was brought up in the guise of a rezoning action. There was no public action or statement of policy proposing the use of eminent domain prior to identifying the beneficiary of such taking.[323] Instead, by covering its own expenses, Columbia was able to orchestrate a seven year long campaign of advocacy and private planning.[324] ESDC all the while denied having made any decision to use eminent domain, and evaded requests for information, whether from elected officials,[325] the West Harlem Community Planning

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[322] *See* December 10, 2002 Memorandum of Lorinda Karroff, re. Minutes of Manhattanville Team Meeting on Dec. 5, 2002, RA-429; Agenda for first meeting of EDC with Columbia and DCP, Sep.20, 2002, RA-476; Agenda of Manhattanville meeting with EDC and DCP, Oct. 31 2002, RA-474.

[323] Despite changing patterns of business and employment, the Manhattanville industrial area has, prior to the present Determination and Findings, never been found by any study to be "substandard and insanitary" or "blighted." It has never been subject to any urban renewal plan, or made part of any urban renewal zone. *See also* note 18, *supra*.

[324] Cost Agreement Letter between ESDC and Columbia University, July 30, 2004, RA-492-497.

[325] *See, e.g.,* January 27, 2005 Letter of Keith Wright, R-662-3; March 8, 2005 reply letter of Charles Gargano, RA-664.

Board,[326] or Petitioner-Respondents requests under FOIL.

The Columbia project did not result from the consideration of alternative plans. *Cf. Kelo*, 545 U.S. at 492. EDC never considered any alternative development plans before committing itself to rezoning the Manhattanville area exclusively around Columbia's needs, and before endorsing Columbia's desire for the use of eminent domain.[327] Rather than select a developer from a group of applicants, as New London had done in *Kelo*, neither EDC nor ESDC issued a request for proposals, and no application other than Columbia's was considered.[328] In fact, an alternative plan did exist. As late as May 3, 2007, the drafts of the GPP make no mention of Community Board 9's comprehensive 197(a) plan, over ten years in the making, or any other alternative plan.[329] In the October 12, 2007 draft of the GPP, the 197(a) plan is rejected on the ground that it did not meet Columbia's needs as Columbia had defined

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[326] June 27, 2005 Letter of Anita Laremont, RA-665.

[327] *See* FN 119, 128, *supra.*

[328] From the early stages of state participation in the project, the only developer under consideration was Columbia. *See, e.g.*, West Harlem Pier/Manhattanville Development Work Plan (Jun. 11, 2002), RA-427; Agenda for first meeting of EDC with Columbia and DCP (Sep. 20, 2002), RA-476; Agenda of ESDC meeting of March 22, 2004, RA-1255; Agenda of ESDC Meeting of May 4, 2004, RA-485; Agenda of meeting between ESDC and Columbia June 15, 2004, RA-1256; Agenda of ESDC meeting of July 30, 2004 discussing below-grade condemnation, RA-1257, Agenda for meeting, Manhattanville Columbia University Project, August 24, 2004, RA-1258, Agenda and Attendance sheet of meeting of August 2005, RA-489; Agenda of meeting of May 5, 2005, RA-488.

[329] *See, e.g.,* Draft GPP (Jan. 17, 2007), RA-831; Draft GPP (May 18, 2006), RA-753.

them.[330] When the New York City Planning Commission adopted the 197(a) plan, it carved out the area sought by Columbia because it did not provide Columbia "adequate opportunity to facilitate Columbia's long-term growth."[331] The record thus shows no evidence that the ESDC placed any constraints upon the scale or configuration of Columbia's plans, or required any accommodation of existing or competing uses.

Rather than formulate a neutral plan without a principal beneficiary in mind, as New London had in *Kelo*, EDC and ESDC formulated a plan tailored to the needs of the principal beneficiary. In fact, every document constituting the plan was drafted by the beneficiary's pre-selected attorneys, consultants and architects. Even the blight study that ESDC based its findings on, was prepared by Columbia's consultant AKRF;[332] AKRF had been nominally retained by ESDC for the purpose, but with such blatant conflict of interest that both the New York State Supreme Court and the Appellate Division agreed that AKRF could not be regarded as independent of Columbia's interest. *See Kaur,* 892 N.Y.S.2d at 13-14.

Finally, rather than comply with procedures to facilitate review of the record

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[330] *See October 30, 2007* Draft GPP as reflect in track changes of April 21, 2008 GPP, at 14, RA-901 (dismissing Community Board 9's 197a plan as providing only 13% of Columbia's program space needs, later revised to 31%.)

[331] A-2087-88.

[332] *See* September 11, 2006 Subcontract Agreement between ESDC & AKRF for Manhattanville Neighborhood Conditions Study, RA-1065.

and facilitate inquiry into its purposes, ESDC has consistently resisted disclosure of information about the project, refused to disclose records requested under FOIL, and repeatedly misrepresented what records it had in its possession. By invoking legally insufficient claims of exemption, refusing to provide factual basis for its determinations of exemption, and exercising its privilege to stay the judgements of numerous New York courts ordering the release of the records, Respondent-Appellant has established a pattern for running out the clock to limit Petitioner-Respondents' opportunity for judicial review.

The planning process from which this project emerges is thus not only riddled with but defined by precisely the favoritism that concerned Justice Kennedy. Favoritism was present not just in the estimation of which owner of any given lot would make more profitable use of the land; favoritism was also shown to Columbia over Community Board 9's well developed comprehensive plan, and further demonstrated in the refusal to hold Columbia to any rational accounting of whether it needed exclusive control of the entire area to generate the anticipated indirect benefits from the project. ESDC and EDC made inquiries as to how Columbia intended to proceed if it did not get eminent domain,[333] but Columbia made no

[333] *See* Questions to be answered by Columbia University, Requested by EDC, DCP, & ESDC, DCP, Aug. 1, 2005, RA-539.

acknowledged response.[334] By proceeding with the project notwithstanding Columbia's silence, it may be inferred that ESDC simply did not consider any alternative plan.

New York City and New York State expected to reap indirect economic development benefits in the form of jobs, tax revenues, secondary economic growth or reenforcement of local or regional comparative economic advantage in the certain economic sectors. However, without a "carefully considered plan" commensurate to the New London Plan on which *Kelo* was decided, it may not be presumed that public interests were paramount in each decision establishing the parameters of the project.

To the contrary, the elaborate history of bad faith and pretextual justifications on the part of the Respondent-Appellants demands precisely the opposite presumption. In fact, this case fulfills Justice O'Connor's warning of the impact of broadening the use of eminent domain for unrestrained legislative expectations of indirect benefit from a private party's pursuit of its own interests:

> [T]he beneficiaries are likely be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has the license to transfer property from those with fewer resources to those with more.

Kelo, 545 U.S. at 505.

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[334] Columbia's answers to the "Questions to be answered by Columbia University, Requested by EDC, DCP, & ESDC, DCP, Aug. 1, 2005" were specifically requested by Petitioners. Its disclosures in relation to *TIA v. ESDC I* , *TIA v. ESDC II,* and three subsequent FOIL requests have shown no responsive document or communication from Columbia. ESDC has certified in each case that no such document could be found despite diligent search.

As Justice Kennedy's controlling concurrence stated, such situations demand a heightened standard of judicial review going beyond traditional deference to the legislative agency. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Kelo*, 545 U.S. at 491. "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.*, at 493.

The present case is one where such heightened scrutiny is in order. Had *Kelo* been presented with the facts in this case, it would most likely have been decided the other way. Accordingly, the Court should recognize that without a "carefully considered plan" designed to protect the primacy of the public interest, the Columbia project represents an unconstitutional taking.

POINT VI

The term "substandard and insanitary" in the UDCA is unconstitutionally vague as applied and on its face.

Because the term "substandard and insanitary" as used in UDCA § 10(c)(1) does not give fair notice to individuals of the criterion on which blight can be found, and permits ESDC to discriminate against different developers and property owners,

the term is void for vagueness, both on its face and as applied in this case, in violation of both the 14th Amendment to the U.S. Constitution, and Article I, Section 6 of the New York State Constitution.

"[C]ivil as well as penal states can be tested for vagueness under the due process clause." *Montgomery v. Daniels*, 38 N.Y.2d 41, 58 (1975)(citing *Giaccio v Pennsylvania*, 382 U.S. 399, 402 (1966)); *see* U.S. Const., 14th Amend.; N.Y. Const., Art. I, §6. Due process requires that a statute be sufficiently definite "so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." *Foss v. City of Rochester*, 65 N.Y.2d 247, 253 (1985); *see also People v. Stuart*, 100 N.Y.2d 412, 420 (2003). "To this end, nothing less than 'adequate warning of what the law requires' will do." *People v. New York Trap Rock Corp*., 57 N.Y.2d 371, 378 (1982) (internal citation and quotation marks omitted). Notice is required even when a citizen is made liable to loss of property, not through any affirmative act, but by their mere presence in a location. *Lambert v. California*, 355 U.S. 225, 228 (1957) (Where ex-convicts were required to register their residence, "[n]otice is required before property interests are disturbed, before assessments are made, before penalties are assessed.").

After the U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), state courts have focused renewed attention on the broad scope of blight statutes. *See, e.g., Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 191

N.J.344 (2007). In *Norwood v. Horney,* 110 Ohio St. 3d 353 (2006), the Ohio Supreme Court found a statute authorizing use of eminent domain in language similar to the UDCA void for vagueness on its face, where it defined blight as a "deteriorated or deteriorating area". *Cf.* UDCA § 3 (12).[335] In *Norwood*, the town found a residential area with predominantly well kept homes to be "deteriorating" from the encroachment of commercial uses. The court found that property owners did not have fair notice of what conditions constituted a "deteriorating area". 110 Ohio St. 3d at 382. Although the Norwood Code's definition of "deteriorating area provide[d] a litany of conditions, it offer[ed] so little guidance in application that it was almost barren of any practical meaning." *Id.*

The Ohio court found that the factors listed in the Norwood Code were so broad as to describe "virtually every urban American neighborhood." *Id.* at 381; *see also Beach-Courchesne et. al. v. City of Diamond Bar*, 80 Cal. App. 4th 388, 407 (Cal Ct. App. 2000) ("If the showing made in [this] case were sufficient to rise to the level of blight, it is the rare locality in California that is not afflicted with that condition"); *Birmingham v. Tutwiler Drug Co.*, 475 So.2d 458, 466 (Ala.1985) (the area alleged to be blighted "was typical of much of downtown Birmingham"). Therefore, the Ohio Supreme Court found that Norwood's criterion of a "deteriorating area" was a

[335] "The term "substandard or insanitary area" shall mean and be interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area..." UDCA § 3(12).

"standardless standard". *Norwood v. Horney,* 110 Ohio St. 3d at 382.

In Norwood, the criterion of "deteriorating area" could be met if it was "in danger of deteriorating into a blighted area." The Ohio Supreme Court held that this was too subjective a standard to serve as a basis for a taking, because rather than focus the inquiry on the property's condition at the time of the proposed taking, it introduced undue speculation as to the future condition of the property. *Id. at* 382-384. What the vague "deteriorating area" standard should have required was a determination that the property, because of its "existing state of disrepair or dangerousness," posed an actual threat to the public's health, safety or general welfare. *Id.* at 383. Thus, the Ohio Supreme Court concluded that even under a broad construction of "public use," "government does not have the authority to appropriate private property based on mere belief, supposition or speculation that the property may pose such a threat in the future." *Id.*

Respondent-Appellant argues that Manhattanville is a deteriorat*ed* area, rather than a deteriorat*ing* area.[336] But the studies upon which ESDC bases its finding of blight rate buildings in poor or critical condition on the basis of deteriorat*ing* conditions that potentially threaten health and safety *if left unaddressed*.[337] Thus, the studies conducted by AKRF and Earthtech are in fact every bit as prospective, and

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[336] Respondent-Appellant's Brief at 34-35.

[337] *See* FN 234, supra.

speculative, as the standard rejected by the Ohio Supreme Court in *Norwood*.

Vagueness in the definition of blight equally offends the constitutional value of preventing arbitrary and discriminatory application of the law. The requirement of notice through specificity is "not only to assure that citizens can conform their conduct to the dictates of law but, equally important, to guide those who must administer the law." *People v. Illardo*, 48 N.Y.2d 408, 413 (1979). In the criminal law context, the U.S. Supreme Court has expressed its concern that unfettered discretion permits and encourages arbitrary and discriminatory enforcement of the law against minorities. *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972) (where two white women riding in a car with two black men were charged with "vagrancy").[338]

In the context of eminent domain, unfettered discretion enables takings that are motivated by favoritism. *Cf. Kelo*, 545 U.S. at 505 (J. O'Connor, dissenting). With unfettered discretion, the condemning agency can pronounce any area blighted, when really the area's chief characteristic is it's attractiveness to the favored developer. A vague standard of blight permits and encourages discrimination in favor of the developer over the existing community, local businesses, and current owners. As the Ohio Supreme Court put it:

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[338] The plurality opinion of the court below held that, because "[t]he UDCA suffers the same vagueness as the Norwood Code," "[o]ne is compelled to guess what subjective factors will be employed in each claim of blight." *Kaur v. UDC,* 892 N.Y.S.2d at 26.

> Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement--a danger made more real by the malleable nature of the public-benefit requirement. We must be vigilant in ensuring that so great a power as eminent domain, which historically has been used in areas where the most marginalized groups live, is not abused.

Norwood, 110 Ohio St. 3d at 382.

The same subjectivity and ad hoc application also infects the instant case. The plurality of the First Department, correctly held that the term "substandard and insanitary area" in UDCA § 10(c)(1) was unconstitutionally vague as applied by ESDC in Manhattanville. The application of the UDCA in this case resulted in "'ad hoc and selective enforcement,' as evidenced by the greatly divergent criteria used to define blight." *Kaur,* 892 N.Y.S.2d at 26 (quoting *Norwood*, 110 Ohio St. 3d at 382). The plurality opinion noted that AKRF had used different standards in Manhattanville than it had in its previous blight study for the Atlantic Yards project in Brooklyn. For example, in Manhattanville, AKRF counted any building with a vacancy rate of 25% or more as vacant, but in Brooklyn, only buildings with a vacancy rate of at least 50% were counted.[339] AKRF never offered any rationale for applying a less stringent standard of vacancy in Manhattanville. Furthermore, AKRF and Earthtech relied heavily on building code violations in Manhattanville as an

[339] *Kaur v. UDC,* 892 N.Y.S.2d at 25.

indicator of blight,[340] even though in Brooklyn AKRF had explicitly rejected such evidence as being unreliable.[341] AKRF's and ESDC's failure to adjust their 60% threshold for determining underutilization to account for the different zoning between Atlantic Yards and Manhattanville, which resulted in the application of a stricter standard in Manhattanville, also evidences arbitrary application.

Respondent-Appellant argues that the difference in threshold of vacancy made no statistical difference, and downplays the extent to which it relied on vacancy as a factor in its determination.[342] In fact, AKRF and Earthtech rely substantially on vacancy, counting it as yet another condition for which a building can be determined to exhibit substandard and insanitary conditions. Moreover, the issue of vacancy significantly colors their depiction of the area as being marked by underutilization, low employment and under-investment.[343]

Petitioners-Respondents' allegation of variable and discriminatory application of standards, applies beyond the issue of vacancy. By making marginal adjustments

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[340] *See* AKRF Neighborhood Conditions Study, Nov. 1, 2007, A-3378-3381, Earthtech Neighborhood Conditions Study, May 2, 2008, A-5442

[341] AKRF, Atlantic Yards Blight Study at C-5 n. 2, RA-1116 (rejecting use of building code violations on the grounds that "building code violations vary widely in date of issuance and type of violation, making it difficult to make meaningful comparisons in data across lots.")

[342] Respondent-Appellant's Brief at 40.

[343] *See* AKRF Neighborhood Conditions Study, Nov. 1, 2007, at i-ii, vii, A-3351-3352, A-3359; Earthtech Neighborhood Conditions Study, May 2, 2008, at 2-20, A-5435. When AKRF began its survey in the fall of 2006 and winter of 2007, Columbia was still in the process of vacating at least 3251 Broadway, for example. In fact, AKRF counted several buildings as 'substandard' on the sole basis of a 25% vacancy rate. *See* AKRF Neighborhood Conditions Study, Nov. 1, 2007, Figure 2, A-3353.

to the standards for a number of different criteria – such as vacancy, utilization, or building code violations – AKRF and Earthtech were able to incrementally skew the count for multiple criteria. By adding a vacancy here, an "underutilized" designation there, a "safety condition" here, or a "deteriorated condition" based on an outdated building code violation there, or simply ignoring Columbia's failure to repair a skylight or unclog a drain, AKRF and Earthtech were able to conclude that at least 51% of the properties could be assigned at least two blight indicators.[344]

The statutory definition of blight in the UDCL invites such cherry picking of data, and permits the tabulation of unrelated and unweighted data, which can then be shoe-horned into one factor category or another, to arrive at a misleading aggregate that misrepresents any given neighborhood.[345] To guard against discriminatory application of the law, it is not necessary that "the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision." *Yonkers Community. Dev. Agency v. Morris*, 37 N.Y. 2d 484. At a minimum, however, the cause of each factor must be positively identified, not merely inferred; their negative effects on other properties and areas must be actually

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[344] *See* Point II.B.1, *supra* and citations to the record therein.

[345] As AKRF explained to ESDC in its preliminary findings presentation, the Manhattanville industrial area, which is actually over-built to an average FAR of 2. If measured as an area-wide average, four out of five blocks are over-built to a FAR of 2. *See* RA-592. If measured block by block, however, it can be portrayed as "underutilized," giving disproportionate weight to the smaller lots in determining what "characterizes" the area. *See* RA-593. *See* Point II.A.2, *supra.*

documented, not merely speculated. The mere tabulation of "indicators" without offering a basis to establish their significance and relative weight should be proscribed.

In the present case, the plurality of the Appellate Division, First Department did not find the term void for vagueness on its face, and Petitioners-Respondents maintain that the lower court's failure to do so was in error. The plurality stated that the term "substandard and insanitary" has been "interpreted and applied in the past without constitutional difficulty." *Kaur v. UDC,* 892 N.Y.S.2d at 39. In *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, however, the First Department recognized that "blight" is "a highly malleable and elastic concept capable of enormously diverse application," and implicitly assigned the term a more definite meaning than the statutory language of the UDCA itself ensures. 59 A.D.3d 312.

As an example of a blight finding that challenged "one's common-sense understanding", the First Department cited *Jo & Wo Realty Corp. v City of New York*, 157 A.D.2d 205 (1990), which upheld a finding that the Columbus Circle Coliseum site was blighted, "notwithstanding the site's obvious, indisputable potential for private development." 59 A.D.3d at 325. Thus, the First Department only indicated that the definition of "blight" was broader than just areas incapable of private development. The core, and more definite meaning affirmed in the Coliseum example, is that blight requires an adverse effect on the surrounding area. *Jo & Wo*

Realty Corp, 157 A.D.2d at 218 (where the Coliseum was found to have been rendered "outmoded, underbuilt and unutilized"[346] by the new Javits Convention Center).

The First Department's affirmation of the breadth of applicability of the concept of blight in *Develop Don't Destroy* does not preclude abusive interpretation through the "ingenuity of consultants eager to please the developers who pay their bills". *See Develop Don't Destroy,* 59 A.D.3d at 325. Indeed, its qualification that the diverse application of the concept of blight is not "*in the main"* attributable to such ingenuity concedes the possibility. *See id.* (emphasis added). The failure of the statutory definition to require an affirmative causal connection between the criteria employed and the actual impairment of development encourages just such ingenuity. Without a framework for reasonable weighting of evidence, the UDCA similarly encourages the use of prejudicial thresholds of measurement and the accumulation of misrepresentative evidence. For example, UDCA § 10 (c) (1) states that a substandard and insanitary area "tends to impair or arrest the sound growth and development of the municipality." This imposes an additional requirement: a blighted area must have a negative effect on other property or other areas. Such a requirement is still less than clear, rendering the UDCA void for vagueness on its

[346] In *Jo & Wo Realty Corp.*, the term "underbuilt" refers to inadequate size compared to the demands of the modern convention market, and "insufficiently utilized" refers not to unused development rights, but to insufficient use of the facility to keep it fully booked.

face. The prospective verb "tends," however, blunts any definite requirement of an actual showing of negative effect. This speculative gap can be all too easily filled by mere inference from the occurrence of various "indicators" that are found in other blighted areas.

ESDC has not filled this gap in the UDCA. Despite Tuck-It-Away and WHBG's specific requests for any document or statement of standards for finding blight, ESDC has failed to produce any and has four times certified that such a document does not exist, or could not be found despite a diligent search. ESDC's manifest lack of clear, stable standards not only fails to give owners notice of what constitutes a blighted area. This lack of standards permits and encourages ESDC to apply the law in a discriminatory fashion, to favor the developer Columbia over existing businesses and owners, and to go against the express wishes of the Community encapsulated in Community Board 9's 197 (a) plan.

Because ESDC failed to adopt, maintain or promulgate any standard for finding blight, and because the record demonstrates that ESDC actually discriminated against existing owners, businesses and the Manhattanville community by manipulating various standards to ensure a blight finding, this Court should affirm the plurality opinion of the Appellate Division, First Department's finding that the UDCA was applied with unconstitutional vagueness in Manhattanville. Because the vagueness of what constitutes a "substandard and insanitary area" encourages and permits ESDC

to discriminate in favor of not just Columbia, but also developers in other projects, and because it provides no notice to owners that their businesses and property may be taken pursuant to a finding of blight, the UDCA should also be found void for vagueness on its face.

CONCLUSION

For the foregoing reasons, this Court should affirm the findings of both the plurality opinion of the Court below, and of the concurrence, and affirm the majority of the court below in annulling Respondent-Appellant's determination and findings.

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