

To Be Argued By:  
Douglas M. Kraus

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# New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



DEVELOP DON'T DESTROY BROOKLYN; DANIEL GOLDSTEIN; ATLANTIC AVENUE BETTERMENT ASSOCIATION; FORT GREENE ASSOCIATION; BOERUM HILL ASSOCIATION; FIFTH AVENUE COMMITTEE; EAST PACIFIC BLOCK ASSOCIATION; PROSPECT HEIGHTS ACTION COALITION by its President Patti Hagan; PRATT AREA COMMUNITY COUNCIL; SOCIETY FOR CLINTON HILL; DEAN STREET BLOCK ASSOCIATION (4TH TO 5TH Ave.) by its President Judy Sackoff; PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL; ELISELLE ANDERSON; DAVID SHEETS; KEN DIAMONSTONE; and PACIFIC CARLTON DEVELOPMENT CORP.,

*Petitioners-Respondents-Cross-Appellants,*

*against*

EMPIRE STATE DEVELOPMENT CORPORATION,

*Respondent-Appellant-Cross-Respondent,*

*and*

FOREST CITY RATNER COMPANIES,

*Respondent.*

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**REPLY BRIEF AND BRIEF IN OPPOSITION TO CROSS-APPEAL  
OF RESPONDENT-APPELLANT-CROSS-RESPONDENT  
EMPIRE STATE DEVELOPMENT CORPORATION**

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## **Preliminary Statement**

This brief is submitted on behalf of Respondent-Appellant Empire State Development Corporation (“ESDC”) in reply to the opposition brief of Petitioners-Respondents-Cross Appellants (hereinafter, “petitioners”) dated February 28, 2006. This brief is also submitted in opposition to petitioners’ cross-appeal from the portion of the lower court’s order and judgment entered February 15, 2006 that dismissed petitioners’ request to annul ESDC’s December 15, 2005 Declaration of Emergency permitting Respondent Forest City Ratner Companies (“Forest City”) to demolish five vacant and dilapidated buildings within the “footprint” of the proposed Atlantic Yards Arena and Redevelopment Project (“Atlantic Yards”) in Brooklyn.

## **Summary of ESDC’s Reply and Opposition**

In their effort to sustain the decision of the court below disqualifying ESDC’s long-time environmental counsel, David Paget, petitioners make two principal arguments. First, they ask this Court to create a special exception to the well-settled rule that a party has no standing to seek disqualification of another party’s counsel with whom it has never had an attorney-client relationship, arguing that the rule should not apply to purportedly “public” litigants like themselves who move to disqualify counsel for a government agency. Any other result, petitioners contend, would grant governmental entities such as ESDC “immunity” to hire

lawyers with conflicting interests and to ignore the public's concerns about potential bias. (Pet. Br. at 2-3) Second, petitioners argue that the record in this case supports the conclusion that Mr. Paget engaged in simultaneous representation of Forest City and ESDC on the Atlantic Yards project, which was the factual predicate underlying the lower court's erroneous finding of an "appearance of impropriety" here.

Both these arguments fall far wide of the mark. First, there is no justification for a special exception to the rule regarding standing to move to disqualify counsel. If members of the public believe a lawyer for a governmental agency has a conflict, they can file a complaint with the appropriate disciplinary body. If, on the other hand, their concern is with guarding against a potentially biased decision by the agency, they can make their views known in public hearings or other proceedings before the agency and, once a final determination is made, they can seek review of the agency's determination in a court of law. In light of the availability of adequate means for safeguarding the integrity of the process, and the well-recognized risk that disqualification motions are often used for tactical purposes, ESDC respectfully submits that there is no justification for creating any exceptions to the standing rules to accommodate petitioners here. Nor do petitioners gain any comfort from Opinions 629 and 631 of the State Bar Association's Ethics Committee, the only authority they rely on to support their

position. Those ethics opinions deal with the issue of waiver, not standing; but if there is no standing, the issue of waiver is not reached.

Equally misplaced is petitioners' attempt to defend the lower court's erroneous finding that Mr. Paget engaged in simultaneous representation of Forest City and ESDC on the Atlantic Yards project. There is no evidence whatsoever in the record that this occurred in this case. We invite this Court's close attention to petitioners' citations to the record on this point, because they do not even remotely support their assertions on this issue.

Indeed, to support their charge of simultaneous representation on the Atlantic Yards project, petitioners rely exclusively on *ipse dixit* assertions that are wholly inadequate to sustain such a claim. For example, petitioners assert that “[m]ost likely” Mr. Paget participated in the preparation of the Draft Scoping document disseminated by ESDC in September 2005, and that this “further demonstrates his simultaneous representation of the parties.” (Pet. Br. at 24-25) But the SEQRA rules expressly provide that the draft scoping document is to be submitted by the project sponsor (here, Forest City), so even if Mr. Paget had participated in the preparation of that document, this would not support an inference that he was engaged in simultaneous representation of Forest City and ESDC when he did so. Similarly, petitioners argue that, because Mr. Paget advised both Forest City and ESDC that ESDC's approval would be required to demolish

buildings within the project footprint, “it would certainly appear” that Mr. Paget was engaged in simultaneous representation of these two parties when he provided such advice to Forest City in the spring of 2005. (Pet. Br. at 23-24) Apparently, it has not occurred to petitioners that Mr. Paget might have provided such advice to Forest City in the spring of 2005, and then given the same consistent advice to ESDC later, when he began representing it after October 1, 2005. Charges of ethical violations should not be leveled against a respected member of the bar based on such speculative and deficient arguments.

ESDC is well aware of its obligations as a public agency. And it certainly recognizes the perception issue that the court below identified as its reason for disqualifying Mr. Paget. But we respectfully submit that petitioners, like the court below, have failed to address the central issue here, which is that Canon 9's "appearance of impropriety" standard does not provide a sufficient basis for disqualifying counsel absent a clear showing -- which has not been made here -- that another Disciplinary Rule has been violated. This is especially true where, as here, other mechanisms are available to address petitioners' professed concern about preserving the integrity of the process and the order disqualifying Mr. Paget operates to deprive ESDC of its longstanding counsel of choice in what the court

below expressly recognized is a “boutique” area of law where there are unfortunately few substitute counsel with Mr. Paget’s experience and expertise.<sup>1</sup>

As for petitioners’ cross-appeal, the lower court’s order upholding ESDC’s Declaration of Emergency was clearly reasonable and proper, and should be affirmed. The SEQRA regulations give ESDC the emergency power to take appropriate action to protect public health and safety. Such emergency action can be taken without a public hearing, and there is likewise no requirement that ESDC engage independent experts or consultants before taking such action.

Emergency actions are, of course, reviewable under an abuse of discretion standard, but petitioners do not even remotely approach satisfaction of that standard here. As petitioners concede, Rachel Shatz, ESDC’s Director of Planning and Environmental Review, was “the ESDC decision-maker” on this issue (Pet. Br. 41), not Mr. Paget. Ms. Shatz is an urban planning professional with more than 20 years’ experience, and as she explained in her affidavit submitted to the court below, she based her decision to issue the Declaration of

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<sup>1</sup> We note, in this regard, that there are only, literally, a handful of environmental lawyers in New York with the experience to handle a project of the size and complexity of Atlantic Yards, and most of them are representing other parties here. For example, Stephen Lefkowitz of Fried Frank Harris Shriver & Jacobson LLP represents Forest City, as does Richard Leland of Kramer Levin Naftalis & Frankel LLP. And Steven Kass of Carter Ledyard & Milburn LLP represents the Metropolitan Transit Authority. Few, if any, alternatives remain if the lower court’s order disqualifying Mr. Paget is affirmed.

Emergency on (1) her long experience and knowledge that vacant and dilapidated buildings, such as those at issue here, can pose a serious threat to public health and safety (as demonstrated by the collapse, in May 2005, of a vacant building in the Fort Greene section of Brooklyn, which killed a woman and injured five others, including a firefighter), (2) the information she received at a lengthy presentation on November 2, 2005 by LZA Technology ("LZA"), a well regarded engineering firm retained by Forest City to study the buildings, (3) a follow-up report prepared by LZA dated November 8, 2005, and (4) her consultations with other legal and operating staff members at ESDC. While Forest City may have prepared other reports at other times, as petitioners contend, the evidence is uncontroverted that those other reports were not before ESDC, and did not form the basis for its decision to issue the Declaration of Emergency here.

Nor was there any requirement that ESDC compile any more formal record on this matter. This was, after all, an emergency action authorizing the demolition of dilapidated structures that, absent the Atlantic Yards project, the property owner would have been entitled under New York City regulations to demolish for any reason, or for no reason at all. (Thus, these buildings will come down regardless of whether or not the project goes forward.) Ms. Shatz's affidavit in the court below fully described the reasons why ESDC issued the Declaration of Emergency and the documents that it relied on in support of that decision; there is

no other record. Those reasons and documents were before the court below, and are before this Court on appeal. They either are, or are not, sufficient to sustain the agency's action. We respectfully submit that such action was plainly proper, and that the lower court's order sustaining the Declaration of Emergency should be affirmed in all respects.

## ARGUMENT

### I

#### **THIS COURT SHOULD REVERSE THE LOWER COURT'S ORDER DISQUALIFYING ESDC'S COUNSEL**

##### **A. The Applicable Standard of Review**

Petitioners take issue with the standard of review as set forth by ESDC in its opening brief, suggesting that this Court's review of a legal issue is not *de novo* in an attorney disqualification case. This is plainly incorrect. Where an appeal turns on the proper interpretation of the pertinent legal and ethical rules, this Court's review is *de novo*. As the Court of Appeals for the Second Circuit has observed:

When the determination of issues presented in an appeal depends upon whether a particular ABA disciplinary rule prohibits the conduct in question, appellate review is not confined to the abuse of discretion standard. Because resolution of such questions "leaves little leeway for the exercise of discretion," *appellate review in those cases is plenary*.

See Doe v. Fed. Grievance Comm., 847 F.2d 57, 61 (2d Cir. 1988) (citations omitted) (emphasis added).

Similarly, where, as here, the findings of the lower court are based on a paper record, this Court need not defer to the factual findings of the court below. See Orbit Holding Corp. v. Anthony Hotel Corp., 121 A.D.2d 311, 315, 503 N.Y.S.2d 780, 783 (1st Dep't 1986); Forum Ins. Co. v. Worcester County Inst. for Sav., 219 A.D.2d 492, 492, 631 N.Y.S.2d 165, 166 (1st Dep't 1995). Contrary to petitioners' suggestion, this Court's power to make its own findings of fact based on the record is not diminished where the issue involved is disqualification of counsel.

Here, the lower court erred as matter of law in its interpretation and application of the ethical rules and made a clearly erroneous factual finding when, based on its mistaken reading of a 2004 draft cost reimbursement agreement, it found simultaneous representation by Mr. Paget of Forest City and ESDC and disqualified him from representing ESDC on the Atlantic Yards project. This Court can properly correct those errors on this appeal. Cf. Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) ("When dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. . . . [T]he conclusion in a particular case can be reached only after a painstaking analysis of the facts and the precise application of precedent").

**B. This Court Should Reject Petitioners' Request that It Create a Special Standing Rule for Litigants Against Public Agencies**

Petitioners recognize, as they must, the rule that a party has no standing to seek disqualification of another party's counsel with whom it has never had an attorney-client relationship. (Pet. Br. at 19) But petitioners ask this Court to create a special exception to this well-settled rule, arguing that the standing rule should not apply to situations in which the counsel sought to be disqualified is representing a public agency. (Id.) This request should be rejected.

The sole authority petitioners rely on to support their position consists of the State Bar's Ethics Opinions 629 and 631, which they contend allow a government agency to waive a potential conflict only if the process by which the consent is granted precludes "any reasonable public perception that the consent was provided in a manner inconsistent with the official's public trust." (Id. at 20) But petitioners are mixing apples and oranges here. Opinions 629 and 631 address only the issue of *waiver* by a government agency of a potential conflict. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 629 (1992); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 631 (1992). They have absolutely nothing to do with the *standing* of a party to seek disqualification of counsel. Indeed, if a party

seeking to disqualify an adversary's counsel has no standing to do so, a court need not ever reach the issue of waiver.<sup>2</sup>

Two sound concerns underlie the rule that a party seeking to disqualify counsel must have had an attorney-client relationship with that counsel in order to have standing to seek such relief. First, as one court has succinctly explained, "if there is no duty owed, there can be no duty breached." Rowley v. Waterfront Airways, Inc., 113 A.D.2d 926, 927, 493 N.Y.S.2d 828, 828 (2d Dep't 1985); see also In re Town & Country Constr. Co., 160 A.D.2d 1085, 1086, 553 N.Y.S.2d 568, 568-69 (3d Dep't 1990) ("The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by the attorney to a current or former client") (citing Rowley). But just as important is the recognition that motions to disqualify are often interposed for tactical purposes, and thus should not be encouraged. See Saftler v. Gov't Employees Ins. Co., 95 A.D.2d 54, 60, 465

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<sup>2</sup> Contrary to petitioners' suggestion (Pet. Br. at 19), courts have indicated that the standing rule applies even where the attorney sought to be disqualified was representing a government entity. See, e.g., Kasza v. Browner, 133 F.3d 1159, 1171 (9th Cir. 1998) (plaintiff had no standing to seek disqualification of Air Force's Department of Justice lawyers); Miller v. City of Omaha, 260 Neb. 507, 518-19, 618 N.W.2d 628, 636 (Neb. 2000) (plaintiff had no standing to seek disqualification of City's counsel); Swanson v. Board of Police Comm'rs, 197 Ill.App.3d 592, 601, 555 N.E.2d 35, 42, 144 Ill.Dec. 138, 145 (1990) (plaintiff had no standing to seek disqualification of village board's attorney), appeal denied, 133 Ill.2d 574, 561 N.E.2d 708, 149 Ill.Dec. 338 (Ill. 1990).

N.Y.S.2d 20, 24 (1st Dep't 1983); In re Yarn Processing Patent Validity Litig., 530 F.2d 83, 90 (5th Cir. 1976).

Petitioners argue, however, that members of the public must be given standing to raise attorney disqualification issues in litigation, because "if there is corruption or an inherent bias in the action by the agency in favor of the applicant, it is obvious that neither the applicant nor the agency will raise the issue" (Pet. Br. at 20), and thus there will be no remedy for violations of the ethical rules. But this is clearly not correct. If a member of the public believes that an attorney advising an agency has engaged in unethical conduct, he or she is free to initiate disciplinary proceedings against the lawyer. As the Second Circuit has recognized, "Given the availability of both federal and state comprehensive disciplinary machinery, . . . there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface." See Nyquist, 590 F.2d at 1246 (citation omitted).

There are also other means available to members of the public to safeguard the integrity of the SEQRA process. For example, in the case of the environmental review of a proposed redevelopment project, such as Atlantic Yards, members of the public have an opportunity to voice their concerns in the public hearings that are an integral part of the SEQRA process. See Hell's Kitchen Neighborhood Ass'n v. New York City Dep't of City Planning, 6 Misc. 3d 1031(A), 800 N.Y.S.2d 347 (Sup. Ct. N.Y. County 2004) (Table) (text available at 2004 WL

3218419, at \*7) (holding that petitioners' challenge to draft EIS was not ripe for review because petitioners may participate in public hearing contemplated by EIS process and lodge their objections at that time). In addition, if an agency takes final action that fails to comply with the requirements of SEQRA, or any other law or rule, members of the public who are aggrieved may bring an Article 78 proceeding or other appropriate judicial proceeding, in which the agency's decisions will be reviewed on the merits on a fully developed record. Thus, members of the public, such as petitioners here, have ample means of preserving the integrity of the SEQRA process without the need for any special exceptions to the rules of standing.

Petitioners' attempt to disparage the effectiveness of judicial review of final agency decisions (Pet. Br. at 21) is entirely unwarranted. As petitioners correctly note, any final action by ESDC will be reviewed under the "arbitrary and capricious or in violation of law" standard. But this is hardly the meaningless review that petitioners make it out to be. In the context of a SEQRA Type I action such as the Atlantic Yards project, this standard requires a court to "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." See Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986) (citations

omitted). As the Court of Appeals observed in Jackson, such a review "insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process." Id. That is surely sufficient to protect any legitimate interests of petitioners or any other members of the public.<sup>3</sup>

The creation of a special rule allowing a party who has never had an attorney-client relationship with an attorney to seek disqualification of that attorney would simply encourage the use of attorney disqualification motions as a litigation tactic, without furthering the purpose of the ethical rules. See In re Yarn Processing, 530 F.2d at 90. While petitioners deny that they are seeking the disqualification of Mr. Paget to obtain a tactical advantage (Pet. Br. at 27), this self-serving assertion is really beside the point. Regardless of petitioners' professed intentions, the effect of Mr. Paget's disqualification has been to hand

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<sup>3</sup> Petitioners also suggest that waiting until judicial review of the EIS will make it "impossible at that point to determine what specific actions or advice given by Mr. Paget influenced the decisions of ESDC." (Pet. Br. at 21) But if ESDC, as the decision maker, complies with the requirements of SEQRA in its environmental review and the preparation of the Environmental Impact Statement ("EIS"), then the specific advice that may have been given by Mr. Paget to ESDC should be irrelevant. Moreover, petitioners themselves characterize the EIS as just a "technical" document "prepared by environmental engineers and planners." (Pet. Br. at 29 n.4) Thus, there can clearly be no harm in requiring petitioners, like other litigants, to wait until ESDC issues the final EIS before seeking judicial review.

petitioners a clear-cut tactical benefit in their campaign to de-rail the Atlantic Yards project by bringing the SEQRA review process to a screeching halt while ESDC seeks out new counsel capable of replacing its preferred environmental counsel of nearly 30 years. See S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 748 (1987) ("[W]e cannot ignore that where the Code of Professional Responsibility is invoked not in a disciplinary proceeding to punish a lawyer's own transgression, but in the context of an ongoing lawsuit, disqualification of a plaintiff's law firm can stall and derail the proceedings, resounding to the strategic advantage of one party over another").

Moreover, petitioners did not hesitate to seize on Mr. Paget's disqualification for their own public relations purposes. No sooner had the court below issued its disqualification order than petitioners told a reporter for The New York Times that Mr. Paget's disqualification, even at this early stage, "colors everything else" and "bolstered a potential future challenge to the agency's environmental review findings." See Nicholas Confessore, Demolition Can Proceed for Brooklyn Arena Project, N.Y. Times, Feb. 15, 2006, at B-4. And immediately upon learning that ESDC intended to appeal the lower court's disqualification order, petitioners issued a press release in which they disparaged ESDC for exercising its right to pursue this appeal, excoriated it for seeking to retain the services of its allegedly "conflicted" counsel, Mr. Paget, and accused

ESDC of being biased in favor of "developers" and against "communities." See Press Release, Develop Don't Destroy Brooklyn, Inc., Empire State Development Corporation to Appeal Decision to Disqualify Conflicted Attorney David Paget from Review of Ratners' "Atlantic Yards", Feb. 16, 2006, <http://www.developdontdestroy.org/litigation/ESDCAppealRelease021606.php>. In the face of such public relations activity, petitioners' self-serving disclaimers of any tactical interest in disqualifying Mr. Paget, although not particularly germane here, clearly ring hollow.

In sum, petitioners' professed concern about preserving the integrity of the SEQRA process does not warrant carving out a special exception to the well-settled standing rules applicable to attorney disqualification motions. Because petitioners' lack standing to seek disqualification of Mr. Paget, the portion of the lower court's order granting disqualification should be reversed.

**C. The Lower Court's Finding of a Prima Facie Conflict Was Incorrect Legally and Factually**

**1. The Record Clearly Shows that Mr. Paget's Representation of ESDC and Forest City on the Atlantic Yards Project Was Consecutive, Not Simultaneous**

In an attempt to defend the lower court's disqualification of Mr. Paget, petitioners now contend that the lower court correctly found that Mr. Paget simultaneously represented ESDC and Forest City on the Atlantic Yards project. (Pet. Br. at 22-24) In their Verified Petition and Complaint, however, they took a

different position, clearly acknowledging that Mr. Paget began representing ESDC on the Atlantic Yards project only after he had represented Forest City on that project:

- "Mr. Paget served as an attorney for [Forest City] for this [Atlantic Yards] project *before* becoming outside counsel for ESDC for the review of the same project." (R 72 ¶ 4) (Emphasis added)
- "Upon information and belief, sometime in 2005 Mr. Paget *switched* from representing [Forest City] to representing ESDC on the Atlantic Yards Project." (R 91 ¶ 74) (Emphasis added)

The lower court's finding that Mr. Paget began representing ESDC in February 2005 on the Atlantic Yards project while he was still representing Forest City on the same project is clearly at odds with petitioners' own allegations, as well as the affirmations of Anita Laremont, General Counsel of ESDC, and Mr. Paget, both of whom categorically state that ESDC retained Mr. Paget beginning as of October 1, 2005. (R 449 ¶ 5, 464-65 ¶ 11) It also flies in the face of Mr. Paget's written engagement letter, which provides for his representation of ESDC from and after October 1, 2005. (R 469-80)

Petitioners do not dispute that the February 2004 draft cost reimbursement agreement -- the only document cited by the court below in support of its finding that Mr. Paget was retained by ESDC on the Atlantic Yards project in February 2005 -- is not indicative of when Mr. Paget began representing ESDC on the Atlantic Yards project. Instead, they contend that other evidence in the record

demonstrates that "Mr. Paget was effectively providing advice to all parties from the outset of consideration of the project." (Pet. Br. at 23) In fact, however, none of that purported "evidence" even remotely supports the inference petitioners now seek to draw.

First, petitioners suggest that the affidavits of Melanie Meyers, counsel to Forest City, and of Rachel Shatz, ESDC's Director of Planning and Environmental Review, demonstrate that Mr. Paget was providing advice to both Forest City and ESDC in the Spring of 2005. (Pet. Br. at 23-24) Ms. Meyers, however, merely states in her affidavit that Mr. Paget and Ms. Shatz voiced concern over her view that Forest City had the right to demolish the buildings without the need for approval by ESDC. (R 515 ¶ 8) She does not say when her discussions with Mr. Paget occurred or when Mr. Paget began representing ESDC. Similarly, in her affidavit, Ms. Shatz states only that ESDC advised Forest City that because the buildings were located within the proposed Atlantic Yards project site and the SEQRA process had begun, Forest City was required to obtain ESDC's approval before taking them down. (R 290-91 ¶ 10) She specifically refers to the SEQRA rules and regulations as the basis for this advice, and does not even mention Mr. Paget as being the source of that advice. But even if Ms. Shatz's affidavit could be construed as stating that Mr. Paget had expressed the same view

to ESDC in the Spring of 2005, that would not have made him ESDC's counsel at that time.

Second, petitioners point to a statement made by ESDC's counsel at the oral argument before Judge Edmead confirming that Mr. Paget advised ESDC that the demolition of the buildings was subject to its review as an emergency action. (Pet. Br. at 24) Again, however, ESDC's counsel only confirmed that Mr. Paget had given that advice to ESDC (while noting that ESDC's in-house counsel also took the same position); he did not say when Mr. Paget gave that advice or when Mr. Paget began representing ESDC. (R 895) The fact that Mr. Paget gave consistent advice to both Forest City and ESDC demonstrates his integrity as a lawyer, but it plainly does not prove that he was representing both parties simultaneously on the Atlantic Yards project, either in the spring of 2005 or at any other time. Cf. Gallicchio Bros., Inc. v. Zoning Bd. of Appeals, Nos. CV-90-381861, CV-90-387502, 1993 WL 268404, at \*21 (Conn. Super. Ct. July 12, 1993) (holding that law firm had no conflict of interest where it "consistently advocated the same position, first, as counsel for the zoning officials before the [zoning board of appeals], and second, in this court, as counsel for the board").

Petitioners next refer to the Draft Scoping Document that was issued by ESDC on September 16, 2005, asserting that "it defies credulity to believe that Mr. Paget had no role" in the preparation of the document, and surmising that

"[m]ost likely Mr. Paget did participate and his advice in the preparation of that document further demonstrates his simultaneous representation of the parties." (Pet. Br. at 24-25) (Emphasis added) This is speculation built on top of speculation, and is clearly insufficient to demonstrate that Mr. Paget began representing ESDC prior to October 2005. See NYK Line (N. Am.) Inc. v. Mitsubishi Bank, Ltd., 171 A.D.2d 486, 488, 567 N.Y.S.2d 409, 411 (1st Dep't 1991) ("the basis for removing an attorney must be substantial and real, not speculative"). In any case, the SEQRA regulations expressly provide that the draft scoping document is to be submitted by the project sponsor, which in this case is Forest City. N.Y.C. R. & Regs. tit. 6, § 617.8(b) (2006). Thus, while there is nothing in the record indicating that Mr. Paget had a role in preparing the Draft Scoping Document, even if he did, that would not, as petitioners assert, support an inference that he represented both Forest City and ESDC at the time the document was issued on September 16, 2005.

The last piece of "evidence" relied on by petitioners consists of the contents of the Draft Scoping Document itself, which petitioners assert favored the view of Forest City. (Pet. Br. at 25) Again, this assertion does not bear on when Mr. Paget began representing ESDC. And in any case, any criticisms petitioners may have of the Draft Scoping Document go to the adequacy of ESDC's environmental review, which can be addressed within the SEQRA process itself or

in an Article 78 proceeding or other appropriate judicial proceeding at its conclusion. See Hell's Kitchen, 2004 WL 3218419, at \*7. They have no bearing on the issue of simultaneous representation or the propriety of the lower court's order disqualifying Mr. Paget.<sup>4</sup>

**2. Mr. Paget's Representation of ESDC Does Not Create a Conflict Under the Applicable Ethical Rules**

Petitioners do not dispute that if this Court finds that that Mr. Paget's representation of ESDC on the Atlantic Yards project began after his representation of Forest City on the same project, the applicable ethical rule for determining whether a conflict exists is DR 5-108. As discussed in ESDC's opening brief, the Court of Appeals has expressly held that a party seeking disqualification of its adversary's lawyer under this ethical rule must first demonstrate that it had an attorney-client relationship with the attorney it seeks to disqualify. See Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 636, 684 N.Y.S.2d 459, 461-62 (1998). Because petitioners do not claim to have ever had an attorney-client relationship with Mr. Paget, they cannot satisfy this requirement.

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<sup>4</sup> Petitioners' principal criticism of the Draft Scoping Document appears to be that it does not mention "the Extell proposal" as an alternative to the Atlantic Yards project. (Pet. Br. at 25) The EIS, however, will be required to include a comparison of alternatives to the proposed project. See Jackson, 67 N.Y.2d at 416, 503 N.Y.S.2d at 304.

Nor do petitioners argue that Mr. Paget's representation of ESDC on the Atlantic Yards project and the representation of Forest City by other members of the Sive Paget firm on other unrelated matters constitute an impermissible conflict of interest under DR 5-105, the ethical rule that governs simultaneous representations. As discussed in ESDC's opening brief, because the Sive Paget firm's current representation of Forest City involves matters completely unrelated to the Atlantic Yards project and does not involve ESDC, there is no likelihood that Mr. Paget's exercise of independent professional judgment on behalf of ESDC will in any way be adversely affected so as to violate DR 5-105.

Finally, petitioners completely ignore the showing made by ESDC that, even if the court below correctly found a *prima facie* conflict in Mr. Paget's representation of ESDC, it erred by summarily disqualifying Mr. Paget without first providing Mr. Paget with an opportunity to show that "there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation," Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976), and by denying ESDC the opportunity to file an answer as required by CPLR 7804(f). Thus, viewed from any perspective, the lower court's order disqualifying Mr. Paget from representing ESDC on the Atlantic Yards project was improper and should be reversed.

**D. Both ESDC and Forest City Waived Any Potential Conflict**

In urging this Court not to find a valid waiver by the parties of any potential conflict of interest in Mr. Paget's representation of ESDC, petitioners rely solely on the State Bar's Ethics Opinions 629 and 631, which they contend allow a government agency to consent to its lawyer's potential conflict only if "the process by which the consent is granted is sufficient to preclude any reasonable public perception that the consent was provided in a manner inconsistent with the public trust." (Pet. Br. at 19-20) This argument is plainly flawed.

As discussed above and in ESDC's opening brief, the lower court erred in finding that Mr. Paget simultaneously represented ESDC and Forest City on the Atlantic Yards project. Because these representations were in fact consecutive, not simultaneous, the applicable ethical rule in determining whether a conflict exists is DR 5-108, which on its face requires *only* the consent of the *former* client: "[A] lawyer who has represented a client in a matter shall not, without the consent *of the former client* after full disclosure . . . [t]hereafter represent another person in the same or a substantially related manner in which that person's interests are materially adverse to the interests of the former client." DR 5-108 (emphasis added). See also St. Barnabas Hosp. v. New York City Health and Hosps. Corp., 7 A.D.3d 83, 91, 775 N.Y.S.2d 9, 15 (1st Dep't 2004) ("[I]t is the privilege of the former client to determine, after full disclosure, whether or not

to consent to the attorney's representation of an adversary in a matter related to the prior representation").

Here, the former client, Forest City, is not a governmental entity and is therefore not subject to the State Bar's Ethics Opinions 629 and 631. Because it has consented to Mr. Paget's representation of ESDC on the Atlantic Yards project, there is no conflict under DR 5-108.

The only simultaneous representation potentially subject to Opinions 629 and 631 here is Mr. Paget's representation of ESDC on the Atlantic Yards project while other lawyers in his firm are also representing Forest City on two small unrelated matters that do not involve either the Atlantic Yards project or ESDC. As discussed in ESDC's opening brief, Mr. Paget has been ESDC's counsel on major development projects for almost 30 years, and ESDC is a sophisticated entity with its own in-house counsel. Given that the matters of the simultaneous representation were entirely unrelated to Atlantic Yards and do not involve ESDC, it was certainly reasonable for ESDC to consent to those other representations so as to secure the assistance of its counsel of choice on the complex Atlantic Yards project. Under the circumstances, it clearly cannot be said that the process by which ESDC gave that consent was "inconsistent with the public trust" so as to be proscribed by the State Bar's Ethics Opinions 629 and 631.

**E. The Lower Court Erred in Premising Its Disqualification Order on an Appearance of Impropriety and in Failing to Consider ESDC's Right to Counsel of Its Choice**

In an attempt to defend the lower court's reliance on the "appearance of impropriety" as a basis for its disqualification order, petitioners argue that section 74 of the Public Officers Law and the General Municipal Law prohibit an officer or employee of a state agency from having an interest which is in "substantial conflict" with the discharge of his duties. (Pet. Br. at 30, 32) By their terms, however, these statutes apply only to public officers and employees of a public agency, and Mr. Paget is neither.

The only Municipal Law opinion cited by petitioners that addresses the obligations of an attorney representing a government agency is an "informal and unofficial" opinion of the New York Attorney General's office, and it did so relying more on common law conflict of interest rules. See 1990 N.Y. Op. Atty. Gen. (Inf.) 1060, No. 90-33, available at 1990 WL 514517 (N.Y.A.G. May 17, 1990). The issue in that opinion was whether an outside attorney for a planning board could represent private clients before that same board. Thus, unlike this case, the issue there concerned simultaneous representation in the same matter of two clients with adverse interests. Notably, in finding that such dual representation was not permissible, the opinion — which was issued in 1990 — specifically noted that the planning board, as a public entity, was precluded from waiving conflicts of

interest. Id. Two years later, however, the State Bar issued Ethics Opinion 629, which removed the per se rule prohibiting governmental entities from waiving a conflict.

Petitioners suggest that an attorney has the same obligation as a public officer to recuse himself based on a mere appearance of an impropriety. But this is plainly incorrect. See In re Stephanie X, 6 A.D.3d 778, 780, 773 N.Y.S.2d 766, 767 (3d Dep't 2004). The Court of Appeals has made clear that, where lawyers are concerned, the possible existence of an appearance of impropriety must be balanced against a party's right to counsel of its choice. See Jamaica Pub. Serv. Co., 92 N.Y.2d at 638, 684 N.Y.S.2d at 462-63. The right to counsel of choice "is a valued right and any restrictions must be carefully scrutinized." S&S Hotel Ventures, 69 N.Y.2d at 443, 515 N.Y.S.2d at 738. See also Nyquist, 590 F.2d at 1247 ("appearance of impropriety" on attorney's part "would rarely" affect outcome of case so as to warrant disqualification in pending lawsuit) (Mansfield, J., concurring).

Moreover, as discussed in ESDC's opening brief, there can be no appearance of impropriety warranting disqualification if the representation at issue does not violate another ethical rule. See Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 806 (S.D.N.Y. 1991) ("Canon 9 'should not be used promiscuously as a convenient tool for disqualification when the facts simply do

not fit within the rubric of other specific ethical and disciplinary rules") (citation omitted). The rationale for limiting the reach of Canon 9 has been aptly articulated by the Court of Appeals for the Fifth Circuit:

It does not follow . . . that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. . . . Therefore, what has been said with respect to judicial conduct is equally applicable here: a lawyer need not "yield to every imagined charge of conflict of interest, regardless of the merits, so long as there is a member of the public who believes it . . . Surely there can be some objective content to any inquiry into whether the 'appearance of justice (or propriety)' has been compromised in a given case." Consequently, while Canon 9 does imply that there need be no proof of actual wrongdoing, we conclude that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur.

Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976) (citation omitted).

Under the circumstances, there was no basis for the lower court to disqualify Mr. Paget and his firm from representing ESDC on the Atlantic Yards project, and that portion of the court's order should be reversed.

## II

### **THE LOWER COURT CORRECTLY CONCLUDED THAT ESDC'S DECISION TO AUTHORIZE DEMOLITION OF THE VACANT BUILDINGS WAS NOT ARBITRARY OR CAPRICIOUS**

#### **A. The Applicable Standard of Review**

This Court's review of an agency's decision under Article 78 is limited to whether the agency's decision was consistent with applicable law, was arbitrary and capricious, was a reasonable exercise of discretion, and had a rational basis in the record. See Schoberle v. New York State Div. of Hous. and Cmty. Renewal, 14 A.D.3d 438, 439, 788 N.Y.S.2d 361, 361 (1st Dep't 2005); see also Dist. Council 37, Am. Fed. of State, County and Mun. Employees v. City of New York, 22 A.D.3d 279, 283, 804 N.Y.S.2d 10, 14 (1st Dep't 2005). The court may not consider questions of fact; it may only consider whether the action was taken "without sound basis in reason." Pell v. Board of Educ., 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

Under this standard of review, "it is not the role of the courts to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency." Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp., 219 A.D.2d 40, 54, 735 N.Y.S.2d 83, 95 (1st Dep't 2001) (citing Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 503 N.Y.S.2d 298, 304-05

(1986)). Furthermore, when the agency determination has a rational basis supported by the record, the court may not upset that determination, even if the court might have decided the matter differently if it were in the agency's position. See Mid-State Mgmt. Corp. v. New York City Conciliation & Appeals Bd., 112 A.D.2d 72, 76, 491 N.Y.S.2d 634, 637 (1st Dep't 1985), aff'd, 66 N.Y.2d 1032, 499 N.Y.S.2d 398 (1985).

Application of these principles here requires affirmance of the portion of the lower court's order dismissing petitioners' cause of action seeking annulment of the Declaration of Emergency.

**B. The Record Before the Lower Court Was Complete**

Petitioners argue that the court below erred in dismissing their cause of action for annulment of the Declaration of Emergency without a certified transcript of the record required by CPLR 7804(e). (Pet. Br. at 37) This argument is spurious.

In support of its motion to dismiss, ESDC submitted the affidavit of Rachel Shatz, ESDC's Director of Planning and Environmental Review -- who petitioners acknowledge was "the ESDC decision-maker" (Pet. Br. at 41) -- describing in detail the reasons ESDC issued the Declaration of Emergency and attaching the documents it relied on in connection with that decision. This was the record; there was nothing more. Thus, the lower court had before it the full record

that was before ESDC when it issued the Declaration of Emergency, and this Court does as well. Based on that record, the lower court's dismissal of petitioners' cause of action seeking annulment of the Declaration of Emergency was proper. See Argyle Conservation League Inc. v. Town of Argyle, 223 A.D.2d 796, 798, 636 N.Y.S.2d 150, 152 (3d Dep't 1996) (in proceeding to nullify town board's repeal of zoning ordinance, holding that respondents complied with CPLR 7804(e) by submitting affidavits and all documents presented and considered by town board in connection with SEQRA process); United States v. City of New York, 96 F. Supp. 2d 195, 208-209 (E.D.N.Y. 2000) (in upholding adequacy of City's SEQRA review despite absence of transcripts of proceedings, court noted that minutes of hearings are not required under CPLR 7804(e) to review decisions in administrative or quasi-legislative proceedings conducted to consider proposed actions of public agencies).

While petitioners complain of purported "gaps and omissions" in the record before ESDC (Pet. Br. at 38), the only such omissions they identify are certain reports concerning the buildings previously prepared by LZA Technology in or about the spring of 2005. (Pet. Br. at 39) As a threshold matter, there is no evidence to suggest that those reports were ever submitted to or considered by ESDC when it issued the Declaration of Emergency. To the contrary, Ms. Shatz's affidavit makes clear that the only documentary materials considered by ESDC

with respect to the Declaration of Emergency were the presentation made by LZA on November 2, 2005 and LZA's report dated November 8, 2005, and both of those documents were attached as exhibits to her affidavit. This Court can determine whether that record either was, or was not, sufficient to support the agency's decision. The mere fact that petitioners may believe that some other document should have been submitted to ESDC does not support their allegation that there was a "gap" in the record. Cf. New York City Housing and Redevelopment Bd. v. Foley, 23 A.D.2d 84, 86-87, 258 N.Y.S.2d 526, 529 (1st Dep't 1965) (although zoning board of appeals failed to make factual findings in rendering decision to grant land use permit, remand for further hearings was not required because return to petition contained "detailed factual findings sufficient to support the determination"), aff'd, 16 N.Y.2d 1071, 266 N.Y.S.2d 392 (1965).

Certainly, petitioners make no showing that the LZA reports to which they refer, had they been submitted to ESDC, would have made any difference with respect to its decision to issue the Declaration of Emergency. In fact, the only evidence here is that those reports would have *supported* that decision, since they recommended that a number of the buildings Forest City had acquired were "so unsafe and structurally unsound that they should be demolished" (R 506 ¶ 6) and thus contributed to Forest City's eventual decision to seek the Declaration of Emergency. See Fama v. Mann, 196 A.D.2d 919, 920, 603 N.Y.S.2d 774, 775 (3d

Dep't 1993) (affirming dismissal of Article 78 proceeding despite inadequate record because "[a]ny gaps in the transcript of the disciplinary hearing do not preclude significant review in this case" and petitioner did not demonstrate prejudice).<sup>5</sup>

Reduced to its essence, petitioners' position here is that the lower court's ruling upholding the Declaration of Emergency should be reversed, because the record did not contain evidence that, had it been included, would have *supported* the issuance of the Declaration of Emergency. That obviously makes no sense. The purported inadequacy of the record plainly does not provide a basis for

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<sup>5</sup> The three cases relied on by petitioners are inapposite. (Pet. Br. at 38) In two of those cases, adjudicative hearings had been held by the agency whose decision was being challenged in an Article 78 proceeding, but the transcript of the hearings was either not filed or was incomplete. See Petty v. Sullivan, 131 A.D.2d 762, 763, 517 N.Y.S.2d 60, 61 (2d Dep't 1987) (failing to annex with answer the transcript of disciplinary hearing that resulted in finding prison inmate guilty of misconduct); Captain Kidd's Inc. v. New York State Liquor Auth., 248 A.D.2d 791, 792, 669 N.Y.S.2d 721, 722 (3d Dep't 1998) (transcript filed omitted direct examination of petitioner whose liquor license was suspended for misconduct). In Gilbert v. Endres, 13 A.D.3d 1104, 787 N.Y.S.2d 554 (4th Dep't 2004), the appellate court remanded to the lower court an Article 78 proceeding challenging the town planning board's determination to issue a special use permit because the record contained no findings of fact underlying that determination. Id. at 1105, 787 N.Y.S.2d at 555.

reversing the lower court's decision dismissing petitioners' cause of action seeking annulment of the Declaration of Emergency.<sup>6</sup>

**C. The Lower Court Correctly Found that  
ESDC's Determination Had a Rational Basis**

The court below correctly found that ESDC's decision to issue the Declaration of Emergency was not arbitrary and capricious and had a rational basis.

As explained in Ms. Shatz's affidavit, ESDC's involvement in the events leading to the issuance of the Declaration of Emergency began in the summer of 2005, when representatives of Forest City advised ESDC that they believed that a number of the vacant buildings within the footprint of the proposed Atlantic Yards project were in very poor condition and potentially posed a serious risk of harm to public health and safety. (R 290 ¶ 9) They referred specifically to a recent collapse of a vacant building in the Fort Greene section of Brooklyn that crushed a woman to death and injured six other persons, and stated that they did not want to have a recurrence of that tragic incident. (R 292 ¶ 15) See D. Kahn and J. Burdi, [Killer Collapse in B'klyn; Wall of Vacant Building Falls onto Bodega, Leaving a Woman Dead and Several Others Injured](#), Newsday, May 3, 2005, at A-7.

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<sup>6</sup> There is likewise no merit to petitioners' speculation that the allegedly omitted LZA reports might have shown that there were viable alternatives to demolishing the buildings since, as explained at page 36, *infra*, ESDC was under no obligation to consider such alternatives as a matter of law.

Although property owners in New York City ordinarily are entitled to demolish buildings on their property as of right, SEQRA generally prohibits anyone from making any physical alteration related to a project until SEQRA's requirements have been complied with. N.Y.C. R. & Regs. tit. 6, § 617.3(a) (2006). Accordingly, ESDC advised Forest City that because the buildings were located on the site of the Atlantic Yards project and the SEQRA process had already begun for that project, it would have to obtain ESDC's approval before demolishing the buildings. (R 290 ¶ 10)

On November 2, 2005, Forest City and LZA, a highly respected engineering firm retained by Forest City, gave a detailed presentation to ESDC personnel and others, including Ms. Shatz, ESDC's EIS consultant AKRF, ESDC's outside environmental counsel Sive Paget, and counsel for the Metropolitan Transportation Authority, an agency that also owns property on the project site. (R 291 ¶ 11) The presentation concerned six buildings that LZA believed posed an immediate threat to public health and safety and therefore should be taken down (id.),<sup>7</sup> and included photographs of the interiors of each of the buildings showing in detail, among other things, "cracked bearing walls, deteriorated roofs and flooring,

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<sup>7</sup> The buildings are located at 608-620 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street, 620 Pacific Street, and 622 Pacific Street. (R 341)

and degraded floor joists and timbers." (R 293-94 ¶ 17) There was also a question-and-answer session. (R 291 ¶ 11)

On November 8, 2005, at the request of Ms. Shatz, Forest City submitted to ESDC a written report prepared by LZA, which addressed the condition of five of the six buildings discussed at the earlier presentation by LZA.<sup>8</sup> The report reiterated LZA's request for permission to take the buildings down immediately "to avoid injury to property or persons." (R 291-92 ¶ 13)

In deciding whether to issue the Declaration of Emergency authorizing demolition of the buildings, Ms. Shatz considered a number of factors. Having previously toured the project site, she was aware that the site had a number of vacant and deteriorated buildings that did not have landmark designation or any historical significance. (R 292 ¶ 15) Ms. Shatz also understood that vacant and deteriorated buildings have been known to collapse suddenly and without warning, such as the incident in Fort Greene that Forest City had referred to when its representatives first approached her about demolishing the vacant buildings. (Id)

Ms. Shatz believed that the risk of collapse could be heightened during the coming winter months because of the added stress on the buildings that

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<sup>8</sup> 622 Pacific Street was not included in LZA's November 8 report, and the Declaration of Emergency did not authorize demolition of that building. (R 291-92 ¶ 13)

could be caused by accumulations of snow and ice and the degradation that can result from alternate freezing and thawing. (R 293 ¶ 15) Ms. Shatz also considered the dangers posed to children and teenagers who may use such buildings as a place to play or gather, as well as to homeless persons who may enter the buildings in search of shelter. Ms. Shatz believed that such persons could be injured by loose or falling debris or weakened floors that may give way under their weight. Also, homeless persons and teenagers have been known to start fires, either to keep warm or as acts of vandalism, and these fires could quickly get out of control and cause serious injury, if not death. (R 293 ¶ 16)

The LZA presentation and report confirmed her concerns about the possible threat to public health and safety posed by the vacant buildings. (R 293-94 ¶ 17) Ms. Shatz consulted with other senior personnel at ESDC and Sive Paget, ESDC's outside environmental counsel, and everyone concurred that the buildings posed a threat to public health and safety and should be taken down. (R 292 ¶ 14, 294 ¶ 18) Accordingly, on December 15, 2005, Ms. Shatz, on behalf of ESDC, issued a Declaration of Emergency authorizing "the demolition of the buildings as a 'Type II' action" not subject to the environmental review requirements of SEQRA. (R 294 ¶ 18)

Based on the foregoing, ESDC's decision to issue the Declaration of Emergency clearly was rational and proper.

Petitioners criticize ESDC for not considering two earlier reports by LZA on the conditions of the buildings, which they speculate "presumably contained more detailed information on the conditions of the buildings and probably contained an assessment of alternatives to demolition . . . ." (Pet. Br. at 39) But, as noted above, these reports were not submitted to ESDC; the issue here is whether ESDC made a rational decision on the basis of the record before it. Because the Declaration of Emergency was a Type II action that is exempt from SEQRA review, N.Y.C. R. & Regs. tit. 6, § 617.5(c)(33), ESDC was not required to consider alternatives to demolishing the buildings, even assuming such alternatives were available. See New York State Thruway Auth. v. Dufel, 129 A.D.2d 44, 47, 516 N.Y.S.2d 981, 983 (3d Dep't 1987) (holding that State's emergency action under SEQRA of appropriating appellant's farm for use in a detour route after collapse of a bridge was not irrational, even if preferable alternatives were available); Marcy Hous. Tenants Ass'n v. City of New York, 5 Misc. 3d 1014(A), 798 N.Y.S.2d 708 (Sup. Ct. Kings County 2004) (Table) (text available at 2004 WL 2590582, at \*15) ("[S]ince the City defendants determined that an EIS was not needed, even if they did not consider alternative sites for the sanitation garage their alleged failure would not serve to invalidate the approval process").

Moreover, these vacant and dilapidated buildings serve no useful purpose and eventually will be demolished by Forest City *regardless* of whether the ESDC ultimately approves the Atlantic Yards project. (R 295 ¶ 20) If the project is approved, they will be demolished to make way for the new construction; if the project is not approved, Forest City, like any other property owner, will be free to demolish them for any reason, or for no reason at all, and it has indicated its intention to do just that. (Id) Under these circumstances, repairing the buildings as petitioners suggest would plainly be a waste of time and resources.

Equally unavailing is petitioners' assertion that ESDC should have obtained an evaluation by an independent engineer before issuing the Declaration of Emergency. As noted by the lower court, petitioners fail to cite any case law or other authority in SEQRA that supports their position. In any event, a difference in opinion as to the action that should be taken does not provide a basis for finding that an agency's determination was arbitrary or capricious or lacked a rational basis. See Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp. 291 A.D.2d 40, 55, 735 N.Y.S.2d 83, 96 (1st Dep't 2001) (holding that under the arbitrary and capricious standard of review, "differing conclusions reached by other experts concerning the potential adverse environmental impacts are insufficient to annul an agency's determination").

None of the cases cited by petitioners supports their assertion that ESDC had to undertake an independent assessment of the buildings. (Pet. Br. at 40) In Historic Albany Foundation v. Breslin, 296 A.D.2d 813, 745 N.Y.S.2d 331 (3d Dep't 2002), the building at issue was a County-owned historic structure that the local historic preservation society sought to protect. Although the County ordered its demolition pursuant to its own powers, the City issued its own order directing the County to immediately stabilize the building's façade. Id. at 814, 745 N.Y.S.2d at 332. It was in the specific context of these two competing orders that the court, exercising its power to review the record and make factual findings, determined that stabilizing the façade of the building was the appropriate emergency action for the County to take. Id. at 815, 745 N.Y.S.2d at 332. The case has no applicability here, where the buildings in question have no historical value and only one agency determination is at issue.

Similarly inapposite is Historic Albany Foundation, Inc. v. Fisher, 209 A.D.2d 135, 625 N.Y.S.2d 349 (3d Dep't 1995). There, the court upheld a demolition order because it found that the evidence established "a rational basis for the [City's] determination to invoke the emergency powers authorized by the City ordinance." Id. at 137, 625 N.Y.S.2d at 351. Nothing in Fisher suggests that the court would not have found a rational basis for the City's determination if the City had relied solely on the report submitted by the building owner.

Petitioners fare no better with their suggestion that the vacant buildings have been "on the verge of collapse" for a long time and yet Forest City has done nothing to mitigate the situation. (Pet. Br. at 40-41) It would not be less of an emergency under SEQRA if Forest City was somehow "responsible" for the deterioration of the buildings. As stated by the Court of Appeals:

That this emergency might have been foreseen and that municipal officials may have been derelict in not earlier having made appropriate provision for its resolution . . . does not negate the existence of the present crisis . . . the calendar cannot be turned back. It would serve no appropriate or useful purpose now to fashion relief as a sanction for action and inaction beyond recall.

Gerges v. Koch, 62 N.Y.2d 84, 95, 476 N.Y.S.2d 73, 78 (1984); see also Silver v. Koch, 137 A.D.2d 467, 470, 525 N.Y.S.2d 186, 188-89 (1st Dep't 1988) ("Neither can it be said that the decision to take immediate action at this time is unreasonable because [the] problem [is] of long standing. . . . Emergencies are often precipitated by the failure to take needed action in the past despite adequate warning.") (quoting Board of Visitors -- Marcy Psychiatric Ctr. v. Coughin, 60 N.Y.2d 14, 20, 466 N.Y.S.2d 168, 671-72 (1983)).

Given the highly deferential standard of review here, this Court should affirm that the lower court's finding that ESDC's decision to issue the Declaration of Emergency was not arbitrary or capricious and had a rational basis.

**D. Mr. Paget's Alleged Conflict of Interest Does Not Provide a Basis for Annuling the Declaration of Emergency**

Finally, petitioners argue that Mr. Paget's alleged involvement in the decision-making process impermissibly tainted the Declaration of Emergency. (Pet. Br. at 42) This argument is wholly devoid of merit.

As discussed in part I above and in ESDC's opening brief, Mr. Paget did not have a conflict of interest. But even if he did, he merely advised ESDC and was not a decision maker; as petitioners themselves acknowledge, Ms. Shatz was "the ESDC decision-maker" here. (Pet. Br. at 41) Ms. Shatz, in consultation with other ESDC personnel in charge of Atlantic Yards project, made the decision to issue the Declaration of Emergency. Thus, Mr. Paget's alleged bias has no bearing on whether the agency's decision to issue the Declaration of Emergency was arbitrary or capricious. Cf. Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp., 153 F.3d 1122, 1129 (10th Cir. 1998) (refusing to invalidate EIS prepared pursuant to National Environmental Policy Act ("NEPA") by contractor alleged to have a conflict of interest, because even if conflict existed, oversight provided by agency to the preparation of the EIS protected the integrity and objectivity of the EIS); Burkholder v. Peters, 58 Fed. App'x 94, 99-100 (6th Cir. 2003) (agency's independent oversight of the environmental assessment process under NEPA removed possibility of any taint caused by alleged bias of consultant).

Moreover, it is well-settled that "[m]erely alleging bias is not sufficient to set aside an administrative determination." See Sunnen v. Admin. Review Bd. for Prof'l Med. Conduct, 244 A.D.2d 790, 791, 666 N.Y.S.2d 239, 241 (3d Dep't 1997); see also Harley Rendezvous, Inc. v. Zoning Bd. of Appeals, 131 Misc. 2d 1060, 1066, 502 N.Y.S.2d 599, 604 (Sup. Ct. Schenectady County 1986) (holding that allegation of conflict of interest on the part of zoning board members was inadequate to overcome "presumption of regularity attendant to administrative determinations"). Rather, to prevail on a claim of bias, a party "must set forth a factual demonstration supporting the allegation as well as prove that the administrative outcome flowed from it." Sunnen 244 A.D.2d at 791, 666 N.Y.S.2d at 241; see also Partition St. Corp. v. Zoning Bd. of Appeals of City of Rensselaer, 302 A.D.2d 65, 68-69, 752 N.Y.S.2d 749, 751-52 (3d Dep't 2002); Yoonessi v. State Bd. for Prof'l Med. Conduct, 2 A.D.3d 1070, 1071, 769 N.Y.S.2d 326, 328 (3d Dep't 2003).

Here, petitioners have failed to allege any facts demonstrating any bias by Mr. Paget. They contend only that Mr. Paget did not advise ESDC about the earlier LZA reports or about less drastic means of addressing the situation. (Pet. Br. at 42) As discussed above, however, there is nothing in SEQRA that required ESDC to consider those earlier reports or other alternatives to demolition. Thus,

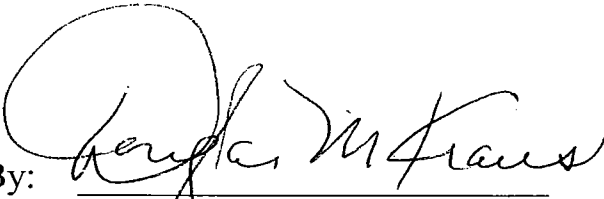
plaintiffs have failed to demonstrate any bias or taint in the issuance of the Declaration of Emergency so as to require its nullification.

**CONCLUSION**

For all the foregoing reasons, this Court should reverse the portion of the lower court's order disqualifying Mr. Paget and his firm from representing ESDC on the Atlantic Yards project and affirm the portion of the order dismissing petitioners' cause of action seeking annulment of the Declaration of Emergency.

Dated: March 7, 2006  
New York, New York

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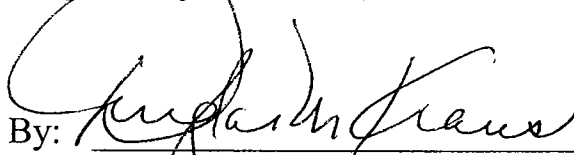
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