To Be Argued By:
Philip E. Karmel

New York County Clerk's Index Nos. 114631/09 and 116323/09

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Index No. 114631/09

In the Matter of the Application of

DEVELOP DON'T DESTROY (BROOKLYN), INC., COUNCIL OF BROOKLYN NEIGHBORHOODS, INC., ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC., BROOKLYN BEARS COMMUNITY GARDENS, INC., BROOKLYN VISION FOUNDATION, INC., CARLTON AVENUE ASSOCIATION, INC., CENTRAL BROOKLYN INDEPENDENT DEMOCRATS, by its President Lucy Koteen, CROWN HEIGHTS NORTH ASSOCIATION, INC., DEAN STREET BLOCK ASSOCIATION, INC., DEMOCRACY FOR NEW YORK CITY, EAST PACIFIC BLOCK ASSOCIATION, INC., FORT GREENE ASSOCIATION, INC., FRIENDS AND RESIDENTS OF GREATER GOWANUS, PARK SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS ACTION COALITION, by its President

(Additional Caption On the Reverse)

REPLY BRIEF FOR RESPONDENT-APPELLANT EMPIRE STATE DEVELOPMENT CORPORATION

BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
212-541-2000
pekarmel@bryancave.com

Attorneys for Respondent-Appellant Empire State Development Corporation

Printed on Recycled Paper

Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, and SOUTH PORTLAND BLOCK ASSOCIATION, INC.,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES, LLC,

Respondents-Appellants.

Index No. 116323/09

In the Matter of the Application of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., ATLANTIC AVENUE LOCAL DEVELOPMENT CORP., BOERUM HILL ASSOCIATION, INC., BROOKLYN HEIGHTS ASSOCIATION, INC., FIFTH AVENUE COMMITTEE, INC., PARK SLOPE CIVIC COUNCIL, INC, PRATT AREA COMMUNITY COUNCIL, INC., STATE SENATOR VELMANETTE MONTGOMERY, NEW YORK CITY COUNCIL MEMBER LETITIA JAMES, ALAN ROSNER, EDA MALENKY, PETER KRASHES, JUDY MANN, RHONA HESTRONY, JAMES GREENFIELD, MICHAEL ROGERS, ANURAG HEDA, ROBERT PUCA, SALVATORE RAFFONE, RHONA HETSTONY, ERIC DOERINGER, JILLIAN MAY and DOUG DERRYBERRY,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES, LLC,

Respondents-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The issue before this Court is whether the ESDC Directors were arbitrary and capricious in determining not to prepare an SEIS for the Atlantic Yards Project. The Directors made this determination twice – first, in September 2009 and again in December 2010, after consideration of additional environmental analyses prepared in response to the lower court's Remand Order. The validity of ESDC's determination turns on one fundamental question: whether ESDC in its environmental review – as documented in the 2009 Technical Memorandum and 2010 Technical Analysis – took a "hard look" at whether there would be new environmental impacts not previously disclosed in the FEIS.

Petitioners-respondents ("Petitioners") do not address this bottom-line question until the last eight pages of their 64-page brief, and even then they do not identify errors in ESDC's environmental review. They virtually ignore the substance of ESDC's analysis, which – in *both* the 2009 Technical Memorandum and 2010 Technical Analysis – examined the impacts of a delay in Project construction and whether such delay would result in new significant adverse environmental impacts not previously addressed in the FEIS. Nor do Petitioners identify in concrete terms what new environmental analysis an SEIS for Phase II of the Project should include that is not already contained in the

FEIS, 2009 Technical Memorandum and 2010 Technical Analysis. *See* Point II, *infra*.

Instead of addressing the issue on appeal, the first 56 pages of Petitioners' brief are devoted to highly inflammatory allegations that ESDC acted in "bad faith," engaged in "sham" decisionmaking, "fabricated" facts, and engaged in other acts characterized by "fundamental illegality." Their contention is that ESDC focused its environmental review exclusively on the potential impacts of constructing the Project in 10 years and engaged in a "cover up" to conceal the fact that construction could take much longer. But that contention is patently false since: (i) the 2009 Technical Memorandum presented to the Directors in connection with their approval of the 2009 MGPP addressed squarely the potential for a prolonged build-out due to depressed market conditions; and (ii) an amplified analysis of the possible effects of a prolonged construction schedule was laid out in the 2010 Technical Analysis in response to the Remand Order. *See* Point I, *infra*.

POINT I

PETITIONERS' ALLEGATIONS OF BAD FAITH ARE BASED ON MISCHARACTERIZATIONS OF THE RECORD

Petitioners spin a dark tale in which ESDC was desperate to hide the potential for Project delay in order to protect its environmental analysis, which supposedly rested solely upon the premise that the Project would be

completed in 10 years. Thus, they open their brief with the allegation that ESDC engaged in a "cover up" to "suppress[]" disclosure of the 25-year outside date for construction "rather than the 10 years identified in the MGPP and analyzed in the accompanying SEQRA Technical Memorandum." Pet. Br. at 2. But their conspiracy theory falls apart upon a review of the record in this proceeding, since ESDC acknowledged from the outset that the 10-year construction schedule could be substantially delayed by the poor economy. Although the 2009 MGPP required FCRC to use commercially reasonable efforts to complete the Project by 2019 (A3852), at the same time it noted that the 2009 "Technical Memorandum … addresses the potential impacts from a delayed build-out." A3861; *see also* A3840 (June 2009 staff memorandum). While Petitioners fail to mention it, that initial environmental review did in fact include an analysis of potential impacts using *both* a 10-year construction schedule and a delayed schedule, and thereby took a hard look at whether a construction delay would result in new environmental impacts that would warrant preparation of an SEIS. A151.

Moreover, it is plain from the outside dates presented in the 2009 MGPP itself that construction could extend beyond 2019. Thus, the outside date for *beginning* construction of the first of the Project's 16 non-Arena buildings was 2013; the outside date for beginning construction of the second

such building was 2015; and the outside date for the third building was six months later. A3852. In other words, the 2009 MGPP set the outside dates for beginning construction of the first three of the 16 non-Arena buildings about three years before a 2019 completion date, and the plan did not establish any outside dates at all for the other 13 non-Arena buildings. *See* A3858-60. Petitioners themselves concede that the 2009 MGPP "suggested that construction could continue far beyond the period originally considered." Pet. Br. at 5.[1] The 2009 MGPP and 2009 Technical Memorandum were made available to the public in the summer of 2009.

The Legal Notice (A3911-16) published in the *Daily News* and *New York Post* on June 29, 2009 further disclosed that "Development Leases" were to be entered into between ESDC and FCRC for the non-Arena buildings, which would terminate "on the date the construction of the applicable building is completed, and in any event, no later than the twenty-fifth (25th) anniversary" of vacant possession of the Arena Block. A3914; *see also* A1065-67 (discussing the Legal Notice). The Project Leases Abstract gave similar notice of the 25-year outside date for the Development Leases (A3965), as

[1] As ESDC explains in its initial brief, outside dates do not reflect the actual schedule for Project construction. The distinction between a deadline and a construction schedule is apparent not only in the 2009 MGPP, but also the Development Agreement and other agreements analyzed in response to the Remand Order. *See* ESDC Br. at 68-71.

Petitioners themselves concede. *See* Pet. Br. at 53 (acknowledging that the Abstract discloses this "critical term").

Petitioners claim that the Project Leases Abstract disclosing ESDC's intention to sign "leases with a 25 year term to build" was "hidden away in the hundreds of pages of documents" presented to the ESDC Directors when the 2009 MGPP was approved. Pet. Br. at 11. But this document, far from being "hidden," was one of six exhibits to the staff memorandum requesting approvals related to the 2009 MGPP. A3923. Moreover, each of the documents referenced above – including the 2009 MGPP, 2009 Technical Memorandum, June 2009 and September 2009 staff memoranda, Project Lease Abstract and Public Notice – was included in the initial administrative record provided to the lower court, and ESDC also discussed the 25-year outside date in its answer and memorandum of law. *See, e.g.*, ESDC Answer dated Dec. 11, 2009 (A677-78); ESDC Memorandum of Law dated Dec. 11, 2009 at 35-36. Thus, Petitioners are dead wrong in their allegation that "ESDC did not … give the slightest indication that [its agreements with FCRC] contained a 2035 [outside] completion date for the Project." Pet. Br. at 29.

Petitioners' assertions concerning the 2009 Technical Memorandum are particularly puzzling. They contend that ESDC "insist[ed]" in this document "that the Project would be completed in 10 years" and that it

was this "fabrication" that "allowed ESDC to conclude that no SEIS need be prepared in connection with the 2009 MGPP." Pet. Br. at 8; *see also* id. at 30 (the "fundamental illegality in ESDC's conduct" was "the agency's … adherence to the … 10-year construction schedule"). But the 2009 Technical Memorandum acknowledged the considerable uncertainty in the construction schedule, noting that "[c]urrent economic conditions … have led to decreases in demand for both residential and commercial real estate, while turmoil in the financial market has made it more difficult to obtain financing for development projects." A151. The approach taken in the 2009 Technical Memorandum to address this concern – analyzing both the 10-year schedule (which the FEIS had identified as the reasonable worst-case for construction impacts (A3079)) *and* a delayed build-out scenario (A151) – was eminently reasonable, and can hardly be criticized as a "sham."

It was also reasonable for ESDC to focus much of its attention on a 10-year build-out in its 2009 assessment of construction period impacts, since the FEIS, as noted above, had found construction under that schedule to be the "reasonable worst case" for assessing those impacts. Petitioners allege that ESDC "never considered … whether the longer build-out would be the reasonable worst case for the purpose of assessing construction impacts." Pet. Br. at 49. However, the record establishes just the opposite. The FEIS

determined that a 10-year schedule would best serve the purpose of disclosing potential impacts because that schedule would "concentrate construction activities at the site and assure[ ] that the reasonable worst-case construction condition is analyzed." A3079; *see also* A3074, 3080. ESDC was well within its discretion in relying upon that earlier determination (upheld in Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d 312, 318 (1st Dep't 2009)) in preparing the subsequent analysis to determine whether an SEIS was required. *See* Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 233 (2007) (agency may rely on "material already in its file" in determining whether an SEIS should be prepared).

Petitioners are also mistaken in asserting that it was ESDC's "insisting" on a 10-year schedule that allowed it to conclude that no SEIS was required. Pet. Br. at 7-8. In fact, both the 2009 Technical Memorandum and 2010 Technical Analysis concluded that a delay in the construction schedule would not warrant an SEIS. A159, A218-44.

Similarly, Petitioners distort the record in claiming that ESDC took the position that the "'downturn in the real estate market'" had "no bearing on the projected 10-year build-out." Pet. Br. at 11; *see also* id. at 35 (alleging that ESDC "ignored the glaring evidence of the market collapse and adhered to the 10-year build out"). To the contrary, ESDC's position was that the likely pace

of construction would be dictated by economic conditions rather than outside dates in commercial agreements (A675-78), and it was for this reason that ESDC: (i) discussed the pertinent economic considerations in its approval documents in September 2009 (A3932-34); (ii) retained KPMG, a well-respected financial consultant, to analyze the pace at which the market could absorb the Project's residential units (A3971-4018); and (iii) assessed whether a delay in the project schedule due to prolonged adverse economic conditions would result in new environmental impacts that would warrant preparation of an SEIS. A151. Contrary to Petitioners' contention, ESDC's judgment did not ignore "market realities." Pet. Br. at 26.

Petitioners also allege that ESDC kept its "agreement [with FCRC] under wraps until after the Court had denied the petitions." Pet. Br. at 29. But that agreement was not finalized and signed until late December 2009 (A994) *and was given to Petitioners' counsel* in January 2010 (A810), prior to the lower court's initial decision in March 2010 (A67). Attempting to breathe some life into their conspiracy theory, Petitioners point out that ESDC opposed their request (made by telephone application rather than formal motion) to add the Development Agreement to the administrative record for the 2009 MGPP. Pet. Br. at 29. But it was entirely proper for ESDC to do so, because the Development Agreement post-dated by several months the Directors'

affirmation of the 2009 MGPP in September 2009. Indeed, it was on that basis that the lower court initially excluded the document from the record below. A81 (citing Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000)). Although Petitioners thereafter persuaded the lower court to come to a different conclusion, ESDC's advocacy was well grounded in legal precedent and wholly appropriate.[2]

Petitioners also make note of the lower court's reference to statements that ESDC's counsel made at oral argument on January 19, 2010. First, Petitioners quote counsel's statement that the last page of the Project Leases Abstract (A3966) "'summarizes many of the salient elements of the general project plan.'" Pet. Br. at 20 n.8 (quoting Tr. 45, lines 22-23). But this statement was accurate, as this page of the Abstract does summarize many of the salient elements of the 2009 MGPP. Moreover, as discussed above, the Abstract, in its outline of the 16 Non-Arena Development Leases, notes the 25 year outside date. A3965. Second, Petitioners cite the court's reference to counsel's statement that the Development Agreement requires FCRC to construct the Project in accordance with the 2009 MGPP. Pet. Br. at 19-20. But this statement was correct, because the Development Agreement does

[2] ESDC has not objected to this Court's consideration of the Development Agreement, because it is properly part of the administrative record for ESDC's December 2010 determination not to prepare an SEIS, which is before this Court for review.

require FCRC to construct the Project in accordance with the 2009 MGPP. A4033-35, 271-74. As noted above (*supra* at 3-4), the 2009 MGPP does not require all construction to be completed in 10 years (rather, it calls for FCRC to make commercially reasonable efforts to achieve this goal) and refers specifically to the environmental analysis of a delayed build-out in the 2009 Technical Memorandum.

Thus, the asserted "eerie resemblance" between this case and the "Westway debacle" (Pet. Br. at 34) does not exist. The delayed build-out analyses in the 2009 Technical Memorandum and 2010 Technical Analysis, along with the multiple disclosures discussed above, make clear that there was no "cover up" of either the outside dates for Project completion or the potential for construction to extend beyond 10 years.

Petitioners' inflammatory accusations are little more than a recycling of their motion before the lower court for sanctions, which the court denied in a short-form Order entered July 14, 2011. They should not distract the Court from the real issue: whether ESDC's environmental analysis – presented in the 2009 Technical Memorandum and 2010 Technical Analysis, and informed by the FEIS and the comprehensive mitigation measures previously imposed – provided a rational basis not to prepare an SEIS. The remainder of this reply brief addresses that fundamental issue.

POINT II

PETITIONERS' SUPERFICIAL CRITIQUE OF THE 2010 TECHNICAL ANALYSIS DOES NOT ESTABLISH THAT ESDC ABUSED ITS DISCRETION IN DETERMINING NOT TO PREPARE AN SEIS

To the extent Petitioners address the merits of ESDC's environmental assessment, they make no effort to defend the grounds stated by the lower court in its decision, but instead seek to break new ground. In describing the applicable standard of review, they read out of Riverkeeper language that is directly germane to this case. *See* Point II.A, *infra.* Seeking to downplay ESDC's latitude in selecting the timeframe for its analysis, they also draw a faulty distinction between a "build year" selected by a lead agency for analytical purposes and the end date selected for the purpose of analyzing construction period impacts. Id. Their contention that the 2010 Technical Analysis cannot cure ESDC's previous alleged SEQRA violation ignores not only the 2009 Technical Memorandum, but also the new determination, made by the ESDC Directors under the Remand Order on the basis of an enlarged administrative record, that an SEIS is not warranted for the Project. *See* Point II.B, *infra*. Finally, the handful of issues Petitioners raise when they at last reach the substance of the 2010 Technical Analysis are wholly without merit. *See* Point II.C and II.D, *infra.*

A. Riverkeeper Affords An Agency Particularly Broad Discretion In Deciding Whether To Prepare An SEIS.

ESDC and Petitioners agree that this Court should "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." Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d 400, 417 (1986) ("Jackson"). However, ESDC also pointed out in its initial brief that application of this three-pronged test is "tempered" by the "rule of reason," taking into account the particular circumstances of the case before the court. Id. As ESDC explained, the Court of Appeals in Riverkeeper put a finer point on the Jackson standard when the circumstance under review is an agency's decision on whether to prepare an SEIS. In articulating the applicable standard in that circumstance, the Court emphasized the discretionary nature of an agency's decision on the need for an SEIS, as compared to the determination of whether to prepare an EIS in the first instance. Thus, the Court in Riverkeeper highlighted the fact that "[t]he relevant SEQRA regulations provide that: '[t]he lead agency *may* require a supplemental EIS,'" as "distinguished from regulations regarding the preparation of a DEIS or FEIS, which a lead agency must … prepare." 9 N.Y.3d at 231 (emphasis in original) (quoting 6 N.Y.C.R.R. § 617.9[a][7][i]). Ignoring the import of this language, Petitioners portray ESDC's decision on

whether to prepare an SEIS as "the equivalent of a Negative Declaration," Pet. Br. at 37, subject to the identical standard of review as a determination not to prepare an EIS in the first place. *See* Pet. Br. at 39 (Riverkeeper "did not establish a higher or different standard."). But ignoring the plain language of the Court of Appeals does not negate that language, or the particular deference owed to an agency's exercise of discretion in determining whether to prepare an SEIS.

Nor is it ESDC's intent to "eviscerate" SEQRA's statutory mandate by arguing that the decision to prepare an SEIS "lie[s] entirely within the discretion of the agency." Pet. Br. at 39. Rather, the principle to be drawn from Riverkeeper is that where the question is whether an SEIS is to be prepared, the Jackson standard is to be applied with an extra measure of deference to an agency's decision.

Petitioners also attempt to hobble ESDC's discretion with respect to the timetable utilized for the review of construction impacts, by contending that the construction period is to be distinguished from the build year selected for the environmental analysis. Pet. Br. at 50. On that basis, they argue that the well-established principle that the courts will not second-guess an agency's selection of a build year (*see* ESDC Br. at 64-67) is not applicable here. But an environmental assessment under SEQRA is an integrated effort, and the build

year selected for analysis is used throughout the document, including to create the framework for assessing construction period impacts. Thus, Petitioners' criticism of the timetable employed in such an assessment is, at bottom, a challenge to ESDC's selection of the build year, and the cases relating to that issue are relevant here.

Petitioners also seek to apply a less deferential standard of review by disparaging the 2010 Technical Analysis as "hastily" prepared. Pet. Br. at 14, 30, 42, 56, 57. But what matters is whether ESDC, drawing upon the wealth of information already at hand by virtue of its previous environmental reviews, took the requisite "hard look," not whether ESDC acted expeditiously to comply with a court order. *See* Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 689 (1996) (rejecting argument that "review was conducted too quickly to be valid" and stating that fact that agency "was able to [complete the environmental assessment] quickly, does not establish that its review was inadequate as a matter of law"). As explained in ESDC's initial brief (ESDC Br. at 76-77), Petitioners' criticism reveals a misunderstanding of the "present state of the information" already available, 6 N.Y.C.R.R. § 617.9[a][7][ii][*b*], and the task before the agency.

Petitioners also complain that ESDC did not disclose the authors of the 2010 Technical Analysis. Pet. Br. at 23. But the document itself states that

it was prepared by AKRF (A174) – the same environmental firm that prepared the FEIS (A1198) – in consultation with ESDC staff. Notwithstanding Petitioners' innuendos, it is not customary for the resumes of an environmental consulting firm's professionals to be appended to its SEQRA work product.

Petitioners cite several instances where courts have invalidated agency actions because of a failure to prepare an EIS. Pet. Br. at 37-38 & 38 n.14. However, these decisions present situations very different from the present case, since all but one of the cited cases[3] address negative declarations determining that an initial EIS was not required. Under Riverkeeper, ESDC had greater discretion here, where the question under review is whether an SEIS should be prepared. *See* ESDC Br. at 18-20, 62-64.

The cases also present entirely different facts, such as omission in a bare-bones negative declaration of key chemical exposure issues identified in legislative hearings, *see* N.Y.C. Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337, 349-50 (2003); an agency's refusal to consider secondary socioeconomic displacement and neighborhood character as areas of potential

[3] Kahn v. Pasnik, 90 N.Y.2d 569 (1997), nominally involves a court order to prepare an SEIS, but the court was in fact reviewing a negative declaration for a new project. 90 N.Y.2d at 573. The Village Board relied on an EIS for a shopping mall as the basis for a negative declaration for an entirely different project (a "single, large 24-hour supermarket") proposed by a different developer at the same site. Id. at 572-73. In issuing the negative declaration, the Village Board disregarded the new project's "dramatically" different impacts, and ignored its own consultant's identification of "at least nine major areas of concern" that would need to be addressed before a determination of significance could be made. Id. at 573-74.

environmental impact, *see* Chinese Staff & Workers Ass'n v. City of N.Y., 68 N.Y.2d 359, 365-66 (1986); an agency's disregard of information indicating potential impacts in the environmental assessment prepared by its own staff, *see* Kogel v. ZBA of Town of Huntington, 58 A.D.3d 630, 632 (2d Dep't 2009); and an agency's failure to provide any basis for its conclusion that a development would have no impact on wildlife, *see* Kittredge v. Planning Bd. of Town of Liberty, 57 A.D.3d 1336, 1338 (2d Dep't 2008). *See also* ESDC Br. at 63 (distinguishing Serdarevic v. Town of Goshen, 39 A.D.3d 552 (2d Dep't 2007)).

By contrast, in the instant case ESDC thoroughly investigated the Project's long-term construction impacts, as documented in the FEIS, 2009 Technical Memorandum and 2010 Technical Analysis. Petitioners may disagree with ESDC's conclusions regarding such impacts, but a difference in opinion is no basis for overturning ESDC's determination that no SEIS is required. *See* Coalition Against Lincoln West, Inc. v. Weinshall, 21 A.D.3d 215, 222 (1st Dep't 2005). Nor is ESDC required to undertake its environmental analysis using Petitioners' preferred methods, as the lead agency has "considerable latitude in evaluating environmental effects." Jackson, 67 N.Y.2d at 417.

B. The ESDC Directors' Determination In December 2010, Made On The Basis Of The 2010 Technical Analysis, Is Properly Before This Court For Review.

Petitioners assert that the 2010 Technical Analysis "was not really in response to the Court's order" because that order "asked for a reasoned elaboration of the reasons that ESDC continued to use the 10-year build-out in evaluating the … impacts of the … MGPP." Pet. Br. at 56. However, the Remand Order directed ESDC to make further findings not only on the effect of the commercial agreements on the use of a 10-year build-out, but also "on whether a Supplemental Environmental Impact Statement is required or warranted." Remand Order at 18 (A63). In response to these two directives, ESDC first summarized and assessed the effect of the commercial agreements on the build years used in the 2009 Technical Memorandum. Finding that under those agreements, the Project would be constructed as quickly as warranted by financial conditions, it determined that market forces would dictate the pace of construction; since ESDC had based its build year selection on an assessment of long-term market conditions, it determined that the agreements did not materially affect the reasonableness of its judgment on that issue. ESDC Br. at 12-13, 67-71. Having responded to the first directive imposed by the Remand Order, ESDC was faced with the court's second

directive: to determine whether, in light of the commercial agreements, an SEIS "is required or warranted." Remand Order at 18 (A63).

ESDC was mindful that the 2009 Technical Memorandum had looked carefully at the impacts of Project construction under both a 10-year schedule and a prolonged construction period. However, given the slippage experienced in the Project schedule and the "continuing weak general economic and financial conditions" (A266, 286), ESDC responded to the court's second directive by assessing the effects of Project construction yet again, but this time assuming that construction would extend all the way to the outside dates specified in the agreements. It is for that appropriate purpose that the 2010 Technical Analysis was prepared.[4]

Petitioners argue that the 2010 Technical Analysis "could not cure the failure of the ESDC Board to have had such an evaluation before it at the time it approved the MGPP" in 2009. Pet. Br. at 56 (citing Tri-County Taxpayers Ass'n v. Town Bd. of Queensbury, 55 N.Y.2d 41 (1982) ("Tri-County")). In Tri-County, the Court of Appeals determined that certain actions taken by a municipality had to be declared null and void because an EIS had not been prepared. Id. at 45-47. But the lower court explicitly held that the rule of

[4] Although the lower court ultimately disagreed with the conclusions of the 2010 Technical Analysis, it expressed no objection to its preparation in compliance with the Remand Order.

Tri-County is not applicable in the instant case, a holding that Petitioners have not cross-appealed. Final Decision at 19 (A35). Thus, the lower court ruled in the Final Decision that "this is not a case in which the Project has been implemented without any prior 'valid environmental review'" and the case "does not involve a claim that further environmental review is required of the essential substantive features of the Project," and for that reason, declined to nullify ESDC's Project approvals or to enjoin construction. Id. Similarly, the Remand Order did not annul or require additional findings regarding the 2009 MGPP. Remand Order at 18, 21 (A63, 66).

Thus, the case presented here is not one where an agency is attempting to resuscitate a "null and void" project approval by preparing an after-the-fact environmental review. Rather, the 2010 Technical Analysis was prepared by ESDC expressly for the purpose of complying with the Remand Order. *Cf.* Fisher v. Giuliani, 280 A.D.2d 13, 23 n.5 (1st Dep't 2001) (remanding for additional environmental analysis). It would be nonsensical if ESDC's new findings, made on the basis of new environmental studies prepared in response to the Remand Order, could be barred from the record merely because they were prepared on remand.

In sum, the 2010 Technical Analysis was a critical component of the enlarged record upon which the Directors made the December 2010 findings

required by the Remand Order (A302) and is properly before this Court. Indeed, a decision by this Court upholding the Directors' determination made in December 2010 – the determination Petitioners challenged in their Supplemental Petitions – would render academic their earlier challenges to the same determination made in September 2009, because there would be no basis to require ESDC to prepare an SEIS if the Directors properly determined, on the record before it in December 2010, that an SEIS is not warranted.

C. The Shiffman And Goldstein Affidavits Do Not Establish A Failure To Take A Hard Look Or An Abuse Of Discretion.

Petitioners repeatedly cite the reply affidavits of Ronald Shiffman (A1176-80) and James Goldstein (A1185-97). Pet. Br. at 43-44, 58. However, it is not apparent that either affiant has so much as read the FEIS, 2009 Technical Memorandum, 2010 Technical Analysis, 2009 MGPP or any other document pertaining to the Atlantic Yards Project. Thus, in his affidavit Mr. Shiffman makes some general points about the methodologies used to assess the impacts of long-term development projects, but does not specify deficiencies in the methodologies followed by ESDC. He points out, for example, "CEQR does not support an arbitrary extrapolation of projected ten-year conditions into a timeframe of twenty-five years." A1177. But Mr. Shiffman does not actually examine the method by which the 2010 Technical Analysis projected either conditions without the Project or conditions with the Project completed in 2035.

If he had done so, he would have found that ESDC did not engage in any "arbitrary extrapolation" but instead took all available information (such as new growth projections and new traffic, schools, day care and other data available after the 2006 FEIS) into account, and made a series of reasoned judgments in making its projections. A176-80, 182-84, 186-204.

Similarly, Mr. Shiffman makes the general suggestion that a phased approach should be followed in analyzing the effects of long-term development, with one or more interim years being studied. A1178. What he fails to mention, however, is that ESDC followed just that approach in the 2010 Technical Analysis, by breaking down 25 years of construction activity into seven different phases and separately analyzing the likely impacts posed by each such phase. A220-44, 253-59.

Mssrs. Shiffman and Goldstein both discuss at some length large development projects that experienced extensive construction delays. Their logic seems to be that since the prolonged periods of construction in those cases allegedly resulted in adverse environmental impacts, such impacts will result from an extended construction period for the Atlantic Yards as well. They fail to acknowledge, however, that there is no dispute that the long construction period for Atlantic Yards will result in significant adverse environmental impacts. The FEIS, 2009 Technical Memorandum and 2010 Technical

Analysis all acknowledge that fact. The issue is not whether impacts will occur, but whether extending construction beyond ten years would give rise to new or different significant impacts warranting preparation of an SEIS to add to the voluminous information on construction impacts already provided in the FEIS, 2009 Technical Memorandum and 2010 Technical Analysis. The anecdotal accounts provided by Mssrs. Shiffman and Goldstein of unrelated projects provide no basis to second-guess ESDC's judgment on this issue.

Moreover, while Petitioners' experts may suggest otherwise, many multi-building projects with prolonged construction periods – including Battery Park City and ESDC's 42nd Street redevelopment project (the subject of Jackson and Wilder v. N.Y.S. Urb. Dev. Corp., 154 A.D.2d 261 (1st Dep't 1989)) (A659, 699) – have been resounding successes, even during the lengthy period in which they have been under construction. There is nothing in their affidavits to indicate that the projects they discuss were to be developed like the Project at issue here – on a parcel-by-parcel basis with each building separately financed and constructed and with a comprehensive construction mitigation program in place. Thus, they provide no reason to conclude that the experience in this case would resemble the situations they describe.

D. Petitioners' Specific Contentions Do Not Establish A Failure To Take A Hard Look Or An Abuse Of Discretion.

Petitioners concede that a "comprehensive" EIS was prepared in connection with the Project in 2006, *see* Pet. Br. at 36, and complain only that the construction impacts analysis assumed a 10-year construction period. Yet they make no mention of how the FEIS analysis, or the resulting mitigation measures, might differ if another assumption had been used. Thus, they do not explain why an analysis based upon the assumption that multiple buildings would be under continuous construction for 10 years fails to address the long-term impacts of Project construction. Nor do Petitioners mention that the 2009 Technical Memorandum examined the effects of a more prolonged period of construction.

Petitioners present no specific criticism of ESDC's general approach in preparing the 2010 Technical Analysis. They do not take issue with ESDC's breaking down the 25-year construction schedule down into seven successive stages of Project completion as "snapshots" in time, showing how the Project site would appear, and how its construction would affect the surrounding area, at various points in the development process. A220-44, 253-59. Nor do they challenge ESDC's finding that construction over 25 years would not increase the amount of work needed to complete each Project

building; or that construction would advance from one area to another sequentially across the 22-acre site.

Instead, they end their brief with a handful of specific issues that they claim were overlooked or should have been studied more closely, as if to suggest that a court will overturn an agency's decision if it finds a single point omitted from the thousands of pages of analysis prepared for a project. But judicial review, as noted above, requires application of the "rule of reason": an agency need not "investigate every conceivable environmental problem" associated with a project, but must pass judgment on those it deems "relevant" within "reasonable limits." *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 306 (2009).

1. ESDC Adequately Considered Long-Term Cumulative Impacts On Neighborhood Character.

According to Petitioners, the "most glaring deficiency of the Technical Analysis was its failure to consider the long-term cumulative effects of 25 years of ongoing construction" on the "fabric of the neighborhood." Pet. Br. at 57-58. More particularly, they fault ESDC for "tak[ing] a series of separate elements – traffic, noise, neighborhood character and the like – and assess[ing] them separately." Id. at 59. But the FEIS, the 2009 Technical Memorandum and 2010 Technical Analysis examined such environmental concerns as traffic, noise and air pollution associated with construction

activities individually, and *also* examined the overall effects of project construction on neighborhood character. A142-50, 226-44, 2315-18, 2326-51, 2355-400; *see also* A1063-64 (explaining that the analysis of "neighborhood character" encompasses a synthesis of impacts on land use, urban design, visual resources, traffic, noise, socioeconomic conditions and other analysis areas). In all three documents, ESDC concluded that construction would have localized neighborhood character impacts in the immediate vicinity of the Project site, but that the adverse impacts would not affect the character of the larger surrounding neighborhoods. A158-59, 241-44, 2317.

Petitioners' critique of ESDC's conclusion ignores entirely the analytical basis for ESDC's assessment of this issue. *See* ESDC Br. at 39-42. Without rehashing the details of that discussion here, it bears noting that ESDC observed that construction-related air, noise and visual impacts are localized (A231, 236, 300, 2380, 2395-98), that extensive construction mitigation measures have already been identified and imposed to limit adverse impacts to the maximum extent practicable (A218-19, 288-90, 2513-18, 4145-55), that if there is a prolonged delay, construction will proceed across the 22-acre site on a parcel-by-parcel basis, with many areas finished and free from construction well before 2035 (A220-22, 241-44, 253-59), and that the duration of construction of individual project components (such as the length of time that it

would take to build one building) is not likely to be affected by a prolonged delay in the overall schedule (A222, 290-91). Instead of getting into any of these details or explaining why the substance of ESDC's analysis fell short of the requisite "hard look," Petitioners simply assert, without any reference to the record, that "there is nothing in the Analysis that supports" ESDC's conclusions. Pet. Br. at 59 n.23. Petitioners' conclusory assertion does not establish a failure by ESDC to take a hard look at the long-term impacts of construction on neighborhood character.

Petitioners do lodge one specific criticism – that the 2010 Technical Analysis was purportedly defective in that it evaluated impacts "on a 'localized' basis as if the Project were a series of separate buildings." Pet. Br. at 59. This assertion evidences a profound misunderstanding of not only the 2010 Technical Analysis, but the earlier environmental review documents as well. ESDC examined the impacts of the Project within study areas appropriate to the technical areas being analyzed. A1031-34. It was as a *result* of such assessment that ESDC determined that the neighborhood character impacts of building-by-building construction activities over an extended period would be concentrated in areas proximate to the particular buildings under construction. Petitioners' claim confuses the *conclusion* of the analysis with some artificial limitation on its *scope*.

2. ESDC Adequately Considered Impacts On Open Space.

Petitioners also assert that ESDC overlooked the impact of an extended build-out on open space resources. Once again, they make this assertion without any reference to the record. ESDC did take a hard look at this issue, as described at pages 53-55 of its initial brief. As noted there, and in the record (A223), the Phase II open space will be made available to the public incrementally as Project buildings are constructed. Moreover, if there is a substantial delay in the construction of Project buildings, the Project-generated incremental *demand* for open space resources will also be deferred. Petitioners do not establish that ESDC failed to take a hard look at these issues.

3. ESDC Took A Hard Look At Block 1129.

Petitioners criticize ESDC's assessment of the environmental impacts of the Project with respect to Block 1129. They begin their discussion by lamenting the loss of a "historic bakery" on the premises. Pet. Br. at 60. Information (including photographs) concerning this long-defunct three-to-six story abandoned industrial building, which took up a substantial portion of Block 1129, are in the record (A3642-51), allowing this Court to draw its own conclusion as to whether its removal was harmful to the character of the surrounding area. In any event, the demolition of this building was discussed in the FEIS (A1675-80) and does not warrant an SEIS.

Petitioners' next contention is that ESDC failed to take a hard look at the prolonged operation of a surface parking lot at this location, but ESDC did examine this issue carefully. In both the 2010 Technical Analysis (A222, 224-25, 242-44, 262-64) and ESDC Response to Remand (A299-300), ESDC specifically evaluated the impacts of the surface parking lot, under circumstances where the Project is delayed.

ESDC's assessment noted that the surface parking lot on Block 1129 would be in place for a longer period of time in an extended build-out scenario. A242-43. ESDC observed, however, that pedestrian and vehicular traffic associated with the surface parking lot on Block 1129 would be *less* than that anticipated in the FEIS upon Project completion, because the surface parking lot on Block 1129 is limited to 1100 parking spaces, while the below-grade facility that will be in place upon Project completion will have 2070 parking spaces. Id. Accordingly, a delay in the construction of the Project would also delay the construction of 970 additional parking spaces (and the pedestrian and vehicular traffic associated with these spaces) on Block 1129.

ESDC also noted that the surface parking lot on Block 1129 would be screened and landscaped around its perimeter, and upon completion of the Arena the construction staging area on Block 1129 would be located in a discrete area of the northeast corner of the block. A243. Petitioners do not

identify what additional, useful information an SEIS would provide about the visual or operational impacts of a parking lot at this location.

Petitioners claim that stackers on the parking lot would have impacts, but the potential use of stackers was also disclosed and discussed in the 2010 Technical Analysis. A222, 225, 243, 263. The record establishes that stackers do not generate significant noise (A1130-32), and the FEIS already disclosed significant traffic and noise impacts in the immediate area of Block 1129 as a result of construction work, traffic and traffic-related noise associated with the operation of the Arena parking lot at this location. A2035-41, 2068-74, 2250-52, 2255, 2275, 2344-45, 2397. Accordingly, ESDC has already imposed noise mitigation for the residential buildings in close proximity to Block 1129, including the requirement that FCRC install double-paned windows and air conditioners as needed. A2399-400.

4. ESDC Took A Hard Look At A Delay In Underground Parking.

Petitioners assert that ESDC failed to consider the delay in constructing underground parking facilities and claim – without citation to the record – that underground parking was "held out as a major mitigation element." Pet. Br. at 62. But ESDC did consider this issue. The seven "snap shots" in the 2010 Technical Analysis show the incremental construction of underground parking facilities as the Project is constructed (A253-59; *see also*

A1036-37), and the accompanying assessment of impacts considers the extent of surface parking and permanent below-grade parking at each stage (A223-44). Petitioners do not identify any significant adverse impacts that ESDC overlooked in its parking assessment.

5. The Issue Of Multiple Arena Events Is Not Related To A Delay In Phase II Of The Project.

Petitioners raise the specter of heretofore undisclosed environmental impacts from the Ringling Brothers Barnum & Bailey Circus, during the few weeks a year it may come to Brooklyn to perform at the Arena, because the circus may schedule more than one performance per day. Pet. Br. at 62. The issue before the Court, however, is whether the lower court erred in requiring ESDC to undertake an SEIS to study the potential impacts of a delay in the construction of Phase II of the Project (the predominantly residential buildings east of Sixth Avenue). Arena construction is well underway (with a scheduled opening date of September 28, 2012), and its impacts would not be the subject of the SEIS that the lower court ordered to be prepared.

The purpose of the 2010 Technical Analysis was to comply with the Remand Order, and its analysis focused on an extended delay in Project construction. The impacts, if any, of hosting a circus event in the Arena (the *first* building to be constructed as part of the Project) are not the result of any delay. Moreover, the FEIS identified a professional basketball game as the

reasonable worst-case scenario for Arena usage because of its high attendance and frequency. Administrative Record 2228-29 (FEIS Appendix C).

CONCLUSION

The Remand Order and Final Decision should be reversed, vacated and annulled, and these Article 78 proceedings should be dismissed.

Dated: New York, New York
January 20, 2012

Respectfully submitted,
BRYAN CAVE LLP

By: 

Philip E. Karmel
J. Kevin Healy
L. Margaret Barry
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 541-2000

Attorneys for Appellant-Respondent
Empire State Development Corporation

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(v), this reply brief was prepared as follows:

Software: Microsoft Word

Typeface: Times New Roman

Point size: 14 (text), 12 (footnotes)

Line spacing: Double (text), Single (footnotes)

Word Count: 6,897 words, exclusive of pages containing the cover, table of contents, table of authorities and this printing specification statement.

DATED: New York, New York
January 20, 2012

L. Margaret Barry