SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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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, STATE ASSEMBLY MEMBER JAMES F. BRENNAN, 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,

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.

- x

Index No. 116323/09

Assigned to Justice Friedman

AFFIRMATION IN SUPPORT OF COMBINED MOTION FOR LEAVE TO REARGUE AND RENEW ARTICLE 78 PETITION <u>AND TO MODIFY ORDER</u>

ALBERT K. BUTZEL, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under penalties of perjury pursuant to Section 2106 of the New York Civil Practice Law and Rules:

1. I am Senior Counsel at the Urban Environmental Law Center, which represents the Petitioners in this proceeding. I am fully familiar with the facts and

circumstances of this case. I submit this affirmation in support of the Petitioners' Combined Motion, pursuant to CPLR 2221, to (A) Reargue the order and decision of the Court dated March 10, 2010 that dismissed to Petition and (B) Renew the requests for relief set forth in the Petition on the grounds of new evidence the Petitioners believe demonstrates the illegality of the respondent Empire State Development Corporation's failure to prepare a supplemental environmental impact statement in connection with its approval of a Modified General Project Plan ("MGPP") for the Atlantic Yards Arena and Redevelopment Project (the "Project"). A copy of the Court's Order and Decision is annexed hereto as Exhibit A.

2. The Petition presented two claims, only the first of which is the subject of this Motion. The first cause of action alleged violations of the State Environmental Quality Review Act ("SEQRA") and focused on the failure of ESDC to prepare a supplemental EIS in light of fact that Project construction was likely to extend well beyond the 10 year period that had been evaluated in the 2006 EIS. In support of their position, the Petitioners pointed to the revised agreement that the developer, Forest City Ratner Companies ("FCRC"), had negotiated with the Metropolitan Transportation Authority ("MTA"). This extended the time in which FCRC was permitted to acquire property that would be used for residential construction until 2030 and possibly beyond. The extended construction schedule, in turn, would subject the adjoining residential neighborhoods to construction noise, dust, air pollution, traffic blockages and empty lots for 20 years or more – a negative situation that was never addressed in

the 2006 EIS or the 2009 Technical Memorandum and should have required the preparation of a supplemental EIS.

3. By its Decision and Order of March 10, 2010 (the "March 10 Order"), this Court, with some apparent misgivings, rejected the Petitioners' claim, concluding that it could not say that ESDC had acted irrationally in adhering to its position that the entire Project would be completed within 10 years. This was the case even though the MTA Agreement allowed FCRC up to 20 years to acquire all the land needed to build six of the large towers that would be part of the Project. In reaching its conclusion, the Court relied heavily on the representation in the MGPP that the leases for the sixteen separate building parcels would contain a covenant requiring FCRC to use "commercially reasonable efforts" to complete the entire project by 2019 and would impose significant penalties if FCRC failed to meet this schedule.

4. The Petitioners respectfully submit this Combined Motion to Reargue and Renew because, with respect to the former, they believe the Court misapprehended to some extent the position that the Petitioners were espousing and the authority they relied on and, with respect to the Motion to Renew, they believe that the master development agreement provides new and determinative evidence that the 10-year construction period to which ESDC limited its analysis of construction impacts is (and may always have been) a fiction. Petitioners could not present this evidence in connection with their Petition, because the Court did not feel it was appropriate to accept it at that time. However, CPLR 2221 expressly contemplates the presentation of new evidence through a Motion to Renew, and on that basis, Petitioners believe it is

appropriate to submit the master development agreement at this time and explain why they believe it should lead to the modification of the March 10 Order.

A. Motion to Reargue

5. In the Petitioners' view, the Court correctly identified the tenets of law that were to be applied to their first cause of action. The Court's role in reviewing ESDC's determination not to prepare a supplemental EIS was a limited one. It was not permitted to substitute its judgment for ESDC's, nor was it allowed to weigh the evidence or competing expert opinions. Under Article 78, it was limited to determining whether the decision not to prepare a supplemental EIS was arbitrary, capricious or an abuse of discretion. At the same time, however, the Court's review had to be "meaningful." [Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 NY3d 219, 232 (2007)]. The Court had to assure itself that ESDC had identified the relevant areas of environmental concern, taken a hard look at them and provided a reasoned elaboration of its reasons for reaching the conclusions it did about environmental impacts. [Matter of Jackson v. New York State Urban Dev. Corp., 67 NY2d 400, 417 (1986)].

6. Petitioners respectfully submit that this Court accorded an excessive amount of discretion to ESDC when it concluded that the agency's "continuing use of the 10 year build-out was supported – albeit, in this court's opinion, only minimally – by the factors articulated by ESDC." As the Court of Appeals has stated, judicial review of SEQRA decisions must be "meaningful," which has to mean more than taking the agency's word at face value when the surrounding facts suggest that the evaluation is wishful thinking. And beyond that, the courts must ensure that the involved agency

has taken a "hard look" at the relevant facts and potential environmental impacts. If, in the circumstances of this case, where the *documentary evidence* showed that the build-out period could extend 20 years or more, the Court allows ESDC to proceed because it intended to include a single phrase – "commercially reasonable efforts" – in its leases that *might*, under absolutely optimum circumstances, result in a 10 year build-out, it is hard to understand how any judicial review will ever be "meaningful." Equally important – and of even greater concern – if the courts are unable to require agencies to take a "hard look" at the potential environmental impacts of what, based on the documentary evidence, may be 20 years or more of construction, SEQRA will have little meaning at all. All an agency will need to do under these circumstances – or any others where reality suggests an outcome to the agency's disadvantage – is to include a clause in a contract or some equivalent document in its plan (or EIS) and secure an "expert" opinion that a less impactful outcome is possible, and that will foreclose any effective review by the courts. This can hardly have been the intention of the Legislature when it approved the law that required agencies to take all reasonable steps to minimize environmental impacts.[1]

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[1] The Petitioners recognize that ESDC also purported to rely on a report by KPMG that the market could absorb 6,600 units of housing by 2019. *However, that report said nothing about the feasibility of completing construction within 10 years.* Moreover, insofar as it purported to identify a demand for more than 4,000 units of market rate housing in the 10 year period, at least some of its data were wrong. Thus, KPMG stated in the report that a new development known as the Oro was 75% sold out at the time of the report (8/09). This was not the case. A March 30, 2010 press release issued on behalf of the Oro states that the project has *just* reached the 50% mark for sales and has achieved that only by reducing prices by as much as 25%. http://www.prnewswire.com/news-releases/oro-condominium-in-downtown-brooklyn-hits-50-sold-mark-89422282.html. For more additional information on the KPMG Report, see http://atlanticyardsreport.blogspot.com for March 30, 2010. For a case in which a court required an agency to reevaluate its conclusions because a report it relied on was wrong, see Hudson River Fisherman's Ass'n v. Federal Power Commission, 498 F.2d 827 (2d Cir. 1974).

7. The fictional nature of the construct ESDC has put forward is reflected by the abstractness of the term "commercially reasonable efforts." A Lexis review found only 12 cases in which the term was in issue – none of them coming close to involving a development scenario of the sort involved here (none of them, indeed, involving the pace at which action was taken). There is no clear meaning, in short, of what the phrase means. However, can there be any doubt that if the capital markets are restricted, it would be "commercially reasonable" for FCRC to hold off proceeding with development? Yet that is exactly the situation the developer finds itself in now and precisely the reason that it is delaying the start of construction of any components of the Project other than the Arena. And if, as appears to be the case, affordable housing subsidies are not available over the next 10 years in the full amount FCRC requires to build the 2,250 units it has committed to, can it be doubted that it will be excused from constructing some or all of those units on the basis that even using "commercially reasonable efforts," it could not have been in a position to develop them? Indeed, as noted in Petitioners' Motion to Renew below, both of these circumstances are explicitly identified as justification for FCRC delaying the commencement of construction of both Phase I and Phase II residential buildings; and there are many other situations set out in the master development agreement that effectively exempt FCRC from it promised commitment to complete the Project by 2019.

8. There is another critical point that we believe this Court overlooked in reaching its decision. This is the requirement found in the DEC regulations and the New York City Technical Manual that an EIS address the "reasonable worst case"

scenario for any proposed action. In this case, even if it were *possible* that the build-out of the entire Project could be achieved in only 10 years, it was equally possible – and actually far more likely – that the construction period would extend well beyond such an accelerated schedule and could last 25 years under the options provided in the MTA Agreement. Under the "reasonable worst case" scenario, it is the impacts of this extended build-out that were required to be evaluated in an EIS. Thus, even if the evidence presented by ESDC on the length of the build-out had been persuasive (which we believe it was not), it was obligated under SEQRA and the SEQRA regulations to have disclosed and evaluated the environmental impacts resulting from the longer build-out to which ESDC was willing to agree. As a matter of law, therefore, ESDC's failure to have undertaken and presented the analysis of such impacts violated SEQRA. The Court, however, did not address this issue in its March 10 Order.

9. We also want to emphasize the relief that Petitioners were seeking. They were not asking the Court to substitute its judgment for that of ESDC on the substantive issues. They were not asking that the Court direct ESDC to prepare a supplemental EIS. What they were asking of the Court was that it hold that ESDC had not taken a hard or objective look at the relevant circumstances in concluding that the build-out for the entire Project would extend for only 10 years and on this basis set aside the determination that no supplemental EIS was required. However, we did not ask or expect that the Court would direct ESDC to prepare a supplemental EIS. That decision would still be for the agency to make after – but only after – it had taken a hard *and realistic* look at the likely timing of the build-out and had made a realistic

assessment of the resulting environmental impacts, as compared to those described in the 2006 EIS. At that point, ESDC would be in a position to decide whether or not a supplemental EIS was necessary. It seems to us that the Court handcuffed itself by assuming that what was being asked of it was to order ESDC to prepare a supplemental EIS – an order that would have placed it in the position, at least theoretically, of substituting its judgment for the of the agency. But that is not the case. What the Petitioners urged – and what they ask the Court to do now – is simply to find that ESDC's failure to analyze the impacts of a build-out scenario beyond 10 years was arbitrary and capricious in the circumstances of this case and the evidence inherent in the MTA Agreement.

10. Finally, in the closing paragraphs of the March 10 Order, the Court placed considerable emphasis on the substantial amounts the State, City and FCRC have already invested in the Project, suggesting that work was already so far advanced that the courts could not fairly intervene at this point. In this regard, we simply wish to point out that most of the money spent so far has been to lay the groundwork for the construction of the Arena, not the residential components of the Project. Indeed, as far as the Petitioners are aware, very modest sums have been expended on work intended to serve the residential components in Phase I and virtually nothing with regard to Phase II. Consequently, it would, in Petitioners view, be entirely appropriate for this Court to require ESDC and FCRC to re-evaluate the potential negative impacts of the build-out of the 16 residential towers that has not yet begun and for them to modify the Project to reduce those impacts.

B. Motion to Renew

11. Shortly after this matter was submitted for the Court's consideration, ESDC and FCRC (among others) entered into a master development agreement – hereinafter referred to as the "MDA" – setting out the actual terms of the development deal between the parties, including their respective obligations. The sections of the MDA relevant to this motion are attached to this affirmation as Exhibit B. Consistent with the statement contained in the MGPP, the MDA included a single sentence pursuant to which the developer "agreed to use commercially reasonable effort to cause Substantial Completion of the [entire] Project to occur by December 31, 2019." [MDA, §3.2]. However, as explained below, the remainder of the MDA presented one exception after another to what Petitioners' regard as the fictional commitment to complete the Project by the end of 2019. In our view, the inclusion of this language in the MGPP and then in the MDA had no reality whatever, as reflected in the further terms of the MDA, and, in fact, constituted an improper effort by ESDC and FCRC to conceal from the public and this Court the reality of the far more lengthy construction schedule they both understood would be involved in building the 16 residential towers that are current components of the Project. As a result, the negative environmental impacts of the extended construction schedule were able to be ignored, which in turn allowed ESDC to avoid having to prepare a supplemental EIS. By this Motion to Renew, the Petitioners are asking the Court to take into account the realities so clearly reflected in the MDA and to order ESDC to reevaluate that decision.

12. In its March 10 Order, the Court took the position that its review of ESDC's determination "was confined to the facts and record adduced before the agency," and on that basis, it rejected the Petitioners' request to consider the terms of the MDA before reaching its decision. However that may be, the provisions of the CPLR governing motions to renew clearly contemplate courts taking account of new evidence, and that is what Petitioners are asking this Court to do here. Moreover, unlike the Matter of Featherstone v. Franco decision cited by the Court and the other decisions referenced in that opinion, here the MDA was a part of the administrative record in the sense that MGPP and Technical Memorandum both referenced the fact that separate development agreements were to be drafted and executed by FCRC; and it was these agreements that would supposedly embody terms that would assure the completion of the Project by 2019. As it has turned out, those agreements included many additional terms bearing on the timing of construction, which, as described below, clearly evidence a construction schedule extending far beyond 2019. The likelihood (if not the certainty) that that this would be the case was undoubtedly known to the agency at the time it reached its decision not to prepare a supplemental EIS, but was not disclosed. If ESDC were now allowed to hide behind the fact that it had only partially disclosed the terms of what it reasonably understood would be the key provisions of the further development agreements, it would make a mockery of the review of adminstrative actions. The law does not support such a result. *See* Matter of Cohen v. Kohler, 181 A.D.2d 285 (1st Dept 1992)(motion to renew granted due to the failure of an

agency to include in the administrative record documents that it had which bore significantly on the plaintiff's discharge).[2]

13. As noted, the obligation of the developer to use commercially reasonable efforts to complete the Project by December 31, 2019 is contained in a single sentence of in Section 3.2 of the MDA. Virtually everything else in the MDA is about how long FCRC can wait until it must begin construction of the various project elements, and how long in total it has to complete the Project.

14. Taking the last item first, the MDA sets as an outside completion date 25 years after ESDC delivers vacant possession of the Arena Block to FCRC – the date of delivery of vacant possession being referred to in the MDA as the "Project Effective Date" [MDA, §8.7]. That has not yet occurred and may not occur before the end of 2010. Assuming, however, that that condition is satisfied in 2010, the required outside completion date is 2035. *On this basis, construction would be ongoing for 25 years, rather than the 10 years claimed by ESDC in the Technical Memorandum.*

15. Moreover, 2035 is not actually the outside completion date. Under the MDA, this date will be extended – on a day-by-day basis – for so called "Unavoidable

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[2] The Petitioner's also submit that the Court should not have relied on a basically unsupported claim by ESDC – that the inclusion of the obligation to use "commercially reasonable efforts" to complete the Project by December 31, 2019 would result in that outcome – to validate its failure to prepare a supplemental EIS, when the MDA that followed upon that approval is clear evidence that the Project will never be complete by that date. Indeed, as in Matter of Cohen v. Kohler, *supra*, we believe that the failure of ESDC to have described more fully and more accurately the key terms that would be included in the MDA raises questions about whether the agency acted in good faith in stating in the MGPP that it expected the entire Project to be built out by the end of 2019.

Delays" that occur at any time before 2035. These are not limited to acts of God, war and the like. They also include, among other things, "unusually severe weather conditions, governmental action of restriction [whatever that means], unknown physical conditions which differ materially from those ordinarily found to exist and generally recognized as inherent in the construction of large mixed use projects in Brooklyn, failure of transportation . . . , strikes, labor troubles [undefined], or the inability to procure labor, equipment, materials or supplies . . . , which are not attributable to the improper acts or omissions of the [developers]," as well the failure to obtain affordable housing subsidies under certain circumstances [MDA, §8.7 and Appendix A, p. A-18]. Thus, for every day of unusually severe weather, unusual physical conditions, labor troubles or the inability to secure materials or supplies of any kind, or if housing subsidies are unavailable, the outside completion date will be extended an additional day. Over 25 years, it can hardly be doubted that this will add up to a considerable amount of time, resulting in an even longer construction period.

16. The virtual certainty of an extended construction schedule beyond 10 years is reflected to an equal, if not greater, extent in other sections of the MDA. Thus, looking only at the planned Phase I development, the outside completion date is identified as 12 years after the Project Effective Date (which has not yet occurred) [MDA, §8.6]. Again, however, this so-called outside date will be extended in the case of Unavoidable Delays, the unavailability of affordable housing subsidies and the un-availability of what is called "Market Financing" for any housing [MDA, §§8.6, 8.6(d)]. Given that current market conditions almost certainly make "Market Financing"

unavailable at this point for the Phase I residential towers, FCRC presumably has no obligation to begin to build them at this point; and just to be sure, the MDA does not require it to even start construction for three to four years – and then only if available housing subsidies and market conditions permit. Under these circumstances, there is no reason to expect that even Phase I (much less the entire Project) will be completed by 2019. To the contrary, under the 12 year outside completion date, it will be 2022 before Phase I is complete; and if, as seems likely, poor market conditions or lack of affordable housing subsidies or any of the many Unavoidable Delay events intervene, the completion date will be pushed well beyond 2022.

17. Other elements of Project have even more generous start and completion dates. Thus, the MDA provides that construction of the Platform that is to support six of the Phase II residential towers need not begin until 15 years after the Project Effective Date – i.e., not until 2025 or 2026 [MDA, §8.5]. Here, too, however, the start date is subject to extension in the event of Unavoidable Delays. Moreover, when construction begins, it need be only for a portion of the Platform sufficient to support a single building, with the rest of the work deferred for an indeterminate period of time. Assuming that the construction of even part of the Platform will take several years, it is likely to be 2027 before construction of the single building would begin, and another two to three years – or until 2030 – before it would be finished. At this point, five additional towers would still remain to be constructed.

18. Even for those residential buildings that would not require a platform to support them, a minimal time requirement applies. Indeed, the only specific re-

quirement for these structures is that at least one tower on Block 1129 must begin within 10 years after the Project Effective Date [MDA. §8.7(c)]. But this schedule will be extended for Unavoidable Delays, lack of affordable housing subsidies and/or poor market conditions, virtually ensuring that this outside time limit will not require that construction begin before 2020. Other than this, there is no start date imposed for any of the other Phase II Towers, so the outside completion date of 2035 is the only requirement that bears on them; and as already noted, even this date – 25 years after construction has begun – is likely to be extended several more years.

19. As anticipated by the MGPP, the MDA does include penalties – framed as liquidated damages – if FCRC fails to meet certain of the "deadlines" set forth in the MDA. However, a close reading of the complex Liquidated Damages Attachment [Schedule 3 to the MDA] reveals that the only penalties of substantial magnitude relate to the failure to begin and complete construction of *the Arena* within certain time limits. The penalty for failing to start one of the three required Phase I residential towers on time is, at the maximum, $5 million a year [MDA, Schedule 3, pp. 3-4] – a pittance compared to the $4 billion supposedly to be invested in the overall Project and probably less than the amount of interest during construction that would be paid if that building was underway. For all other failures to meet scheduling requirements, including, it appears, *all* Phase II failures, the amount of the penalty is only $1,000 a day [MDA, §17.2(a)(x)], a sum that would provide absolutely no incentive for FCRC to meet any of the identified deadlines. Here, too, the impression given in the MGPP and reinforced by FCRC's counsel at oral argument was, at the very least, misleading and

significantly undercuts the claim that the penalty provisions included in the MDA and the individual leases for the buildings to be constructed as components of the Project would have the effect of causing FCRC to meet a construction schedule that would assure completion of the entire Project by the end of 2019.

20. There is, in addition, another gaping hole: the MDA provides no security to ensure that FCRC honors its obligations. Under the MTA Agreement, FCRC is required to put up an $86 million letter of credit to back up its promises to build the relocated LIRR rail yard. But there is absolutely nothing required of the developer in the way of security under the MDA. Thus, while FCRC cannot walk away from its agreement with MTA without forfeiting a huge sum that is already secure, there is no similar arrangement under the MDA. Once the Arena is completed, FCRC will have virtually nothing to lose should it decide to slow the pace of the development, decide not to proceed with the Platform or simply give up on the rest of plan.

21. Here are the realities, then:

A. Ground breaking for the Arena has taken place and construction of that facility is underway. Roads have been permanently closed and construction congestion is now a reality. Heavy equipment is at work, noise and dust and air pollution are being generated on a daily basis, and the adjoining residential communities are suffering these and other adverse impacts. Despite FCRC's claim that its earlier demolition of buildings on the site was necessary to provide room for construction staging, two lanes of Atlantic Avenue are now closed at Flatbush Avenue, its busiest intersection, to allow for exactly that.

B. The Arena construction work is expected to continue into 2012 and, under the terms of the MDA, can extend for six years until 2015. During this period *and through 2022*, work is also to be underway on Project infrastructure, the Carlton Avenue Bridge, the Urban Room, the Subway Entrance to Atlantic Terminal and the replacement LIRR rail yard [MDA, §§8.2, 8.4, 8.6(a), (b), (c) and (e)].

C. By 2013, construction is supposed to have begun on the first of the Phase I residential towers, adding to the adverse construction impacts. [MDA, §8.6)(d)(I)]. It is anticipated that that work on this building will continue into 2015, adding to the construction impacts on adjoining neighborhoods.

D. By 2015, construction is supposed to have begun on the second of the Phase I residential towers, but it is likely that the start date will be deferred for one or many of the many excuses that allow FCRC to hold off with its building plans. Work on this building can be expected to continue to 2018.

E. By 2017, construction is supposed to have begun on the third of the Phase I residential towers, although under the MDA, that work does not have to begin until 2020. By the same 2020 date, at least one Phase II residential tower is also supposed to go into construction, further expanding the negative impacts. At this point, construction will have been ongoing for 10 years, with three years of additional construction required to complete these two buildings. Assuming the beginning of construction is not extended due to one of the many excuses permitted under the

MDA, upon the completion of these two buildings, construction will have been continuous for 13 years – from 2010 through 2022.

F. By 2025, construction of at least a part of the Phase II platform is required to be underway (subject to Unavoidable Delays and the like). The time required to complete the platform will depend on how much of it is constructed at a time; as noted previously, the only requirement in the MDA is that a portion sufficient to support a single building be under construction by 2025. It is reasonable to expect that the build-out of the *full* platform will itself require at least four years.

G. As of 2025, the MDA requires that only five buildings be completed – the Arena, three Phase I residential towers and one residential tower on Block 1129. In addition, Platform construction is supposed to have begun, though this may be limited to providing a base for a single building and construction of that building will not itself have begun. This means that the remaining 12 residential towers will need to be built over the next 10 years if the outside completion date for the entire project – 25 years after the Project Effective Date – has not been extended due to Unavoidable Delays or a lack of Available Affordable Housing Subsidies. If that is the case, construction impacts will certainly be heavy over these 10 years, extending the overall period of construction impacts to 25 years.

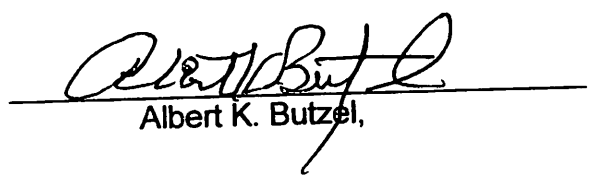
H. Except for penalties connected with the Arena's construction, there are no meaningful financial incentives for FCRC to complete the Project by 2035, much

less by 2019; and none of the completion obligations, including those for the Arena, are secured.

22. The MDA constitutes new evidence that was only made public and only became available to the Petitioners after the Petition was filed and, indeed, after oral argument of this proceeding on January 19, 2010. Also, the Petitioners' efforts to require Respondents to submit this new evidence to the Court prior to the March 10 Order were not successful. Consequently, the new evidence and its implications could not be brought to the Court's attention before this Motion. Petitioners also submit that the new evidence should have a decisive effect on the outcome of this proceeding.

23. For the reasons set forth above, Petitioners respectfully ask the Court to grant this Combined Motion for Leave to Reargue and to Renew and, upon reargument and renewal, to modify the March 10 Order to grant the Petition and enter an order and judgment: (A) annulling ESDC's determination that no SEIS was required in connection with its approval of the MGPP; (B) annulling ESDC's approval of the MGPP; (C) declaring the MGPP null and void; (D) enjoining ESDC from further pursuing the Project on the basis of the MGPP; (E) awarding petitioners their costs and disbursements; and (F) granting such other and further relief as this Court deems just and proper.

Dated: April 1, 2010



Albert K. Butzel,

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners,

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.

Index No.: 114631/09

DECISION/ORDER

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al.,

Petitioners,

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.

Index No.: 116323/09

DECISION/ORDER

In these Article 78 proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc.

Exhibit A

(DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenge the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of a modified general project plan (MGPP) for the Atlantic Yards Project in Brooklyn, which is to be constructed by respondent Forest City Ratner Companies (FCRC). The Atlantic Yards Project is a massive, publicly subsidized, mixed-use development project, extending eastward over 22 acres from the junction of Atlantic and Flatbush Avenues. The Project is to be built in two phases: Phase I will include an 18,000 seat sports arena that is intended to serve as the new home of the New Jersey Nets, a professional basketball team, and construction of a new rail yard on the site of a rail yard that is owned by the Metropolitan Transportation Authority (MTA). The Project also calls for 16 high rise buildings that will contain commercial space as well as between 5,325 and 6,430 residential units, of which 2,250 will be affordable to low, moderate, and middle income persons. Four to five of these buildings in the vicinity of the arena are proposed for Phase I, with the remainder to be constructed in Phase II.

ESDC approved the first plan for the Atlantic Yards Project on July 18, 2006 and first modified the plan on December 8, 2006. The Project has been the subject of extensive litigation. The court refers to prior opinions for a detailed discussion of the scope of the Project and of petitioners' challenges to the prior regulatory findings and approvals. (See e.g. Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312 [1st Dept 2009] [DDDB I], lv denied 13 NY3d 713, rearg denied 2010 WL 520599 [2010] [holding, among other things, that the Project qualified as a Land Use Improvement Project pursuant to the Urban Development Corporation Act, based on ESDC's findings of blight at the site, and rejecting petitioners' challenges to

ESDC's environmental review under the State Environmental Quality Review Act]; Matter of Goldstein v New York State Urban Dev. Corp., 13 NY3d 511 [2009], rearg denied 2010 NY Slip Op 63486 [2010] [upholding the use of the eminent domain power under the State Constitution for takings of private property to be used for the Project]; Goldstein v Pataki, 516 F3d 50 [2d Cir 2008], cert denied 128 S Ct 2964 [same under the U.S. Constitution].)

On June 23, 2009, ESDC adopted a Modified General Project Plan (Record at 4684 et seq.) which ESDC affirmed by resolution on September 17, 2009 (Record at 7236). In the present proceedings, petitioners challenge ESDC's September 17, 2009 resolution on two main grounds: First, they argue that ESDC violated the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 et seq.) by not preparing a Supplemental Environmental Impact Statement (SEIS) as a result of changes to the Project. Second, they argue that ESDC violated the New York Urban Development Corporation Act (UDCA) (L 1968, ch 174, § 1, as amended) (McKinney's Uncons Laws of NY § 6260[c]) by not assuring that a plan is in place to alleviate the blight that ESDC previously found to exist at the Project site.

Petitioners' challenge, in turn, rests on the MTA's renegotiation in June 2009 of its agreement with FCRC to sell FCRC the air rights to the rail yards that the MTA currently owns.[1] It is undisputed that these air rights are necessary to develop six of the eleven buildings that are to be constructed in Phase II. Under the agreement between the MTA and FCRC that was in effect at the time of ESDC's 2006 approval of the Project plan, FCRC was required to pay $100 million to the MTA, at the inception of the Project, for the air rights and related real property

[1] The 2009 MGPP abandons the design for the arena facade by prominent architect Frank Gehry, which was described in the FEIS, and replaces it with "a more traditional design." (Technical Memorandum at 4 [Record at 4749].) This design change is not the subject of challenge in the DDDB proceeding and is mentioned only in passing in the PHND proceeding.

interests necessary to construct the arena as well as six Phase II buildings to be located above the rail yard platform. Under the 2009 MGPP, FCRC will pay the sum of $20 million for acquisition of the property interests necessary for the development of the arena block, will provide the MTA with an $86 million letter of credit to secure the obligation to build the upgraded rail yard, and will pay the balance of the $100 million on an installment schedule. (See Memo. of Marisa Lago to ESDC Board of Directors, dated June 23, 2009, at 4 [Record at 4678] [June 23, 2009 Memo.].) According to the MTA's summary of the renegotiated agreement, the remaining $80 million, discounted to present value, will be paid in installments of $2 million each in the years 2012 through 2015, and installments of $11 million per year for 15 years beginning in 2016. MTA will convey the parcel necessary for construction of the arena at the closing for the $20 million purchase price, while the air rights parcel will "be conveyed only after substantial completion of the new permanent rail yard and only upon payment in full of the price of a development parcel." (MTA Staff Summary, dated June 22, 2009, at 2-3 [Record at 4667-4668].) The air rights parcel consists of six development sites, and the installment payments for the air rights parcel are "allocated proportionally to each Development Parcel." (MTA Staff Summary, Attachment at 2 [Record at 4671].) A Development Parcel is "conveyable (to ESDC or FCR) only upon payment to MTA of the full Development Parcel Purchase Price." (Id.)

Based on the renegotiated MTA agreement, petitioners argue that FCRC does not have the financial incentive to complete the project in a timely manner, that it has until 2030 to complete acquisition of the air rights necessary for construction of six of the Phase II buildings, and that it could "abandon" the project completely. (See DDDB Memo. of Law in Support at 14-

15 [DDDB Memo.].) Petitioners also claim that ESDC ignored the MTA agreement and its impact on the expected time frame for the project (id. at 10) and improperly used a 10 year build-out for the project, with a 2019 completion date. (Id. at 12-13.) Respondents deny that ESDC staff did not make the ESDC Board aware of the MTA agreement. (ESDC Memo. of Law in Opp. to DDDB Pet. at 22.) They also counter that there is no inconsistency between the renegotiated MTA agreement and the 2009 MGPP, that the dates for FCRC's acquisition of the air rights necessary for construction are "outside dates," and that the Phase II buildings will be constructed on a parcel-by-parcel basis. (Id. at 18-20.) Respondents emphasize that a separate agreement between ESDC and FCRC will require FCRC to use "commercially reasonable efforts" to complete the entire Project by 2019. (Id. at 22.)

Petitioner DDDB's argument that ESDC violated the UDCA by not assuring that a plan is in place to eliminate blight reduces, in effect, to the argument that the 2009 MGPP is not a "plan" because it lacks guarantees that the Project will be completed. Governing legal authority does not support this contention. (See generally Neville v Koch, 79 NY2d 416 [1992].) Authority is similarly lacking for petitioner PHND's claim that ESDC unlawfully delegated control to FCRC over the schedule for the Project. The court is also unpersuaded by petitioners' contention that the development agreement with FCRC illegally conditions the development of affordable housing on the availability of public subsidies. The remainder of this opinion accordingly addresses petitioners' SEQRA claim.

The standard for SEQRA review of an ESDC determination is well settled. The regulations which implement SEQRA provide: "The lead agency [here, ESDC] may require a supplemental EIS, limited to the specific significant adverse environmental impacts not

addressed or inadequately addressed in the EIS that arise from: [a] changes proposed for the project; or [b] newly discovered information; or [c] a change in circumstances related to the project." (6 NYCRR 617.9[a][7][i][a]-[c].) A lead agency's determination whether to require an SEIS is "discretionary." (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231 [2007].) The court's review is limited to whether the lead agency "took the requisite hard look at project and regulatory changes that arose after the filing of a SEQRA findings statement, and made a reasoned elaboration that [an SEIS] was not necessary to address those changes." (Id. at 228-229, 231-232, citing Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986].) As the Court of Appeals has emphasized: The courts may not "second-guess"agency decision making. "[A]ccordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency [in this case, ESDC] . . . has the responsibility to comb through reports; analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. . . . While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].)

Applying this limited or deferential standard of review, the court must deny petitioners' challenge to ESDC's determination not to require an SEIS. Contrary to petitioners' contention, ESDC did not ignore the renegotiated MTA agreement. There is no question that ESDC knew that the MTA agreement extended FCRC's time to acquire the air rights needed for development of the six Phase II sites. Each agency was aware of the other's proceedings. It appears that the

MTA's own approval of its agreement with FCRC was conditioned on ESDC's approval of the 2009 MGPP. (See MTA Staff Summary, Recommendation at 3 [Record at 4668].) ESDC staff noted the existence of the MTA agreement in the memoranda that were submitted to the ESDC Board prior to its June 23, 2009 adoption of the MGPP and its September 17, 2009 resolution affirming the MGPP and determining that an SEIS was not "warranted" in connection with the modified plan. The June 23, 2009 Memorandum categorized the "MTA Site Acquisition" as a "major change" to the 2006 plan. It noted that the air rights for the development of the non-arena stages of the Project would be acquired by FCRC on an installment schedule and that "[t]he conveyance of MTA air rights is essential for the development of the [railway] platform and improvements thereon." (June 23, 2009 Memo. at 3-4 [Record at 4677-4678].) The September 17, 2009 Memorandum included, among its description of the changes to the 2006 plan, "a phased acquisition of the MTA air rights necessary to complete development of the Project site." (Memo. of Dennis Mullen to ESDC Board of Directors at 2 [Record at 7022].)

In connection with its initial review and approval of the MGPP in June 2009, ESDC worked with consultants to prepare a Technical Memorandum, dated June 2009 (Record at 4744 et seq.), which was used to determine whether an SEIS was necessary. As set forth in both the June 23, 2009 Memorandum and the Technical Memorandum, the purpose of the Technical Memorandum was to assess whether the proposed modifications to the 2006 plan, design development, changes to the Project schedule, changes in background conditions and analysis methodologies since the FEIS [Final Environmental Impact Statement], and the potential for delay due to prolonged adverse economic conditions would result in "any new or substantially different significant adverse impacts than those addressed in the FEIS" that was prepared in

connection with ESDC's approval of the 2006 plan. (See June 23, 2009 Memo. at 6 [Record at 4680]; Technical Memorandum at 9 [Record at 4759].) The Technical Memorandum discussed each of these changes, and concluded that the changes "would not, considered either individually or together, result in any significant adverse environmental impacts not previously addressed in the FEIS." (Technical Memorandum at 55 [Record at 4808].)

The Technical Memorandum and the ESDC staff memoranda recommending approval of the 2009 MGPP without an SEIS, assumed a 10 year build-out for the Project with an expected completion date of 2019. The FEIS had also used a 10 year build-out, with an expected completion date of 2016. In extending the FEIS build-out for three years from 2016 to 2019, the Technical Memorandum stated: "The anticipated year of completion for Phase I of the project has been extended from 2010 to 2014 due to delays in the commencement of construction on the arena block. The anticipated date of the full build-out of the project -- Phase II -- has been extended from 2016 to 2019 for the same reason." (Technical Memorandum at 5-6 [Record at 4752, 4755].) The Technical Memorandum also undertook an analysis of the potential for a delayed build-out based on "prolonged adverse economic conditions," and recognized that such conditions could cause delays of some of the buildings on the arena block and on Phase II sites. It concluded that the delay would not result in significant adverse environmental impacts that had not previously been considered in the FEIS. (Technical Memorandum at 55, 63 [Record at 4808, 4816]. The Technical Memorandum analyzed environmental impacts on traffic and parking as well as transit and pedestrian conditions over an additional five year period until 2024. While it did not provide a specific number of years for its analysis of other environmental impacts, including delays in the development of open space and extensions of time during which above

ground parking lots would remain in existence, it anticipated that the Phase II buildings would be constructed on a parcel-by-parcel basis and that, as each of the buildings was completed, these impacts would be lessened or eliminated. (See id. at 58, 62 [Record at 4811, 4815].)

ESDC's staff's September 17, 2009 Memorandum concluded that the Project remained "viable" and that the Project schedule was "achievable based on existing and projected economic conditions" and on the report of KPMG, a real estate consulting firm that ESDC retained to perform an analysis of whether, taking into account the severe recession, the market can absorb the residential units called for by the Project over the 10 year period. (See Sept. 17, 2009 Memo. at 5 [Record at 7025].) KPMG concluded that FCRC's residential absorption rate estimates were supported by current market data for condominiums and were "not unreasonable" for market rate rental units, and that, given the need for low income housing in New York City, low income units would be absorbed as soon as they were brought onto the market. (KPMG Analysis, dated Aug. 31, 2009, at 38, 36 [Record at 7117, 7115].)

As petitioners acknowledge, public comments were made about the potential delays that the MTA agreement would cause and the 2030 date for FCRC to complete the acquisition of all of the air rights necessary to complete the construction of the Phase II buildings. (See Summary of Comments and Responses, dated Sept. 2009, esp. Comments 10, 13, 14, 16, 24-31 [Record at 7030 et seq.]. See Testimony of Daniel Goldstein at Sept. 17, 2009 ESDC Board Meeting [Record at 7179-7180].) In responding to the public's questions about the feasibility of completing the Project by 2019, ESDC's staff stated that the assumption of the 10 year schedule in the Technical Memorandum was reasonable because 1) FCRC has made a substantial investment to date in acquisition costs and has an incentive to recognize a return on its

investment as soon as possible; and 2) it is reasonable to expect that the market will absorb the units called for by the Project. (Comment 10 [Record at 7036].) ESDC's staff also noted that "[t]he Project documentation will obligate the developer to complete the entire Project in accordance with the MGPP." (Comment 26 [Record at 7043].) This reference was to a provision in the 2009 MGPP which states that "[t]he Project documentation to be negotiated between ESDC and the Project Sponsor [FCRC] will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule [for Phase I construction] and to complete the entire Project by 2019. The failure to commence construction of each building would result in, inter alia, monetary penalties being imposed on the Project Sponsors." (2009 MGPP [Record at 4692-4693].) In addition, ESDC's staff summarized a number of public comments about the environmental impacts that would occur - e.g., on open space, air quality, and traffic – as a result of prolonged delays in completing the Project, and noted requests from the public that an SEIS be prepared to study such impacts. ESDC's staff responded that it "anticipated that the full build-out of the Project would be completed by 2019." (Comment 29 [Record at 7044]. See e.g. Comments 30, 37, 39 [Record at 7044, 7047-7048].) The response also noted that the Technical Memorandum had considered the potential for delay of the build-out due to prolonged adverse economic conditions. (See e.g. Comments 25, 27 [Record at 7042-7043].)

The ESDC Board's September 17, 2009 Resolution did not contain any independent analysis of the MGPP, and stated that the Board had "considered the Technical Memorandum, the comments received during the public comment period for the Modified General Project Plan and the view of the Corporation's staff that the preparation of a Supplemental Environmental

Impact Statement would not provide information useful to the determination whether to affirm the Modified General Project Plan." (Resolution [Record at 7236].)

Petitioners' challenge in these proceedings focuses on the ESDC's continuing use of the assumption of a 10 year build-out, or 2019 completion date for the Project, in the face of the MTA agreement under which FCRC is not required to acquire all of the air rights needed to complete the construction of six of the Phase II buildings until 2030. ESDC contends that it has a rational basis for its use of the 10 year build-out and its consequent finding that adverse environmental impacts were adequately addressed in the FEIS that had also used a 10 year build-out. ESDC grounds the rationality of its determination in the opinion of its consultant that the market can absorb the planned units over a 10 year build-out; its intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC's financial incentive to do so – all factors that were articulated and relied on by ESDC in the documents discussed above. (See ESDC Memo. of Law in Opp. to DDDB Pet. at 22-27.)

Under the limited standard for SEQRA review, the court is constrained to hold that ESDC's elaboration of its reasons for using the 10 year build-out and for not requiring an SEIS was not irrational as a matter of law. ESDC's continuing use of the 10 year build-out was supported – albeit, in this court's opinion, only minimally – by the factors articulated by ESDC. ESDC did not, for reasons that are unexplained to this date, expressly state, in the documentation prepared in connection with its review of the 2009 plan, that the MTA agreement permitted FCRC to defer acquisition until 2030 of air rights necessary to complete construction of various buildings called for in Phase II of the Project. Contrary to petitioners' contention, however, the documentation of ESDC's review unquestionably demonstrates, as found above, that ESDC

categorized the MTA agreement as a "major change" to the Project (June 23, 2009 Memo. at 3-4 [Record at 4677-4678]), and was aware of the MTA installment through 2030. ESDC determined, however, to continue to use the 10 year build-out, based on its intent to require FCRC to commit to use commercially reasonable efforts to build-out the Project within 10 years, and based on its real estate consultant's opinion that, notwithstanding the economic downturn, the market could reasonably be expected to absorb the units over the 10 year period. In analyzing the environmental impacts of the delayed Project, ESDC also assumed that Phase II buildings would be constructed on a parcel-by-parcel basis, with attendant mitigating effects on the environmental impacts.

ESDC's assumptions were consistent with the MTA agreement. In approving the agreement, the MTA noted that changes in the acquisition of the air rights were made due to the tightening of financial and credit markets, and "[i]n recognition of the impact that the financial and real estate downturn has had upon the economics of the original FCR proposal." (MTA Staff Summary at 2 [Record 4667].) Although the MTA agreement permits FCRC to acquire the development rights for construction of the arena up front, and to defer until 2030 acquisition of air rights necessary to complete construction of certain Phase II buildings, the MTA agreement also permits FCRC to acquire the necessary air rights for these Phase II buildings on a parcel-by-parcel basis. (See MTA Staff Summary Attachment at 2 [Record at 4671].) Thus, the MTA agreement is not inconsistent with the development scenario posited by ESDC in which the Project would proceed incrementally within the 10 year period rather than stall until all of the air rights were acquired in 2030.

Significantly, petitioners do not make any showing, or indeed, even claim that it is not

financially feasible for FCRC to acquire the Phase II parcels on an incremental basis. Petitioners also do not submit any financial analysis to show that ESDC lacked a rational basis for its finding that FCRC has the financial incentive, based on the investment it has made in the Project to date, to acquire the Phase II sites on a parcel-by-parcel basis. Under these circumstances, petitioners do not demonstrate that ESDC lacked a rational basis for its intent to require FCRC to make a separate commitment, notwithstanding the MTA agreement, to use commercially reasonably efforts to complete the Project within 10 years.[2]

SEQRA review of the financial feasibility of a Project may be appropriate where there is a showing that the financial feasibility is a "sham." (See Matter of Tudor City Assn., Inc. v City of New York, 225 AD2d 367 [1st Dept 1996]; Matter of Nixbot Realty Assocs. v New York State Urban Dev. Corp., 193 AD2d 381 [1st Dept 1993], lv denied 82 NY2d 659.) Here, petitioners stop far short of leveling the serious charge that FCRC's financial ability to construct the Project is a sham. At most, petitioners submit a report from their real estate consultant, Joshua Kahr, opining generally that the Project is not financially feasible within the 10 year period. However, petitioners' expert's opinion is highly qualified and does not question the feasibility of FCRC's acquisition of the air rights for the Phase II buildings on a parcel-by-parcel basis.[3] In any event,

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[2] Documentation of this commitment was not in existence at the time of ESDC's June 23, 2009 approval of, and September 17, 2009 resolution affirming, the 2009 MGPP. To the extent that petitioners now claim that the documentation that was subsequently negotiated does not provide adequate guarantees that the Project will be built within the 10 year period, that issue is not before this court. Under long settled authority, a court reviewing an agency's determination is confined to the facts and record adduced before the agency. (See generally Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000].)

[3] The Kahr report summarizes its conclusion as follows: "Based on our analysis, we do not feel that the project is financially feasible within a ten year development period. We feel that it is much more likely that the development will take 20 or more years to complete." The report summarizes the bases for this conclusion as follows:

> "– The current state of the capital markets will make it extremely difficult to obtain financing for a project of this size within the next 36 months.

in a SEQRA review, it is not the province of the court to resolve disagreements between petitioners' and ESDC's experts. (See Matter of Fisher v Giuliani, 280 AD2d 13, 19-20 [1st Dept 2001].)

ESDC's use of the 10 year build-out meets the minimal threshold for rationality of a build year articulated in DDDB I. In DDDB I, petitioner argued that the 10 year build-out in the FEIS and the 2006 plan was intentionally underestimated and skewed the FEIS' findings as to the environmental impacts of the Project. The Appellate Division of this Department explained the standard for judicial review of the rationality of the build year as follows: "[T]he ultimate accuracy of the estimates [of the build-out periods] is neither within our competence to judge nor dispositive of the issue properly before us, which is simply whether the lead agency's selection of build-dates based on its independent review of the extensive construction scheduling data obtained from the project contractor may be deemed irrational or arbitrary and capricious. . . . The build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use." (DDDB I, 59 AD3d at 318.) In reviewing the 2009 MGPP, ESDC did not take the position, nor could it have reasonably done so given the changes to the

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... The projected residential market rate rental and condominium prices that the developer relied on when they originally underwrote the deal are substantially above the current market. . .
– The demand for housing units is most likely not sufficient to support a project of this scale over the next ten years.
– The developer recently restructured its original agreement with the MTA to enable it to exit the purchase of the Phase II properties for a minimal or no breakup fee depending on timing. Based on the timing of the payments, we believe that the developer is concerned about its ability to complete the project within the stated 10 year frame."

(Kahr Report, dated Aug. 31, 2009 [Ex. D to Baker Aff. In Support of DDDB Pet.].)

As this summary shows, although the report cites the difficulty in obtaining financing as a basis for the conclusion that the 10 year build-out is not financially feasible, the report projects such difficulty only over a 36 month period. The report also cites the MTA agreement as evidence of FCRC's concern about its ability to complete the project within the 10 years, but does not engage in any analysis of the FCRC's ability to acquire Phase II air rights on an incremental basis.

2006 plan, that it was required only to look at construction scheduling data to determine the continuing feasibility of the 10 year build-out. Rather, it looked at additional factors including, as discussed above, the report of its real estate expert and its expectation that the buildings would be completed on a parcel-by-parcel basis. For the reasons also discussed above, these bases for ESDC's use of the 10 year build-out may not be deemed irrational under the governing legal standard.

In conducting a SEQRA review, a court is precluded from making substantive judgments on the evidence or "evaluat[ing] de novo the data presented to the agency." (Akpan v Koch, 75 NY2d 561, 571 1990].) This court may not make any independent findings of fact or any independent determination on the impact of the changes in the plan for the Project and therefore may not, and does not, make its own evaluation of the effect of the MTA agreement on the build-out of the Project, the likelihood of the potential for delay as a result of the agreement, or the need for an SEIS; its role is restricted to determining whether ESDC had a rational basis for its determination.

While the court cannot find that ESDC lacked any rational basis for its use of the 10 year build-out for the Project, the court cannot ignore the deplorable lack of transparency that characterized ESDC's review of the 2009 MGPP. Although the MTA agreement was identified as a major change in ESDC's staff's June 23, 2009 and September 17, 2009 memoranda, these memoranda did not contain any explicit discussion of the impact of the installment schedule on the build-out of the Project. Neither ESDC's Technical Memorandum nor its Summary and Responses to the public comments mentioned the MTA agreement by name. The MTA agreement was the elephant in the room. Although ESDC articulated reasons for its continued use of

the 10 year build-out that are marginally sufficient to survive judicial scrutiny under the limited SEQRA standard of review, ESDC's consideration of the modification of the plan lacked the candor that the public was entitled to expect, particularly in light of the scale of the Project and its impact on the community.

This court is not the first to criticize the process by which ESDC has made environmental findings for the Atlantic Yards Project. In DDDB I, Justice Catterson concurred with the majority, based on his finding that ESDC had sufficient evidence of blight, but only "by the barest minimum," to satisfy the limited review standard. (59 AD3d 333.) However, he sharply criticized the "less than admirable sleight of hand" with which ESDC's blight study had been prepared (id. at 331), as well as ESDC's rush through the review process (id. at 327-328), and concluded by "deplor[ing] the destruction of the neighborhood in this fashion." (Id. at 333.) The Court of Appeals upheld the use of the power of eminent domain to take property for the Project, but observed that "[i]t is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight." While reiterating that the remedy must come from the legislature, the Court noted that "[i]t may be that the bar has now been set too low -- that what will now pass as 'blight' . . . should not be permitted to constitute a predicate for the invasion of property rights." (Goldstein, 13 NY3d at 526.)

Here, too, it is quite possible, as petitioners have done, to dispute ESDC's assumption of a 10 year build-out for the Project, to disapprove its failure to address more directly the impact of the MTA agreement on the completion of the Project, and to disagree strongly with ESDC's decision, as a quasi-public agency, to permit construction to proceed on the arena without greater certainty that the surrounding Brooklyn neighborhoods will not be subjected to the

deleterious, if not blighting, effects of significantly prolonged construction. As of the date petitioners filed this current environmental challenge, however, the Project was already well underway: The Appellate Division of this Department had affirmed ESDC's 2006 approval of the Project plan, and the Court of Appeals has recently declined to review the case. During this litigation, ESDC has expended or approved disbursements of $75 million of the $100 million State-appropriated monies for the Project, and has received $85 million of $100 million that the City has committed to the Project. (Sept. 17, 2009 Memo. at 4 [Record at 7024].) FCRC has expended over $350 million in acquiring properties for the Project and in demolishing over 30 vacant buildings on the site. FCRC has also already performed extensive work on the infrastructure of the Project (e.g., relocation of sewers and utilities) and on construction of a temporary rail yard. At this late juncture, petitioners' redress is a matter for the political will, and not for this court which is constrained, under the limited standard for SEQRA review, to reject petitioners' challenge.

It is accordingly hereby ORDERED that the petitions of Develop Don't Destroy (Brooklyn), Inc. and of Prospect Heights Neighborhood Development Council, Inc. are denied; and it is further

ORDERED that petitioner Develop Don't Destroy (Brooklyn), Inc.'s motion for a preliminary injunction is denied.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
March 10, 2010

MARCY S. FRIEDMAN, J.S.C.