

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., et al,

Index No. 116323/09

Petitioners,

Assigned to
Justice Friedman

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,

AFFIRMATION OF
ALBERT K. BUTZEL
IN SUPPORT OF
SUPPLEMENTAL
PETITION

Respondents.

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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 Prospect Heights Neighborhood Development Council *et al.* in this proceeding. I am fully familiar with the facts and circumstances of this case. I submit this Affirmation in support of the Supplemental Petition in this proceeding, which asks the Court to (1) annul the Modified General Project Plan ("MGPP") approved by the Empire State Development Corporation ("ESDC") on September 17, 2009, (2) annul the Findings of ESDC made on December 16, 2010 (the "December Findings") in response to the remand ordered by this Court in its Decision and Order dated November 9, 2010 (the

“November 9 Decision”) and (3) stay and enjoin further construction of the Atlantic Yards Land Use Improvement and Civic Project (the “Project”) unless and until ESDC complies fully with the State Environmental Quality Review Act (“SEQRA”) and the Court’s November 9 Decision. The stay and injunction is sought against Forest City Ratner Companies (“FCRC”), which, directly and through various affiliates, is the sponsor and builder of the Project.

2. The underlying facts of this case and the procedures that have brought it to this point are well known to the Court, and I will not repeat them at length here. In summary, the Petitioners initiated this proceeding in November 2009, challenging the approval of the MGPP as in violation of SEQRA. The principal basis for this claim was that in its SEQRA review, ESDC had restricted its analysis of construction impacts to 10 years, when the build-out of the Project would be much longer than that, resulting in adverse impacts over as many as 25 years. From the beginning, the Petitioners argued that the 10 year build-out was not only undercut by the realities of the market but was specifically called into question by the MTA Agreement allowing FCRC until 2030 to acquire the air rights for the Project’s Phase II building sites. This contention was dismissed by ESDC and its counsel, who asserted that 2030 was simply a theoretical outside date. However, their claim was belied by a Master Development Agreement (the “MDA”) between ESDC, FCRC and other parties, which was executed in late December 2009. The Petitioners attempted to submit the MDA to the Court in February 2010, but counsel for ESDC represented that it added nothing new. It was as a result of this misrepresentation – and ESDC’s failure to provide the Court with a document that it had

to know bore directly on the Petitioners' claims – that the Court was misled into concluding that there was enough in the record – albeit barely – to support ESDC's continued use of the 10 year build-out.

3. The Petitioners subsequently moved for Reargument and Renewal of the Petition, presenting as a primary basis for reconsideration the timetables for construction set forth in the MDA. These did not require that any part of Phase II of the Project be started for 15 years, included no specific start dates for all but one of the Phase II buildings; allowed 25 years (or more in certain cases) for the completion of the Project; and included no substantial penalties for Phase II (and many Phase I) defaults. The Petitioners contended that the MDA evidenced explicitly what had certainly been the case when the MGPP was approved – namely, that there was no likelihood the Project would be completed in 10 years, (which had been the basis of analysis in the Technical Memorandum) and that the resulting adverse environmental impacts had not be identified or properly evaluated by EDSC at the time it approved the MGPP.

4. By Decision and Order dated November 9, 2010 (the "November 9 Decision"), the Court granted the Motion to Reargue and Renew, concluding that the MDA's "25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement giving FCRC until 2030 to complete acquisition of the air rights necessary to construct 6 of the 11 Phase II buildings, raise a substantial question as to whether ESDC's continuing use of the 10 year build-out has a rational basis." Holding that ESDC "did not provide a 'reasoned elaboration' for its determination

not to require an SEIS, based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project,” the Court remanded the matter to ESDC “for additional findings on this issue.”

5. Following the November 9 Decision, the Petitioners moved for a stay of further construction, but before that motion was heard, ESDC responded to the Court’s remand order. On December 16, 2010 – just five weeks after the Court’s November 9 Decision – the ESDC Board adopted findings “responding” to that Decision. (Copies of these findings – referred to hereinafter as the “December 16 Findings – are included as Exhibit B in the Exhibit Binder). In summary, the Findings concluded that (a) the MDA had no material effect on the reasonableness of using a 10-year construction schedule, (b) it appeared unlikely that the Project could be constructed on a 10-year schedule, and (c) an extension of the construction schedule, even up to 25 years, would not result in any new significant adverse environmental impacts; thus such an extension did not “require or warrant the preparation of an SEIS.” The Findings were supported by two other documents – a Technical Analysis of an Extended Build-Out (the “Technical Analysis”) , which is included as Exhibit C in the Exhibit Binder, and ESDC’s Response to Supreme Court’s November 9 Decision (the “Response”), which is included as Exhibit D in the Exhibit Binder. These documents were submitted to the Court and provided to the Petitioners on December 17, 2010.

The MGPP Approval Violated SEQRA and Should be Annulled.

6. ESDC presumably made its December 16 Findings and submitted the Technical Analysis and Response with the expectation that they met the remand order; and there is no question that the agency made "additional findings on the issue." But to conclude, as ESDC apparently does, that these findings, without more, bring an end to the matter or meet the Court's November 9 mandate is to put the cart before the horse. The critical issues that remain are (a) whether the December 16 Findings themselves are rationally based and (b) whether ESDC's September 17, 2009 approval of the MGPP, which, as the Court stated, "did not provide a 'reasoned elaboration' for its determination not to require an SEIS," was somehow cured by the new analysis and Findings. The Petitioners' understanding of the Courts' remand order was that ESDC was obligated to make *rationally-supported* findings explaining why it continued to use a 10-year schedule in determining whether an SEIS was required. If ESDC could not provide that rational basis and "reasoned elaboration," then its approval of the MGPP would not be sustainable, since it did not have before, at the time that approval, the information on environmental impacts that SEQRA required. For the reasons described below, the Petitioners submit that the December 16 Findings and the materials on which they are based do not support the ESDC's use of the 10-year build-out that it continues to try to justify; that its after-the-fact analysis of a longer construction schedule cannot be substituted, *nunc pro tunc*, for the evaluation of impacts it was required to have before it at the time it approved the MGPP; and that the belated Technical Analysis is deficient in its analysis of the long-term construction impacts, serving as a justification rather than the good faith evaluation that SEQRA and the Court's November 9 Decision called for.

7. Indeed, the Petitioners believe the hasty reevaluation that ESDC has undertaken in this case is an extension of the series of efforts on its part that began in the summer of 2009, when, knowing that an SEIS would almost certainly be required if it acknowledged the likelihood of a construction schedule extending for as long as 25 years, ESDC sought to suppress that reality and thereby allow work on the Arena to begin. This is reflected in ESDC's continued insistence in its recently-submitted documentation that the terms of the MDA and the MTA Agreement had no bearing on "whether it was reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project." (Finding 1) It hardly need be said that ESDC had no choice but to make this Finding – otherwise, it would have been admitting that at the time it approved the MGPP, it did not have a responsible (or rational) basis for continuing to adhere to the 10-year build-out in measuring environmental impacts. Consequently, an overriding self-interest had to pervade – and in the Petitioners' view underlies – ESDC's response to the questions the Court identified with regard to the MDA and its bearing on the length of the build-out.

8. The transparent nature of ESDC's claim that the schedules in the MDA and the MTA Agreement had no significance is underscored by the agency's second grudging finding that as of December 2010, "it appears unlikely that the Project will be constructed on a 10-year schedule . . ." (Finding 2). That is a gross understatement. Based on the facts on the ground today, as well as the further discussion in the ESDC's response to the Court, which points out, among other things, that by the end of this year, when four of the Phase 1 residential buildings were supposed to be under construction, only one will

be (Response, page 22), and given that Phase II contemplates constructing 12 additional buildings, plus a platform over the rail yards, there is no chance that work will be completed in 10 years. That ESDC couches its current finding in conjectural terms – completion is “unlikely” in 10 years – is sharp contrast to the assertions at the time of its approval of the MGPP that construction would last no more than a decade is further evidence of its questionable good faith.

9. The thin thread that ESDC seeks to hold on to, which, unlike Spiderman’s, has no bearing strength, is the claim that whatever the situation today and whatever the dates reflected in the MDA and the MTA Agreement, the agency had a rational basis in September 2009 to conclude that the Project would be completed in 10 years. This is a claim that cannot withstand objective scrutiny – the circumstances and documents involved simply do not support that contention.

10. To begin with, on April 9, 2009 – five months before the MGPP was acted on by the ESDC Board – Marisa Lago, then the agency’s CEO, responding to a question put to her regarding the build-out of the Project in light of the recession, “recognize[ed] that it is project that is scheduled to grow out over multi-years, *decades*, not months.” [\[http://www.cityhallnews.com/newyork/article-669-development-amid-deficits-building-amid-budget-gaps.html\]](http://www.cityhallnews.com/newyork/article-669-development-amid-deficits-building-amid-budget-gaps.html). A printout of the article is attached to this Affirmation as Exhibit A.] This comment, given at a breakfast sponsored by the publication On/Off the Record, makes it clear that within ESDC, it was well understood at the time that construction

would extend for 20 years, if not longer.¹

11. Ms. Lago's observation was not conjecture but based on then-current economic conditions: by April 2009, the real estate markets had already imploded. The crash in housing began in 2007 [see, for example, "U.S. Housing Crisis Deepens in 2008 After Record Drop [in 2007]," December 14, 2007, Bloomberg article posted at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5Mwref21u9>]. In the years between 2006, when the FEIS was completed, and the third quarter of 2009, when the Technical Memorandum was issued, residential sales in Brooklyn decreased from nearly 4,200 units a quarter to 1,500 units a quarter [see Miller Samuel Report at <http://www.millersamuel.com/charts/gallery-view.php?ViewNode=1226031153vgie>. A copy of the chart is attached to this affirmation as Exhibit C.]. Thus the housing market into which the Project intended to sell was less than half the strength of the 2006 market, and no one was predicting a rapid recovery. To the contrary, the commercial real estate market had also broken, with financing for major projects all but dried up, by the time the MGPP was prepared [see, for example, "Commercial Real Estate is a Time Bomb, Maloney Says," July 9, 2009, Bloomberg article found at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTP9nCROB6PU>]. It did not take a genius to recognize the situation – all one needed to do was walk the streets and see the many projects brought to a halt in mid-stream or to read any of the many articles appearing in the nationwide press and prominent real estate publications. If ESDC was able to find an

¹ Ms. Lago's assessment has more recently been confirmed by FCRC's principal, Bruce Ratner, who, at the groundbreaking for the Area, is reported to have said that the 10-year timeline was always misunderstood. "It was never supposed to be the time we were supposed to build them [the 16 buildings] in." Reported in an article by Matthew Schuerman dated Tuesday, September 28, 2010, for WNYC News. A printout of the article is attached as Exhibit B.

“expert” to opine that it was “not unreasonable” to assume that the market could absorb the 8,000 plus new units that the Project included, it was an opinion that ran counter to all the objective and reported data. Moreover, it was an opinion that did not purport to deal with the issue of whether a 10-year build-out could be financed given restrictive bank lending policies.

12. That it could not be was evidenced first – or came to light first – through the MTA Agreement; and this is where ESDC’s case breaks down completely. The amendment of the MTA Agreement allowed FCRC to move forward with construction of the Arena with an upfront payment to the MTA of only \$20 million, rather than the \$100 million the Agreement had originally required. There can only have been one reason for this: given the sharp downturn in the residential real estate market and the tight lending policies of the banks, \$100 million in financing, above what would be needed to build the Arena, was not available to FCRC. Equally important, in allowing FCRC to purchase tracts *seriatim* through 2030, the revised MTA Agreement was clearly geared to the length of the build-out that the parties foresaw in the face of a still-declining real estate market.

13. While disclaiming this conclusion, ESDC effectively acknowledges it in its Response to the Court. Thus, on page 4 of the Response, the agency states that “in 2009, ESDC, MTA and FCRC negotiated certain changes to the general business plan for the Project to allow construction to proceed *notwithstanding the downturn in the real estate market*,” as if that market, and the “changes” made, as reflected in the relevant

documents, had no bearing on the projected 10-year build-out. Again, at page 20 of the Response, ESDC, referring to the MDA and MTA Agreements, states:

From a general perspective, it was to get the Project going *in a difficult economic climate* that ESDC and MTA agreed to allow FCRC to purchase Project property in pieces and to proceed with platform work in three distinct phases. (emphasis added)

For ESDC to assert that the MDA and MDC Agreement responded to the difficult economic climate in getting the Project started but, despite the extended completion dates they included, had no bearing on the reasonableness of continuing to use a 10-year construction schedule defies all logic, much less the very market conditions that it has invoked in its Response.

14. The MTA Agreement, with its extended purchase and payment schedule, came to light before the Petitioners initiated this proceeding and was supposedly made known to the ESDC directors before it approved the MGPP. Assuming that to be the case, this situation demonstrates that at the time the MGPP was approved, it was already recognized that the market downturn was having a severe impact on FCRC's ability to get started with the Project, much less complete it. That, in its own right, should have alerted the agency to the irrationality of continuing to use a 10-year build out in evaluating the environmental impacts of construction. But that was not in the interest of ESDC or its staff or FCRC. Frustrated by the slow progress of the Project and facing an already difficult economic climate, the last thing they wanted was to go back and reassess the impacts of an extended construction schedule in an SEIS. That would have added another four months or more to the schedule and possibly threatened FCRC's financing plans for the Arena. So, the Petitioners suggest, rather than taking that course, ESDC

arbitrarily decided to adhere to the 10-year schedule, ignoring the market realities, suppressing as best it could the changes in the MTA Agreement and finding (or perhaps more correctly, paying) a consultant to opine that it was “not unreasonable” to conclude that market meltdown would have no impact on the timing of Project construction. It is by this thread that ESDC continued to hang its case. But in doing so, it only led from one fabrication to the next.

15. Unlike the MTA Agreement, the MDA was not signed until December 2009, three months after ESDC approved the MGPP. But there can no longer be any reasonable doubt that the terms of the MDA, insofar as they set out completion dates, were agreed to in the same time frame as the MTA Agreement (which was before the MGPP was approved); thus, both agreements run in parallel in terms of timing. In addition, the abstract of lease attached to the MGPP referenced a 25-year outside completion date. In these circumstances, for ESDC to assert in its Response to the Court that the MDA had no material significance on the reasonableness of using a 10-year construction schedule to evaluate environmental impacts is either to misunderstand what the Court was asking or to add another layer of fabrication on top of that surrounding the MTA Agreement.

16. ESDC continues to argue that the outside dates have little meaning and do not reflect what is actually likely to happen. To quote the agency’s Response to the Court at page 19:

All of these [outside] dates [up to 2035] are subject to specified extensions. However, outside dates incorporated into complex, heavily negotiated development agreements do not reflect reasonable business projections as to the actual timetable for completing the project under discussion. Rather, they reflect the prudent business judgment of the parties and their transactional

lawyers seeking to anticipate any and all of the possible risks, however unlikely, that could potentially arise as a project goes forward, including how and when a project may be failed or incomplete. Thus negotiated contractual deadlines are not synonymous with reasonably expected project completion dates.

This is a tired refrain. It effectively suggests that the outside dates are abstractions, subject to being made irrelevant by earlier completion. It is no doubt true that parts of the Project could be completed before the specified “outside” dates. But it is equally true that the work could go on even longer. Indeed, that possibility is noted in the first sentence of the paragraph quoted above. Moreover, it is equally as likely that work will extend beyond the outside dates as it is that it will be finished sooner. All that would be needed to make this legal would be an amendment to the MDA. Indeed, the Petitioners understand that many more government-sponsored projects run on longer than anticipated than are completed early. The likelihood of ESDC declaring a breach of contract, rather than extending the completion date, on the grounds that the Project is not finished by 2035, seems remote.

17. As for the negotiated documents not reflecting “reasonable business projections as to the actual timetable,” but rather representing “the prudent business judgment of the parties and their transactional lawyers seeking to anticipate any and all of the possible risks, however unlikely,” this is, at best, confusing. Where negotiations are involved, there are countervailing interests, and the outcome is generally a compromise of those interests. Otherwise – in this case, for example – the outside date would be 35 or 45 years, since that would give FCRC the greatest possible flexibility. Presumably, ESDC was not prepared at this point to allow such an elongated schedule. Of equal

importance, an agreement on schedule that is reached on the basis of “prudent business judgment” is presumably one that both parties regard as reasonable in light of existing conditions. In this case, as we have already emphasized, market conditions made a long-term build-out not only possible, but likely. Certainly, the 25-year outside date was not plucked out of thin air but rather represented a projection of how much time could be required to complete the Project in the face of a collapsed market. And that was undoubtedly true at the time the MGPP was approved, with the MTA Agreement already complete and the MDA under negotiation. That should have led ESDC to reevaluate the Project on the basis of a 25-year construction schedule.

18. Legally, that was what was required of ESDC under SEQRA and its implementing regulations and practices at the State and City level. Specifically, these require that an agency pursuing or approving an action analyze that action on the basis of a “reasonable worst case” scenario.” [CEQR Technical Manual, Chapter 2, pp. 1, 3, 5, 8-9].² The Manual explicitly identifies “Duration” as one of the elements that must be taken into account in evaluating construction impacts [CEQR Technical Manual, Chapter 22, pp. 1, 6, 9, 10]. In the case of the Project, the reasonable worst case in terms of duration, as reflected in the MDA, is 25 years (and it could be longer). Thus, even if ESDC had had a rational basis for believing that the Project would be completed in 10 years – and we do not believe it did – it was obligated to analyze and consider the impacts of the longer construction period before it acted on the MGPP. This it failed to do. As a consequence, its approval of the MGPP was illegal and should be annulled.

² The Manual can be found at http://www.nyc.gov/html/oec/html/ceqr/technical_manual.shtml.

Moreover, before it can proceed further with the Project, it must reassess the MGPP, taking account of the impacts of long term construction. Only then may it act again on the MGPP.

19. The bottom line is that ESDC wanted to have it both ways and, as a result, overreached. First and foremost, it wanted the Project to be successful. To this end, as the agency admits in its Response to the Court, it and the MTA agreed to restructure the terms of their original agreements with FCRC, as reflected in the General Project Plan, to reduce the developer's upfront payment obligations and to set new and greatly extended outside completion dates for the Project and its constituent. But this change in the build-out schedule had significant implications in terms of environmental impacts, as it would mean that the residential communities surrounding the Project site would be exposed to the negative effects of construction over a generation rather than a decade. The need to analyze the resulting impacts would, in turn, have meant a further delay moving the Project, including the Arena, forward. How to avoid this must have been a subject of considerable debate among the ESDC staff and its advisors. The answer – to assert that the Project would still be completed in 10 years – was, on its face, the simplest choice, especially because the terms of the MTA Agreement and the MDA were not then public. But when those documents did become public, the staff could foresee themselves hoisted by their own petard. From that time on, all their efforts have been to conceal or dismiss the realities reflected in the terms set forth in those agreements. They have done so most blatantly in asserting that the agreements were irrelevant to the reasonableness of using the 10-year timetable, even while admitting that the Project cannot now be

completed in 10 years; and as discussed below, they have continued the same approach in their hasty evaluation of long-term construction impacts.

The Technical Analysis is Fundamentally Flawed.

20. In its Finding 3, the ESDC Board has concluded that even if the build-out of the Project does extend over 25 years, it would not result in “any new significant environmental impacts not previously identified” in the 2006 FEIS and the 2009 Technical Memorandum. In reaching this conclusion, the Board relied on the hastily-assembled Technical Analysis provided to the Court and the Petitioners on December 17 and included in the Exhibit Binder as Exhibit C. However, even if the evaluation contained in that Analysis were persuasive, it could not cure the failure of the ESDC Board to have had such an evaluation before it at the time it approved the MGPP. That approval was given on the basis of a 10-year construction schedule, without regard to the *reality at the time* that the build-out would extend much longer. Perhaps the Board would have approved the same MGPP after considering the impacts of the extended construction schedule. However, it did not do so in September 2009, because it could not do so without an analysis of those impacts; and it chose not to do so on December 16. Instead, it simply adhered to the line that the decision to evaluate impacts on the basis of a 10-year build-out was rational at that time. But as discussed above, that was not the case, and ESDC knew that it was not the case. As a consequence, the MGPP was not validly approved on September 17, 2009; and because ESDC has not reconsidered the Plan in the context of a 25-year construction schedule, it remains invalid.

21. It is the Petitioners' view, moreover, that the Technical Analysis does not represent a good faith effort to measure the negative effects of a 25-year construction schedule, but is rather part of ESDC's continuing effort to disclaim and conceal the very real long-term impacts that such an extended build-out would impose on the Petitioners' surrounding neighborhoods. As discussed above, the initial efforts were to conceal the reality of construction extending more than 10 years. Now, with ESDC grudgingly admitting that this will not be the case, the agency, relying on an evaluation that took less than five weeks to prepare and deliver, takes the tack that the longer build-out will make no difference. This is far from the case.

22. The most glaring deficiency of the Technical Analysis is its failure to consider or evaluate the long-term cumulative effects of 25 years of ongoing construction on the health of the surrounding neighborhoods. Not the physical health of residents but the fabric of the neighborhood: the willingness of residents to stay in the face of prolonged construction, the willingness or reluctance of owners to make improvements or renovate existing housing stock, the impacts on local businesses – in short, the impact of Project construction over 25 years in diminishing the ambiance and natural growth of adjacent areas. There is no secret about this; the adverse impact of prolonged major construction on immediate and adjoining neighborhoods was first highlighted in The Power Broker, Robert Caro's acclaimed biography of Robert Moses. An example in point is the Cross Bronx Expressway, which, due the damage it imposed as a result of eminent domain takings, its physical configuration and the many years required to complete the project (from 16 to 24 years, depending on whether the Bruckner interchange is included)

overwhelmed viable neighborhoods and diminished their livability for decades [Caro, The Power Broker, Vintage Books Edition, 1975, pp. 860-61, 886-94]. Another example, closer at hand, is the Gowanus Expressway, the construction of which decimated the adjoining neighborhoods [Caro at pp. 520-25]. Yet despite this history, the Technical Analysis does not address the cumulative implications of long-term construction or otherwise identify the potential of the negative effects on the well-being of adjoining neighborhoods.

23. Instead, the Technical Analysis evaluates each area of potential impact in isolation. What it has done is simply to take a series of separate elements – traffic, noise, neighborhood character and the like – and assessed them separately; and it has compounded this approach by evaluating impacts on a “localized” basis, as if the Project were a series of separate buildings. Nowhere is there to be found an analysis of the overall implications to the surrounding neighborhoods of 25 years of continuous construction.³ Yet, the CEQR Technical Manual, in placing emphasis on the *duration* of the construction process as a key factor to consider [CEQR Technical Manual, Chapter 22, pp. 1, 6, 9, 10], clearly anticipated such an evaluation. The Atlantic Yards Project is as massive in its plans for new buildings as the Cross Bronx Expressway was in the highway context. In the light of this history and that of other large-scale projects in the

³ At one point, the Technical Analysis acknowledges that that the Project would have “significant adverse neighborhood character impacts in the vicinity of the Project site during construction, but these impacts would be localized and would not alter the character of the larger neighborhoods surrounding Project site.” (Technical Analysis, p. 69) However, there is nothing in the Analysis that supports this assertion – no reference to other similar situations, no citation of studies regarding the cumulative impacts of long-term construction on adjoining neighborhoods. It is simply a bare statement made by the unknown authors of the document.

City, the overall (or cumulative) impacts of the extended construction schedule should have been, but were not, addressed.

24. Expanding upon the approach taken in the 2009 Technical Memorandum, the Technical Analysis dismisses many adverse impacts resulting from the extended construction schedule as simply being “temporary.” For example, in assessing the impact of the Extended Build-Out Scenario on Open Space and the requirement that eight acres of publicly accessible open space be provided, the Analysis justifies its assertion that no new impacts are involved beyond those described in the FEIS by stating that “the temporary impact identified in the FEIS would extend longer, but would continue to be addressed by the incremental completion of the Phase II open space.” (Technical Analysis, p. 50) In this case, however, the “temporary” negative impact will last up to 15 years longer than assumed in the FEIS – 15 years in which the adjacent neighborhoods will be without the promised open space benefits of the Project (which, among other things, were the basis of ESDC’s approval). It is as if time has no bearing on the assessment of impacts -- as if “duration” is irrelevant under SEQRA. But the law does not support such an approach. Three years without adequate open space is an impact that might be characterized as “temporary;” 15 years is something else and represents a significant change compared to the situation evaluated in the FEIS. Contrary to ESDC’s essentially unsupported conclusion found at page 34 of its Response to the Court, a thoughtful examination of the consequences required an SEIS.

25. As set forth in the Affidavit of Stuart Pertz submitted in support of the Supplemental Petition, another basic omission in the Technical Analysis is the absence

of a detailed project plan or schedule that sets out how the 25-year construction effort would be organized. Such a plan or schedule was provided in the 2006 FEIS, but this was for a 10-year build-out; and this exact same plan, pushed forward three years, was what as used in connection with the approval of the MGPP. (The schedule is reproduced as Figure 2 in the Technical Analysis.) However, no similar schedule has been developed for the 25-year build out. As a result, the specific activities that will be taking place at different times due to the slower pace of construction (Phase 1, for example, is unlikely to be completed for 12 years, whereas under the plan presented in the FEIS, it was to be fully constructed in four years) are not spelled out, or spelled out clearly, so that, as one example, the identification of sites that will be used for staging – the storage, handling and delivery of construction materials and equipment) is left murky at best and appear to conflict with demands for Arena and construction working parking (see Technical Analysis at pp. 47-49, 70-71).⁴ In ESDC's haste to respond to the Court's November 9 Decision, there was apparently not time enough for it to develop a new construction schedule equivalent to what was used for the 10-year build-out/ But this is what was needed if there was to be an accurate analysis of the impacts. ESDC's failure to have done so made it impossible to assess what the specific impacts of the elongated build-out would be.

26. There are many other significant omissions and distortions in the Technical Analysis that evidence the inadequate and pro forma nature of the evaluation it contains

⁴ In its supposed analysis of construction staging, the Technical Analysis effectively omits any evaluation of how such staging will be handled during construction of the remaining Phase 1 buildings, skipping from completion of the Area (Stage 1) to the completion of Phase 2 (Stage 2) without any identification of where materials will be stored, how construction equipment will be accommodated, etc. (see pp. 51-52, 70-71).

and the conclusions that it reached and the ESDC Board relied on. The most important of these are described below.

27. Block 1129. Under the 10-year construction scenario, Block 1129 was to be use for interim parking and construction staging for four years, following which underground parking would become available [FEIS, p. 17-10]. Under the 25-year build-out schedule, it would instead remain as a surface parking lot (accommodating Arena and other traffic) and also be used as a staging site for 12 years or more. Block 1129 lies between two other blocks in the Prospect Heights Historic District and is directly across the street from a residential area. The residents of the other blocks, as well as pedestrians in general, will thus have to contend with the adverse impacts of a huge lot filled with autos, construction vehicles and construction equipment for three times longer than had been assumed and evaluated in the FEIS. For the nearby residents, the eight years of additional impacts would include the pollution of their views, the congestion from the traffic and, perhaps more than any other negative, the *noise* of a facility that will be active from dawn (when construction workers arrive) to late at night (when the crowds from the last of the Arena shows – whether a basketball game or the Circus or some other event – exit in search of their cars). Moreover, because of the delay in the build-out of the Project and the staggered purchase of MTA parcels by FCRC, other interim parking lots the FEIS assumed would be available will not be (see Paragraph 30 below). As a consequence, the demands for parking on Block 1129 have increased, and this, in turn, has required the developer to turn to “stackers” to meet that demand [Technical Analysis, p. 49] – something not planned under the 10-year construction schedule [see

2006 FEIS, p. 12-48]. The stackers will add to the noise that will be especially intrusive at night; yet no analysis of the impact has been provided – not for one day, much less over 12 years. In fact, the noise impacts of the surface parking lot have never be studied – not only the impact of the stackers but of doors being slammed, engines starting up, horns blowing, tires squealing and users talking in loud voices – and not for one year, much less 12. This constitutes a very significant change in impacts on a large number of people for many years. There is nothing temporary about it, notwithstanding the lame disclaimers provided in the Technical Analysis.

28. Delay in Underground Parking. Under the 10-year construction schedule, underground parking for the Arena was to be provided once Phase 1 was completed. This was held out as a major element of mitigating adverse environmental impacts by buffering the adjacent neighborhoods from the noise and other negative impacts that accompany surface parking. This mitigation will be lost for eight years or more as a result of the delays in completing Phase 1 and slower progress anticipated for Phase II construction. This, too, represents a significant change that was not addressed in the FEIS or the Technical Analysis.

29. Construction Staging. Under the 10-year construction scenario, Block 1129 was to be used for construction staging in the four years it would have taken to fully build out Phase 1 of the Project [FEIS, p. 17-10]. Now, however, Phase 1 may take as long as 12 years to complete, requiring the use of Block 1129 for staging for a much longer period than had previously been assumed and evaluated. This may not be possible, however, due to the demands placed on the Block for parking – and not only

for the Arena but also for construction workers and the police. Indeed, the Technical Analysis, in elliptical fashion, suggests that the staging plans for Phase 1 are now uncertain [see Technical Analysis, pp. 47-49, 70-71], leaving open the very real possibility that some or most of such staging will end up taking place in the surrounding streets. This would have significant impacts in terms of traffic, air quality and noise as compared to the presentation in the FEIS based on the 10-year build out. However, there has been no identification or analysis of this potential, which is a direct result of extended construction schedule and the delayed progress of Phase 1.

30. Elimination of Interim Parking. Two interim surface parking lots assumed in the 2006 FEIS [page 12-48] – 182 spaces at the southeast corner of Block 1120 and 470 spaces in a midblock lot on the same block – have been eliminated according to Figures 9 and 10 of the Technical Analysis, presumably because FCRC will not have acquired the properties upfront. This further compounds the complexities of providing parking for the Arena and other activities over the 12 years it will take to complete Phase 1. This change, which appears to be a direct result of the change in the acquisition and construction schedules allowed under the MTA Agreement and the MDA, has not been explained or studied in the Technical Analysis.

30. Multiple Arena Events. FCRC has recently announced that it has booked the Ringling Brothers Barnum & Bailey Circus for the Arena [see the announcement at http://www.barclayscenter.com/press/articles/feld_ent.shtml], a copy of which is annexed to this Affirmation and Exhibit D]. Based on its operations at Madison Square Garden and other venues, the Circus will present two or three shows a day on weekends and

two on some weekdays. Other booked acts, such as Disney on Ice, may also present more than one show a day. This is a new development that was not addressed in the FEIS, the Technical Memorandum or the Technical Analysis; the worst case analyzed in those documents assumed only one show a day. Multiple shows a day will have significantly greater impacts than those presented in the environmental analyses to date. Traffic congestion will extend over longer periods and the emission of air pollutants will be much greater as a result. This has particular implications in terms of the 8-hour ambient air quality standards, which cumulate emissions over that period of time; a second event with eight hours of the first would have the potential to cause a violation that would not have been projected assuming only a single show, as the FEIS did for its worst case evaluation. The imminent booking of the Circus was undoubtedly known to ESDC at the time it prepared the Technical Analysis, but was not mentioned in that document.

30. The deficiencies of the Technical Analysis set forth above and others of equal importance are described in the affidavit of Stuart Pertz, FAIA, also submitted in support of the Supplemental Petition. Mr. Pertz, a former member of the City Planning Commission, is an architect and urban planner who brings his professional expertise to bear on the adequacy of the Technical Analysis and finds it fundamentally flawed. This is no surprise given the haste with which that Analysis was prepared in ESDC's continuing efforts to disclaim and cover up its error in using a 10-year build-out to analyze impacts when it approved the MGPP. The Petitioners submit that the facile and incomplete approach taken by ESDC in the Technical Analysis, with its conclusion that

the impacts of 25 years of construction will not be significantly different than those imposed by a 10-year construction schedule is simply a continuation of those efforts that should be called what it is and rejected by the Court.

Conclusion

31. For the reasons set forth above and in the other papers submitted in support of the Supplemental Petition, the Petitioners respectfully ask the Court to annul ESDC's approval of the MGPP and the December 16 Findings and enjoin further work on the Project unless and until ESDC complies with SEQRA.

Dated: January 17, 2011



Albert K. Butzel



Monday, April 27, 2009

Development amid Deficits, Building amid Budget Gaps

On/Off The Record: Marisa Lago

By City Hall

Empire State Development Corporation President and CEO Marisa Lago was the featured speaker at an On/Off the Record breakfast held **April 8 [2009]** at the TD Bank flagship location on 42nd and Madison. With the economy very much on everyone's mind, Lago discussed how her agency approaches development during a recession, the status on several of the major projects within her purview and the future she would like to see for both Empire Zones and the film tax credit. ***What follows are selections from the on-the-record transcript.***

Q: You work for an economic development agency in New York. At this moment of recession, is the Empire State Development Corporation an oxymoron?

A: I actually think, far from it. Economic development is getting back to the basics, whether one is in a boom economy or in an economy much more challenging, like the one now. And what are the basics? The basics are jobs. When one is in a boom economy the focus tends to be more on attracting new jobs; that doesn't go away in a recessionary economy, but it does heighten the importance of hanging on to the jobs that we already have, so that is one of the shifts in focus. The second, which is a core facet of economic development, is infrastructure. A focus on what government can do through patient investing to put in place the infrastructure so that when the economy rebounds—note I say 'when,' not 'if'—when the economy rebounds, we have in place the infrastructure so that the private sector can then invest on top of it, taking advantage of the infrastructure. The other thing about economic development, whether in a boom time or a recessionary time, is that it has to focus on all of the sectors of the state's economy.

Q: Can you tell us which initiatives have had to be put aside, or which projects have had to be shelved for right now, or at least delayed?

A: I think there's a realism about what can get done now, and let me use an example of the Javits Convention Center. I think of that as Empire State Development's own mini-stimulus package. A few weeks ago our board approved \$463 million worth of construction. That's almost half-a-billion worth of construction, large by any measure. And what is going to be done with that \$463 million? There's going to be a 100,000-square-foot addition on the block north of the current convention center. That expansion space will allow portions of the existing Javits to be taken out of commission for a very significant rehab, a new roof, a new exterior, new heating/ventilation systems. And so one could look and say, "Ahh, a gleaming, doubling-the-size new convention center, that was put on the shelf?" I think that's the wrong lens to look at it—rather to say, we are going to Javits Convention Center, bringing it into the modern age, we're going to do a rehabilitation without shutting it down, keeping the same capacity, and we have \$463 million worth of construction in the city at a time when those jobs are so needed. So that's what I call the new realism.

Q: What is the status on Atlantic Yards?

A: Obviously a challenging project. Again, projects conceived in a different time and in a different economy. But, one, now the focus is very much on moving forward with the Nets stadium and with the housing that is on that first block, the first phase of the project. Attenuated timelines, I think, are a reality for private-sector and for public-sector projects; there's nothing wrong with that. You look

Exhibit A

at the history of the transformational projects that have occurred in the city—earlier I was discussing with some of the folks here Roosevelt Island, the project that has grown over decades; 42nd Street, a project that has grown over the past 25 years—and the scale of the Atlantic Yards is similar in that it is remaking, re-knitting a portion of the city. So, as I said: [we are] focusing on what can get done now in the current climate, what is finance-able now, and also *recognizing that it is a project that is scheduled to grow out over multi-years, decades, not months.*

Q: What dates are we looking at for completion, and what does it look like when it's done?

A: With respect to Atlantic Yards, our focus is on the first phase, on the arena and the attendant community benefits and housing that surround it, and with respect to particular dates, one doesn't know, I think that it is a folly to say that. But, are we driving it aggressively? Absolutely.

Q: So we don't know yet when the first basket will be scored in the Nets arena?

A: You know the history of predicting dates for it. I think the important thing is the commitment that the government has, that the city/state government has in working with Forest City to drive the project forward.

WNYC News

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Ratner Abandons 10-Year Timeline for Atlantic Yards

Tuesday, September 28, 2010

By Matthew Schuerman



[Enlarge](#)

Design for Public Plaza in front of Barclays Center arena at Atlantic Yards (SHoP Architects, P.C.)

Developer Bruce Ratner said Tuesday morning what many of his critics and even some of his associates have been saying for years: there is no way the entire Atlantic Yards project will be done in 10 years.

He said the 10-year timeline was always misunderstood. It was never meant to be more than a best-case scenario to be used in environmental impact statements.

"That was really only an analysis as to what the most serious impacts [would be], if all the other planned development in downtown Brooklyn happened right away," Ratner said. "It was never supposed to be the time we were supposed to build them in."

He added: "I would say it's really market-dependent as to when it will really be completed."

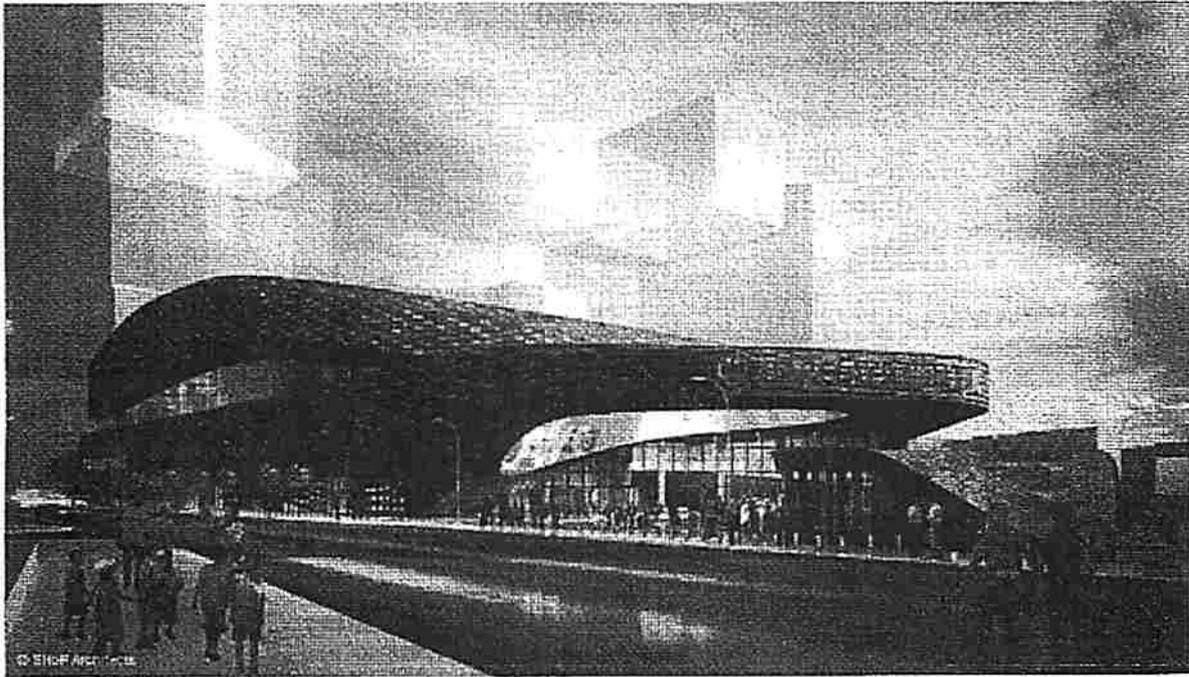
But the 10-year-timeline was also used by the city, state and Ratner's own consultant to determine that the financial benefits to the public outweighed the roughly \$300 million in direct subsidies the project is receiving. But the longer the construction schedule, the longer it will take the government to accumulate the benefits—in terms of income taxes from people who move into the complex, property taxes on the new buildings and other sources.

Daniel Goldstein, a chief opponent of the project who until recently lived in the project's footprint said that Ratner's admission undermines the official reason for state support of the project: to remove the blight on the six Brooklyn blocks that make up the footprint.

Exhibit B

"What we have now is a site that was not blighted turning into a dormant site, nearly 20 acres of vacant lots and parking lots for 20, 25, 30, 40 50 years," Goldstein said. "What was not blighted has become blighted for a very long time."

Goldstein, who lived in a recently converted condominium in the project's footprint, until being bought out, never believed the area was blighted in the first place.



Latest design by SHoP Architects, PC of Barclays Center

The longer construction timetable also affects many of the assumptions the state and city made regarding whether the project is worthwhile for taxpayers to support, according to George Sweeting, deputy director of the city's nonpartisan Independent Budget Office. That's because the government is contributing about \$300 million in subsidies in today's dollars — but might not get that amount back for another 25 or 30 years, when that amount will be worth less.

"Those dollars — if you have to wait 15 years for them — are worth less in terms of today's dollars," Sweeting said.

The IBO, in conducting a cost-benefit analysis on Atlantic Yards last year, only considered the tax revenues from the basketball arena and ignored the impact of new residents and workers in the 16 other buildings because their construction dates were so uncertain. That analysis concluded that the arena would cost the city about \$40 million more in subsidies than it would yield in new taxes. The IBO's analysis was attacked by Mayor Michael Bloomberg and Ratner's company, Forest City Ratner.

By contrast, the city, state and Forest City all conducted or commissioned economic impact analyses that assumed a 10-year build out.

Ratner made his comments Tuesday morning after unveiling the design for the public plaza that will be constructed in front of the Barclays Center basketball arena, the centerpiece of the 22-acre site. Ratner said its construction was proceeding well, and the arena would open in the summer of 2012, in time for the Nets to play their 2012-13 season.

He also said that construction on the first residential tower—a mixed-income building—would likely begin in 8 to 10 months. But Ratner, the chief executive of Forest City Ratner, said the schedule for breaking ground on the remainder of the project—15 other buildings spread from Flatbush to Vanderbilt Avenues, just south of Atlantic Avenue—depending on when the economy rebounded.

One of Ratner's top aides, Maryanne Gilmartin, said that Atlantic Yards was always supposed to be market-driven.

"We always said it would be market-dependent," she said.

While the official agreement among Forest City, the state and the city, gives the developer 25 years to build out the entire site before penalties kick in, Ratner's associates repeatedly used the 10-year time frame in talking to the press and the public.

In a July 2006 PowerPoint presentation to potential tenants of the affordable apartments held at the Marriott hotel in downtown Brooklyn, Forest City Ratner and its housing partner, the now-defunct Acorn organization, told participants that the "final building [would be complete] in 2016"—assuming a groundbreaking later that year.

Less than a year later, after the project got held up in court, Ratner's then-project manager, Jim Stuckey, reiterated the 10-year timeline.

"We don't believe it is going to take 20 years," Stuckey told *The New York Observer* in February 2007. He was in charge of the project at the time. "We expect that it will take 10."

He was responding to an assertion by the project's landscape architect, Laurie Olin, that the build-out really would take much longer than publicized.

Last September, after Forest City rearranged its agreement with the state, a Forest City spokesman was again asked whether the construction schedule had been lengthened to 20 years.

"No, the plan is to build it in the ten-year time frame," the spokesman, Joe DePlasco, said in an e-mail.

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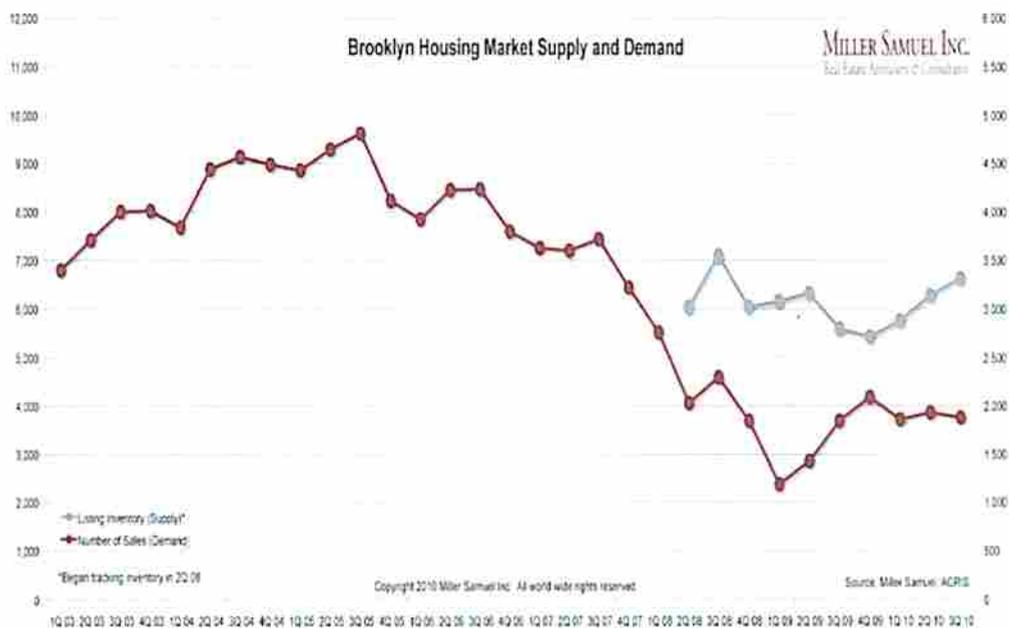


EXHIBIT C



Brooklyn
SPORTS & ENTERTAINMENT™



Contact:

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FELD ENTERTAINMENT, INC. TO BRING TOP FAMILY ENTERTAINMENT TO THE BARCLAYS CENTER IN BROOKLYN

Ringling Bros. and Barnum & Bailey Circus, Disney On Ice, and More to Perform Annually

(Brooklyn, NY) - Feld Entertainment, the world's largest producer of live family entertainment, will bring a range of top family events to perform annually at the world-class Barclays Center in Brooklyn.

Several of Feld Entertainment's live action productions to be staged at the Barclays Center include Ringling Bros. and Barnum & Bailey Circus, Disney On Ice, Disney Live!, Monster Jam, AMA Arenacross (AX), and Nuclear Cowboyz freestyle motocross. Overall, Feld Entertainment's productions will hold at least 48 total performances annually at the Barclays Center.

The Barclays Center, which began to erect steel vertically last month, is scheduled to open in late spring/early summer 2012. Feld Entertainment's productions, which attract more than 30 million people each year, will be part of the more than 200 events annually at the Barclays Center.

Exhibit D

Most suite buyers for the 104 suites will have access to all Barclays Center events, which, in addition to Feld Entertainment's family shows, will include an extensive range of professional and collegiate sports, world-class concerts, NETS Basketball, and much more.

"The Barclays Center will be all about family, entertainment, and fun for people of all economic means," said Bruce Ratner, Chairman and CEO of Forest City Ratner Companies, the developer of the Barclays Center. "I can't wait to see circus elephants marching down Flatbush Avenue and into the Barclays Center, where they will entertain ladies and gentlemen and children of all ages. We look forward to the Barclays Center creating memories that will last a lifetime."

"We are thrilled to align with Feld Entertainment and to offer guests of the Barclays Center the world's most popular family entertainment events," said Brett Yormark, President and CEO of Brooklyn Sports & Entertainment, the sales and marketing arm of the Barclays Center. "As the opening of this world-class sports and entertainment venue draws closer, we continue to demonstrate that the best and most diversified programming is in store for the Barclays Center."

"We look forward to bringing Feld Entertainment's diverse portfolio of live family entertainment productions to the Barclays Center," said Stephen C. Yaros, Vice President, Event Marketing & Sales for the company's Northeast Region, which includes New York City. "The addition of this new state-of-the-art venue in Brooklyn will further enhance Feld Entertainment's commitment to giving families throughout the metropolitan area a huge variety of entertainment options."

Earlier this year, Brooklyn Sports & Entertainment announced several major alliances with top event management companies and promoters to bring the best events to the Barclays Center such as: IMG, which will bring 25 major college basketball and college hockey events annually; Golden Boy Promotions, whose president is 10-time World Champion Oscar de la Hoya, which will promote a minimum of 12 major professional boxing events a year; and Lagardere Unlimited, which will stage several major tennis events annually.

About the Barclays Center

The state-of-the-art Barclays Center, to be located at Atlantic and Flatbush Avenues, will host more than 200 events annually, including professional and collegiate sports, major concerts, family shows, NETS Basketball, and more. The arena will offer 18,500 seats for basketball and up to 19,500 seats for concerts, and will also have 104 luxury suites, including 15 Brownstone Suites (16 seats each), 68 Loft Suites (10 seats each), 11 Cabana Suites, six Studio Suites, and four Party Suites. The arena will also include six clubs and restaurants.

The Barclays Center, designed by the award-winning architectural firms Ellerbe Becket and SHoP Architects, will be one of the most intimate seating configurations ever designed into a modern multi-purpose arena, with unparalleled sightlines and first-class amenities.

In addition to Barclays, the naming rights partner, the Barclays Center currently has 12 major

partners, including: ADT, Cushman & Wakefield, Stolichnaya, EmblemHealth, MetroPCS, MGM Grand at Foxwoods, Willis, Jones Soda, Haier America, Phillips-Van Heusen, Anheuser-Busch, and High Point Solutions.

For more information on the Barclays Center log on to www.barclayscenter.com.

About Feld Entertainment

Feld Entertainment, Inc. is the worldwide leader in producing and presenting live family entertainment that lifts the human spirit and creates indelible memories, with 30 million people in attendance at its shows each year.Â Feld Entertainment's productions have appeared in more than 70 countries and on six continents to date and include Ringling Bros. and Barnum & Bailey, Feld Motor Sports, Disney On Ice, and Disney Live!. Additional information on Feld Entertainment can be found at www.feldentertainment.com.

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The Nets move to Brooklyn is pending NBA approval.

[Text-Only Version](#)

Supreme Court of the State of New York
County of New York

Develop Don't Destroy (Brooklyn), Inc, et al.

v.

Empire State Development Corporation

Index 114631/09

Prospect Heights Neighbourhood Dev. Council, Inc.

v.

Empire State Development Corporation

Index 116323/09

The parties stipulate as follows:

- 1) IF petitioners decide to challenge the ESDC Directors' findings of December 16, 2010, they shall file a supplemental petition pursuant to CPLR 3025(b) on or before January 18, 2011.
- 2) Petitioners consent to respondents' cross-motions for leave to appeal the Court's November 9, 2010 order (entered November 10, 2010).
- 3) Respondents agree not to perfect their appeals until the earlier of June 22, 2011 or this Court's ruling on petitioners' supplemental petitions, without prior leave of this Court.

Exhibit E

- 4) Petitioners agree to withdraw their current motions for a stay of construction without prejudice.
- 5) The Prospect Heights Neighborhood Development Council petitioners (Index 116323/09) withdraw their pending motions for costs and sanctions pursuant to 22 NYCRR § 130-1.1.

FOR Develop Don't Destroy Petitioners
 Jeffrey L. Kell (Tang Sources LLC)

Petitioners

FOR Prospect Heights Neighborhood Dev. Council
 Robert K. B... LLC, ~~and~~ Law Office

Respondent
 FOR Empire State Development ~~Corporation~~ Corporation

Philip E. Kannel, Bryan Cave LLP

Respondent
 FOR Forest City Ratner Companies, LLC

Jeffrey L. ... known as ... LLC
 ... LLC

So Ordered:

MARCY S. FRIEDMAN

Marcy Friedman 12-22-10