

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	:	Index No. 116323/09
	:	IAS Part 57
PROSPECT HEIGHTS NEIGHBORHOOD	:	
DEVELOPMENT COUNCIL, INC., et al.,	:	
	:	VERIFIED ANSWER
Petitioners,	:	OF RESPONDENT
	:	EMPIRE STATE
For a Judgment Pursuant to Article 78 of the	:	DEVELOPMENT
Civil Practice Law and Rules	:	CORPORATION TO THE
	:	SUPPLEMENTAL PETITION
	:	
- against -	:	
	:	
EMPIRE STATE DEVELOPMENT	:	
CORPORATION, et ano.,	:	
	:	
Respondents.	:	

Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) in answer to the Supplemental Petition, sets forth its Affirmative Statement of Facts pursuant to CPLR § 7804(d) and, thereafter, its Answer to the Supplemental Petition as follows:

AFFIRMATIVE STATEMENT OF FACTS PURSUANT TO CPLR § 7804(d)

1. The factual statement presented below is based principally on the Administrative Record (“AR”) of 13 volumes (pages numbered 1-7630) previously filed

with the Court¹ and the Supplemental Administrative Record (“SAR”) of 3 volumes (pages numbered 7631-9211) filed with this Answer.

A. The Urban Development Corporation Act Authorizes Esdc To Plan And Implement Projects.

2. The Urban Development Corporation Act (“UDCA”) authorizes ESDC to plan various types of “projects.” The two categories relevant to the Atlantic Yards Project (“Atlantic Yards” or the “Project”) are a “land use improvement project” and “civic project.” UDCA § 10(c)-(d), Unconsol. L. § 6260(c)-(d). AR 3664-71, 4717-24.

3. ESDC projects are outlined in a “General Project Plan” (or “GPP”) as specified in UDCA § 16, Unconsol. L. § 6266. To proceed with a project, the UDCA requires that ESDC: (i) create and adopt the GPP (*see* UDCA § 16(2), Unconsol. L. § 6266(2)); (ii) hold a public hearing on the adopted GPP (*see id.*); (iii) affirm the GPP as adopted or, alternatively, affirm a modified GPP (or “MGPP”) (*see id.*); and (iv) thereafter implement the GPP (or MGPP) through business agreements with one or more developers or other participants (*see* UDCA §§ 6, 9, Unconsol. L. §§ 6256, 6259).

B. In 2006, ESDC And MTA Approved the Atlantic Yards Project, Establishing Its Basic Parameters.

4. More than four years ago, on December 8, 2006, ESDC approved the Atlantic Yards Project after conducting a coordinated public review process pursuant to the State Environmental Quality Review Act (“SEQRA”), the UDCA and the Eminent

¹ In Develop Don’t Destroy (Brooklyn), Inc. v. ESDC (Index No. 114631/09), the documents constituting the thirteenth volume were filed on November 24, 2009 as an exhibit to an affirmation of Philip E. Karmel.

Domain Procedure Law (“EDPL”). ESDC concluded these administrative processes by (i) adopting a Findings Statement under SEQRA (AR 3538-631); (ii) affirming a Modified General Project Plan under the UDCA (the “2006 MGPP”) (AR 3632-4170); and (iii) issuing the Determination and Findings required by the EDPL.

5. In the 2006 MGPP, ESDC made the findings required for a “land use improvement project.” *See* UDCA § 10(c), Unconsol. L. § 6260(c). ESDC found, *inter alia*, that the Atlantic Yards Project site was characterized by substandard and insanitary conditions and that the Project will eliminate these conditions by redeveloping the site. *See* AR 3664-66 (2006 MGPP at 33-35). The substandard and insanitary conditions of the Project site were documented extensively in the Blight Study dated July 2006. AR 3790-4170.

6. In the 2006 MGPP, ESDC also made the findings required for a “civic project.” *See* UDCA § 10(d), Unconsol. L. § 6260(d). ESDC found, *inter alia*, that the Arena will provide a needed venue for the relocation of the New Jersey Nets to Brooklyn, for the athletic teams of local colleges and academic institutions, and for cultural and community events; that the eight acres of publicly accessible open space will be a significant public amenity; that the new subway entrance at the southeast corner of Atlantic and Flatbush Avenues will improve access to the subway and public safety; and that the new rail yard will improve the operations of the Long Island Rail Road (“LIRR”). *See* AR 3667-68 (2006 MGPP at 36-37).

7. The 2006 MGPP established the basic parameters of the Project. As outlined in the 2006 MGPP, its 17 buildings and open space will occupy an

approximately 22-acre area encompassing all or portions of eight blocks, as well as some adjoining street segments. The Project's features have not changed materially since that time.

8. An approximately nine-acre LIRR rail yard – in a below-grade open cut – has for many decades occupied Lot 7 of Block 1119, Lot 1 of Block 1120 and Lot 1 of Block 1121 on the Project site. One element of the Project is to rebuild the rail yard so that it is even further below grade – allowing the rail yard and the LIRR trains to be covered with an at-grade platform, buildings and open space.

9. Paragraphs 10-12 describe the Project as set forth in both the 2006 MGPP and 2009 MGPP.

10. Construction of the 17-building development has been divided into two phases. In Phase I, the Arena and four other buildings will be constructed on Blocks 1118, 1119 and 1127 and the adjoining segments of Fifth Avenue and Pacific Street (collectively, the “Arena Block”). Phase I also includes construction of: a fifth building on a portion of Block 927 (“Site 5”), a new subway station entrance on the Arena Block, a new LIRR rail yard on Blocks 1120 and 1121 and the eastern portion of Block 1119, permanent below-grade parking facilities on the Arena Block and Site 5, and interim surface parking lots on portions of Block 1120 and Block 1129. AR 3639-46 (2006 MGPP at 8-15); AR 4692-98 (2009 MGPP at 9-15).

11. Phase I requires clearing all buildings on the Arena Block, Block 1129, the eastern end of Block 1121 and Site 5. These areas of the Project site encompass most of the lots documented in the 2006 Blight Study for the Project as

exhibiting blight characteristics. AR 3831-36, 3852-964, 3983-4059, 4077-156 (Blight Study at C-14–C-19, C-35–C-147, C-166–C-242, App. A). Therefore, virtually all of the buildings contributing to the substandard and insanitary conditions at the site will be demolished in Phase I.

12. Phase II consists of development of the remainder of the Project, including 11 buildings with residential, local retail and community facility uses, and eight acres of publicly accessible open space. Six of the Phase II buildings (Buildings 5, 6, 7, 8, 9 and 10) and the open space adjacent to those buildings will be built on a platform constructed over the LIRR rail yard, in the air space acquired from MTA. AR 3646-49 (2006 MGPP at 15-18); AR 4698-702 (2009 MGPP at 15-19).

13. On December 13, 2006, the Board of the Metropolitan Transportation Authority (“MTA”) approved MTA’s participation in the Project, authorizing the sale of real property on Block 1119, Lot 7, the sale of the air rights over the LIRR rail yard, the reconstruction of the rail yard and the construction of the new subway entrance on the Arena Block.

C. The Litigation Challenges To The 2006 Project Approvals.

14. After ESDC’s approval of the Project on December 8, 2006 and MTA’s approval of the Project on December 13, 2006, several litigations were brought to challenge these and other related approvals of the Project. The lawsuits were all rejected on the merits in final decisions that are beyond further appeal or review. *See Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d 312 (1st Dep’t), *lv. to appeal denied*, 13 N.Y.3d 713 (2009) (“DDDB I”), *Anderson v. N.Y.S. Urb. Dev. Corp.*, 45

A.D.3d 583 (2d Dep't 2007), *lv. to appeal denied*, 10 N.Y.3d 710 (2008); Goldstein v. N.Y.S. Urb. Dev. Corp., 13 N.Y.3d 511 (2009); Goldstein v. Pataki, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008); Anderson v. N.Y.S. Urb. Dev. Corp., Index No. 106056/08 (Sup. Ct. N.Y. Co. 2008). Nevertheless, the litigation challenges delayed acquisition of the Project site by eminent domain.

D. Substantial Construction Work Took Place After the Project Approvals in December 2006.

15. Despite the delays in acquisition of the site, ESDC and the private developer – Forest City Ratner Companies and its affiliates (collectively, “FCRC”) – went forward with the Project’s implementation after its approval in 2006.

16. Between 2006 and 2009, FCRC – which had acquired most of the parcels on the site through market purchases – removed numerous buildings on the Arena Block and Block 1129 to clear the site for construction.

17. FCRC also performed extensive utility work to re-route or replace sewers, water lines, electric lines and other in-street facilities to prepare the Arena Block for excavation.

18. Finally, pursuant to a license agreement with MTA, FCRC built a temporary rail yard adjacent to the original rail facility. (This temporary facility is needed to accommodate the LIRR trains while the original rail yard is removed, the grade of that land is lowered, and the new, permanent rail yard is built.)

E. In 2009, ESDC and MTA Modified Their 2006 Project Approvals to Phase Acquisition of Property for the Project.

19. In the summer of 2009, ESDC and MTA modified their earlier December 2006 Project approvals to allow the Project to move forward in the face of the serious downturn in the real estate market. The principal change to the plans was that instead of requiring FCRC to pay for the acquisition of the entire 22-acre Project site up front – in some cases years before the acreage was needed for the Project – ESDC and MTA agreed to allow property to be acquired for the Project in phases. When a similar change had been made to ESDC’s 42nd Street Land Use Improvement Project at Times Square, which was also delayed due to a downturn in the real estate market, the First Department rejected challenges to that modification, holding that modifying the GPP to allow for phased property acquisition did not trigger the need for an SEIS. *See Wilder v. N.Y.S. Urb. Dev. Corp.*, 154 A.D.2d 261, 262-63 (1st Dep’t 1989).

1. On June 23, 2009, The ESDC Directors Adopted The 2009 MGPP For Public Comment.

20. On June 23, 2009, the ESDC Directors adopted a new Modified General Project Plan for the Project (the “2009 MGPP”) for public comment.

21. The 2009 MGPP and 2006 MGPP are virtually identical, as they both involve:

- the same Project site, AR 3633, 3677 (2006 MGPP at 2, Exh. A-2); AR 4685, 4732 (2009 MGPP at 2, Exh. A-2);
- the same 17 buildings at the same locations, AR 3676 (2006 MGPP at Exh. A-1); AR 7072 (Updated Project Site Plan);

- the same uses in these 17 buildings, AR 3634-47, 3676 (2006 MGPP at 3-16, Exh. A-1); AR 4686-700 (2009 MGPP at 3-17); AR 7072 (Updated Project Site Plan);
- the same eight acres of publicly accessible open space, AR 3647-48 (2006 MGPP at 16-17); 4700-01 (2009 MGPP at 17-18);
- compliance with the same set of comprehensive Design Guidelines for the 17 Project buildings and eight acres of open space, AR 3637, 3638, 3678-786 (2006 MGPP at 6, 7, Exh. B); AR 4689, 4690, 4733 (2009 MGPP at 6, 7, Exh. B);
- a new LIRR yard with a new, direct portal to the Atlantic Terminal, AR 3643-45 (2006 MGPP at 12-14); AR 4696-97 (2009 MGPP at 13-14);
- a new subway entrance at the southeast corner of Atlantic and Flatbush Avenues, on the Arena Block, AR 3641-42, 3666-68 (2006 MGPP at 10-11, 35-37); AR 4693-95, 4713, 4720-21 (2009 MGPP at 10-12, 30, 37-38); and
- the same private developer, AR 3632 (2006 MGPP at 1); AR 4684 (2009 MGPP at 1).

22. Thus, the Project itself did not change materially as a result of the 2009 MGPP. The construction work taking place at the site today and which is planned in the future was contemplated and analyzed in the FEIS for the Project. *See* AR 115-17, 123-24, 126-27, 134, 161, 1094-99 (FEIS at 1-18–1-25, 2-6, 17-7–17-10).

2. On June 24, 2009, MTA And FCRC Agreed To New Terms For The Acquisition Of MTA's Air Rights.

23. On June 24, 2009, the MTA Board approved an outline of MTA's new business terms with FCRC (the "MTA Business Agreement"), which allow FCRC to acquire for the Arena the MTA property on the Arena Block first and then acquire the air rights on Blocks 1120 and 1121 for the Project over time. Under the MTA Business Agreement as described in the MTA staff summary dated June 22, 2009, the outside date

for FCRC's last purchase of air rights could occur as late as 2030. AR 4671 (Staff Summary, Att. at 2). The MTA Business Agreement also allows FCRC to acquire the air rights on a more expeditious schedule.

3. ESDC Prepared A Technical Memorandum To Determine Whether The Approval Of The 2009 MGPP Warranted An SEIS.

24. Prior to the Directors' adoption of the 2009 MGPP, ESDC prepared a Technical Memorandum dated June 2009 (the "2009 Technical Memorandum") under SEQRA. AR 4744-827. The 2009 Technical Memorandum examined the potential environmental impacts of the 2009 MGPP modifications and other changes in circumstances since preparation of the Final Environmental Impact Statement ("FEIS") in 2006 to determine whether, individually or collectively, they warranted preparation of an SEIS.

25. The 2009 Technical Memorandum examined the following changes to the Project that occurred after the FEIS in 2006:

(a) The acquisition of property by condemnation will occur in at least two phases, rather than all at once. The first phase includes the Arena Block, Block 1129, the adjoining segment of Pacific Street, Lots 42 and 47 of Block 1121 and Lot 35 of Block 1120 (collectively, the "First-Phase Properties"), which are the properties needed for the Arena, Arena parking, the new LIRR rail yard and the construction of these improvements. The remainder of the Project site will be acquired in a second phase or subsequent phases. AR 4677-78 (Staff Memo at 3-4); AR 4705 (2009 MGPP at 22); AR 4749 (Technical Memorandum at 4).

(b) At the initial stage of Project development, ESDC will acquire from MTA only the property rights and air rights on the Arena Block. The MTA air rights on Blocks 1120 and 1121 will be transferred to ESDC in one or more conveyances after FCRC constructs the new LIRR rail yard and as FCRC pays the allocated purchase price of each parcel to be conveyed. *See* AR 4678 (Staff Memo at 4); AR 4671 (Staff Summary, Att. at 2).

(c) The 10-year construction period identified in the 2006 MGPP was modified by shifting it forward three years, so that it would run from 2010 until 2019, *see* AR 4687, 4701 (2009 MGPP at 4, 18), but ESDC also acknowledged that the economic downturn could lead to further delays in the Project's completion. *See id.*; AR 4680 (Staff Memo at 6); AR 4808-16 (Technical Memorandum at 55-63).

(d) The design of certain Project elements has changed, within the parameters of the Design Guidelines (AR 3678-786), which were incorporated as an exhibit to the 2006 MGPP (and 2009 MGPP) and which have not changed. The Technical Memorandum identified and analyzed these design changes. AR 4680 (Staff Memo at 6); AR 4749, 4752 (Technical Memorandum at 4-5).

26. The 2009 Technical Memorandum analyzed whether the modifications to the 2006 MGPP, the three-year schedule shift outlined above – and potential further delays – along with the design changes would result in any significant adverse environmental impacts that were not disclosed in the FEIS prepared in 2006. AR 4748-49, 4752, 4755 (2009 Technical Memorandum at 3-6). It also assessed changes in background conditions and analysis methodologies. AR 4755-59 (2009 Technical

Memorandum at 6-9, Figure 6). It concluded that the proposed modifications to the 2006 MGPP, the potential for schedule delays and other changes would not result in significant adverse impacts that had not been previously disclosed in the FEIS. AR 4808, 4827 (2009 Technical Memorandum at 55, SC-1).

27. Of particular relevance to the claims petitioners pleaded in their initial Petition (and which they seek to re-litigate in their Supplemental Petition and supporting papers) are the 2009 Technical Memorandum's assumptions as to the "Build Year" for the Project. The 2006 FEIS assumed a 10-year construction schedule and utilized a 2016 Build Year for purposes of its environmental analysis. AR 1094-99 (FEIS at 17-7-17-10). The courts upheld the 10-year construction schedule assumption as reasonable for purposes of preparing the FEIS. *See* DDDB I, 59 A.D.3d at 318.

28. Because the 2009 MGPP did not make any significant changes to the design of the Project and FCRC advised ESDC that its 10-year construction schedule remained in place (with some minor modifications as to the construction sequence), the 2009 Technical Memorandum also used a 10-year timetable, as described above. AR 4687, 4701 (2009 MGPP at 4, 18); AR 4752, 4755 (2009 Technical Memorandum at 5-6).

29. Just as it had done in preparing the FEIS, ESDC retained a construction consulting firm (in this case, Earth Tech/AECOM) to scrutinize FCRC's revised 10-year construction schedule to determine its feasibility from a constructability perspective. AR 4658-65. Earth Tech/AECOM reviewed the new activity-specific construction schedule prepared by FCRC's construction consultant (Turner Construction

Company), which set forth in detail how the Project would be completed by 2019, and found it to be reasonable from a construction standpoint. AR 4660 (Earth Tech/AECOM Report at 3).

30. Nevertheless, because ESDC recognized that the 10-year construction schedule could be delayed by the poor economy, the 2009 Technical Memorandum included an analysis of whether a further delay in the Project would result in significant new environmental impacts that would warrant an SEIS (the “2009 Delayed Schedule Analysis”). AR 4808-16 (2009 Technical Memorandum at 55-63).

31. With respect to environmental issues that the FEIS Construction Chapter had assessed using *quantitative* methods (construction noise, vibrations, air emissions, traffic and parking), the 2009 Technical Memorandum noted that these quantitative analyses were based on the *peak periods* of construction, when multiple buildings are being built simultaneously under a 10-year schedule, resulting in peak levels of noise, vibrations, diesel emissions and construction traffic. *See, e.g.*, AR 1094-99, 1130, 1155, 1164, 1191 (FEIS at 17-7–17-10, 17-39, 17-56, 17-64, 17-80); AR 4799-807 (2009 Technical Memorandum at 49-54). The 2009 Delayed Schedule Analysis reasoned that if the construction schedule were to be stretched out so that, for example, only one building at a time were to be erected on the Project site, then the intensity of the construction activity would be *reduced*, compared to the concurrent construction *peak period* analysis presented in the FEIS for the aforementioned environmental issues. With an elongated construction schedule, there would be lower levels of construction noise, vibrations, diesel emissions and construction traffic during construction activity, as

compared to the concurrent construction scenario analyzed in the FEIS. The 2009 Delayed Schedule Analysis concluded that the delay scenario *reduces* the intensity of these construction impacts and does not warrant an SEIS. *See* AR 4816 (2009 Technical Memorandum at 63); *see also* AR 7063 (Response to Comments at 34).

32. The 2009 Delayed Schedule Analysis also addressed environmental issues (such as the impact of the construction work on neighborhood character) that the FEIS Construction Chapter had assessed using *qualitative* methods. The FEIS had determined that construction activity over a 10-year period would create significant levels of noise, construction traffic and other disruptions to the neighborhood over a lengthy period of time, and therefore would have a localized significant adverse impact on neighborhood character in the immediate vicinity of the Project site. *See* AR 1120-21 (FEIS at 17-29–17-30). The FEIS further noted that no portion of the Project site, or the immediately adjacent area, would be subject to the full effects of construction for the entire construction period, since the location of construction activities would move across the site as construction progresses. *Id.* The 2009 Delayed Schedule Analysis noted that a slower pace of construction would result in a Project that would be built more gradually and occupied as it was developed. In comparison to the compressed 10-year construction schedule analyzed in the FEIS, construction of the 17-building Project over the longer schedule would involve episodic construction of individual buildings in specific areas of the Project site, rather than uninterrupted, widespread construction-related activity across the site. *See* AR 4808-09 (2009 Technical Memorandum at 55-56). In the event of construction delays, major construction equipment would not be left on site in interim

periods between the construction of individual buildings (AR 4816 (2009 Technical Memorandum at 63)); temporary open space on unused parcels would be provided where feasible (AR 4693, 4701 (2009 MGPP at 10, 18); AR 4808-09, 4811, 4818-21 (2009 Technical Memorandum at 55-56, 58, A-2–A-3); AR 7043-44, 7048-49 (Response to Comments at 14-15, 19-20); and permanent open space adjacent to Project buildings would be provided as each building is constructed (AR 3775-85 (Design Guidelines at 98-108); AR 7031, 7044 (Response to Comments at 2, 15)). The 2009 Delayed Schedule Analysis found that an elongated construction schedule would extend the construction activities at the Project site but would not result in new significant impacts during the construction period. *See* AR 4815-16 (2009 Technical Memorandum at 62-63).

33. Finally, other environmental analyses undertaken in the FEIS and the 2009 Technical Memorandum relate to the impacts of the Project upon completion, rather than during the construction period. For these analyses, the 2009 Delayed Schedule Analysis used a delay Build Year of 2024, as illustrative of an extended delay in the anticipated 10-year construction schedule. ESDC determined that such a delay would not result in any significant adverse environmental impacts that were not addressed in the FEIS. AR 4816 (2009 Technical Memorandum at 63).

4. ESDC Published a Legal Notice Describing ESDC’s Proposed Lease, Development and Sale Terms.

34. At the June 23, 2009 meeting, the ESDC Directors authorized the publication of a notice of public hearing (the “Legal Notice”), pursuant to sections 6 and 16 of the UDCA, Unconsol. L. §§ 6256, 6266, for consideration of: (a) the 2009 MGPP

that had been adopted for public comment; and (b) ESDC's proposed lease, development and sale terms with FCRC. AR 4982-87. The Legal Notice further stated that ESDC had posted the 2009 MGPP and 2009 Technical Memorandum on its web site, and that ESDC would hold a public hearing on July 29 and 30, 2009. AR 4982-83. ESDC published the Legal Notice in the *Daily News* and *New York Post* on June 29, 2009. AR 4988-91.

35. The Legal Notice summarized the proposed terms to be negotiated in the future between ESDC and FCRC pertaining to the lease, development and sale of the Project site as follows:

(a) After acquiring title to the Project site (or areas thereof) by eminent domain, ESDC will enter into interim leases (the "Interim Leases") with FCRC for discrete subareas of the site. The Interim Lease for a particular subarea of the site would remain in effect until such time as construction of the building on that area begins. *See* AR 4983 (Legal Notice at 2).

(b) At the point that FCRC begins construction of one of the Project buildings on an area subject to an Interim Lease, the Interim Lease will be replaced by a new "Development Lease." Putting the Arena aside (which is subject to different contractual arrangements), ESDC will enter into 16 Development Leases – one for each of the 16 non-Arena buildings. *See* AR 4983-85 (Legal Notice at 2-4).

(c) Upon construction of a Project building, the Development Lease for that Project building will expire, and title to the building will be conveyed to FCRC. *See* AR 4986 (Legal Notice at 5).

(d) As to Phase I (*i.e.*, the buildings west of 6th Avenue), each Interim Lease will expire after 12 years (or earlier, as noted above, in the event of construction of a Project building on the area subject to the Interim Lease); the 12-year outside date is measured from a start date that occurred on May 12, 2010. *See* AR 4983 (Legal Notice at 2).²

(e) As to Phase II (*i.e.*, the buildings east of 6th Avenue), each Interim Lease will expire after 25 years (or earlier, as noted above, in the event of construction of a Project building on the area subject to the Interim Lease); the 25-year outside date is measured from the same start date of May 12, 2010. *See* AR 4983 (Legal Notice at 3).

(f) Similarly, each Development Lease for non-Arena buildings will expire in 25 years (or earlier, as noted above, in the event of the completion of construction of a Project building on the parcel subject to the Development Lease); the 25-year outside date is measured from the same start date of May 12, 2010. *See* AR 4985 (Legal Notice at 4).

(g) The Legal Notice thus provided public notice that under the business agreements ESDC proposed to negotiate with FCRC, the outside date for construction of the Project buildings would be in 25 years. It advised the public of ESDC's intention to enter into "Development Leases" that commence at the point FCRC begins construction of an individual Project building, expire when the construction of that building is completed and expire "in any event" no later than a 25-year outside date. AR 4985.

² The Project Effective Date is May 12, 2010. *See* ¶ 45(ix), *infra*.

5. ESDC Reviewed And Considered Public Comment On The 2009 MGPP And ESDC's Proposed Lease, Development And Sale Terms.

36. ESDC received numerous written comments, and many members of the public made oral comments at the public hearing held on July 29 and 30, 2009.

Comments were submitted on a wide range of issues, including on the timetable for the Project's construction.

37. ESDC responded to these comments in a "Response to Comments" document, included in the Directors' materials for their September 17, 2009 meeting. *See* AR 7029-65. As to the Project schedule, ESDC's explanation for its schedule assumptions was as follows:

ESDC recognizes that market conditions may impact the Project schedule, but a number of factors support not only the viability, but the need, for the Project on the anticipated 10 year horizon assumed in 2006.

- **Population Growth:** According to the U.S. Census Bureau, the 2008 population of Brooklyn is approximately 2.56 million, representing a 3 percent increase over the 2000 population of the Borough. According to the most recent DCP projections, the population of the Borough is expected to grow to 2.63 million by 2020. Accommodating this substantial population increase will require the construction of tens of thousands of additional housing units.

- **Housing Crises:** According to the Furman Center Report "Key Findings on the Affordability of Rental Housing from New York City's Housing and Vacancy Survey 2008" dated June 2009 (the "Furman Report"), Brooklyn currently has the lowest housing vacancy of the five Boroughs at 2.3 percent. This vacancy rate is far below the national vacancy rate of 8.0 percent. A residential vacancy rate of 5% or less is considered a housing emergency under New York State's rent stabilization law. The severe shortage of housing in New York City – and Brooklyn in

particular – implies a significant demand for housing, notwithstanding the anecdotal information of surplus housing submitted by several commenters.

- **Lack of Affordability:** Another indication of the general housing shortage in New York City is the high cost of housing in the City. According to a recent report by the Center for an Urban Future, a smaller share of homes in the New York City region are affordable for those earning the median income than any other metropolitan area in the United States. According to the same report, the City's average effective rent is nearly triple the U.S. average, pointing to the need for additional housing supply. Similarly, the Furman Report found that in 2008, 53% of New York renters were rent burdened (paying more than 30% of their monthly income on gross rent). The demand for affordable housing remains very high. The Furman Report states that the number of affordable housing units in New York City declined between 2002 and 2008, notwithstanding the construction of many new residential units during this period.

The anticipated population growth, extremely low vacancy rates and shortage of affordable housing imply a significant demand for new housing, notwithstanding the contrary assertions by commenters. The Project is needed to meet the City's housing goals (as described in PlaNYC 2030), and there is ample demand to absorb the incremental housing stock added by the Project. Although the Project contains more than 6,000 housing units, New York City contains approximately 3,190,000 housing units, according to the Furman Report. The Furman Report states that Brooklyn alone contains 927,472 housing units and that 26,272 housing units were built in the Borough between 2002 and 2008.

The Project plan also includes flexibility to meet the demands of an evolving market over the 10 year build-out. The large affordable housing component – 2,250 units – provides a housing type that is largely impervious to market downturns and could be front loaded in the first phase to address current economic conditions.

Finally, the Project is located at a transit-accessible site, convenient to employment centers in downtown Brooklyn and in Manhattan, and is well situated to accommodate the growing housing demand in Brooklyn discussed above. Although the current recession has roiled the market for new condominium

units in Brooklyn, Manhattan, and many other areas of the country, the current market downturn is not expected to affect the long-term trends pointing to increased population and associated housing demand in Brooklyn, which the Project is well positioned to serve.

AR 7036-38 (Response to Comments at 7-9).

38. Moreover, recognizing that the economic downturn could affect the progress of the Project, ESDC commissioned an additional study by KPMG LLP (AR 7075-122), a highly experienced accounting and real estate consulting firm, to determine whether the market could absorb the residential units that would be constructed within a 10-year period. KPMG advised ESDC that it was not unreasonable to expect that the market could absorb the Project's units. AR 7118 (KPMG Report at 39).

39. Finally, ESDC noted that a delay in the 10-year construction schedule could occur due to market conditions, but that ESDC had determined that such a delay would not result in new significant adverse impacts warranting an SEIS. AR 7043-44 (Response to Comments at 14-15); AR 4816 (2009 Technical Memorandum at 63).

40. The materials submitted to the Directors in advance of their September 17, 2009 meeting also included a document titled "Project Leases and Disposition Abstract" (the "Abstract"). AR 7068-70. The Abstract is consistent with the Legal Notice. It describes the 25-year term of the Interim Leases (AR 7068) and Development Leases (AR 7069), and states that the contracts to be negotiated between ESDC and FCRC will require FCRC "[t]o construct the project described in the Modified General Project Plan." AR 7070.

6. The ESDC Directors Affirmed The 2009 MGPP On September 17, 2009.

41. On September 17, 2009, after consideration of the public comments, the Response to Comments document prepared by ESDC staff, the KPMG Report, the Abstract and additional public comments received at their meeting, the ESDC Directors affirmed the 2009 MGPP in the form approved for public comment on June 23, 2009.

AR 7236. The ESDC Directors also determined that the comments received did not require any revisions to the 2009 Technical Memorandum and that it was not necessary to disturb the June 2009 determination that no SEIS was required. Id. The Directors further found that “the preparation of a Supplemental Environmental Impact Statement would not provide information useful to the determination whether to affirm the [2009 MGPP].”

Id.

F. Massive Financial Commitments And Very Substantial Construction Work Have Been Undertaken To Implement The 2009 MGPP.

42. In the resolution affirming the 2009 MGPP, the ESDC Directors authorized staff to take such actions as are appropriate to effectuate the 2009 MGPP. AR 7237. Accordingly, over the course of the subsequent three months, ESDC staff completed intensive negotiations of the Project documents with FCRC. Similarly, during that period, MTA staff also negotiated Project documents with FCRC pertaining to the new rail yard, the new subway station entrance, and the sale, purchase and development of the portions of the Project site owned or to be owned by MTA.

43. The Master Closing of the Project documents occurred on December 21-23, 2009 (the “Master Closing”) among and between numerous entities, including ESDC, MTA, LIRR, the New York City Transit Authority (“NYCTA”), the City of New York, Brooklyn Arena Local Development Corporation, The Bank of New York Mellon and various FCRC affiliates.

44. Several hundred contracts, agreements, letters and other documents were executed at the Master Closing pertaining to the construction, financing, leasing and other aspects of the Project.³ ESDC has included in the Supplemental Administrative Record only those contracts and agreements that appear to be relevant to the scheduling issues raised by petitioners in the Supplemental Petition. These are:

(a) the Commencement Agreement by and among ESDC and several other parties to the Master Closing (SAR 7802-924);

(b) the Development Agreement by and among ESDC and various FCRC affiliates (the “Development Agreement”) (SAR 7925-8112);

(c) the Declaration of Easements by MTA (SAR 8113-242);

(d) the Air Space Parcel Development Agreement between MTA, LIRR and an FCRC affiliate (SAR 8243-388);

(e) the Air Space Parcel Purchase and Sale Agreement between MTA, LIRR and an FCRC affiliate (SAR 8389-768);

³ Many of the documents executed at the Master Closing were placed into escrow pursuant to the Commencement Agreement, to be released upon the occurrence of a specified condition; in some cases, the documents were then to be dated “as of” the date that the document was released from escrow. This is why a number of the documents executed at the Master Closing are dated after December 23, 2009.

(f) the Sale-Purchase Agreement for Block 1119, Lot 7 (SAR 8769-922);

(g) the Yard Relocation and Construction Agreement between MTA, LIRR and an FCRC affiliate (SAR 8923-9133);

(h) the Recognition Agreement by and among ESDC, an affiliate of FCRC and Gramercy Warehouse Funding II LLC (SAR 9134-195); and

(j) the Vacant Possession Certificate of ESDC and certain FCRC affiliates, and the Arena Project Effective Date Certificate of Document Agent (SAR 9196-205).

45. In addition to negotiating and executing the Project documents at the Master Closing, the parties (principally ESDC, MTA, the City of New York and FCRC) have also taken actions to effectuate the Project described in the 2009 MGPP. These activities can be summarized generally as follows:

(i) On or about November 23, 2009, FCRC completed construction of the temporary rail yard for the LIRR.

(ii) LIRR decommissioned the permanent rail yard, and FCRC subsequently removed the railroad tracks from the Arena Block.

(iii) The State and City of New York fulfilled their respective commitments to provide \$100 million and more than \$131 million in public funding for certain elements of the Project. Thus, more than \$231 million of public monies have been invested in the Project.

(iv) On December 23, 2009, at the Master Closing, FCRC posted multiple letters of credit totaling more than \$150 million to guarantee completion of certain Project elements.

(v) On December 23, 2009, the Brooklyn Arena Local Development Corporation successfully completed the issuance and sale of approximately \$511 million of tax-exempt bonds for the Arena.

(vi) On December 23, 2009, ESDC initiated an EDPL Article 4 vesting proceeding with respect to the First-Phase Properties before Justice Abraham Gerges of Kings County Supreme Court.

(vii) On March 1, 2010, pursuant to Justice Gerges' Vesting Order of that date, ESDC acquired title to the First-Phase Properties.

(viii) On March 4, 2010, ESDC acquired the MTA property on the Arena Block.

(ix) On May 12, 2010, FCRC waived certain vacancy conditions for the First Phase Properties, resulting in this date being the Project Effective Date under the Development Agreement and other contracts.

(x) On or before July 30, 2010, ESDC obtained vacant possession of the First-Phase Properties.

(xi) FCRC continued to demolish buildings on the Project site – all of the buildings on the Arena Block and most of the buildings on Block 1129 have now been removed. The only remaining buildings on Block 1129 are: (i) 752 Pacific Street (Lot 13), which is being used as temporary office space for the construction work; and (ii)

three vacant buildings at 802 Pacific Street (Lot 39), 768 Pacific Street (Lot 21) and 603 Dean Street (Lot 76), which will be demolished soon.

(xii) FCRC began construction of the Arena. Such construction is ongoing, with the opening of the facility scheduled for 2012 to allow the New Jersey Nets to move to Brooklyn for the 2012-2013 basketball season.

(xiii) FCRC began construction of the new subway entrance on the Arena Block so that it will be available for the Arena opening. Construction of this subway entrance is ongoing at this time.

(xiv) FCRC continued installation of utilities in the area. This construction work is ongoing at this time.

(xv) FCRC prepared final design plans for the next stage of the LIRR rail yard work (north of the temporary rail yard), which is expected to form a significant portion of the permanent rail yard. Construction of that portion of the rail yard has begun and is ongoing.

(xvi) FCRC prepared final design plans for the new Carlton Avenue Bridge spanning the LIRR rail yard (the previous bridge was demolished in connection with the construction of the temporary rail yard) and obtained New York City Department of Transportation approval of those plans. Construction of the new bridge is expected to begin as soon as the next stage of the rail yard work mentioned above has been completed, and its completion is required for the Arena opening.

(xvii) FCRC is preparing design plans for the first residential building (Building 2 on the Arena Block).

G. Apart From These Proceedings, The Courts Have Dismissed The Other Lawsuits Challenging The 2009 Approvals.

46. The courts have dismissed the other litigation challenges to the 2009 MGPP, the Development Agreement and the MTA Business Agreement.

47. Justice Stallman dismissed the challenge to the MTA Business Agreement, noting that the new business terms reflected “essentially the same plan” that MTA had approved on December 13, 2006. *See* Montgomery v. MTA, 25 Misc.3d 1241(A), 2009 WL 4843782 (Sup. Ct. N.Y. Co. Dec. 15, 2009).

48. Justice Gerges dismissed the counterclaims pleaded by certain respondents in the Article 4 condemnation proceeding, *see* In the Matter of N.Y.S. Urb. Dev. Corp., 26 Misc.3d 1228(A), 2010 WL 702319 (Sup. Ct. Kings Co. Mar. 1, 2010), and dismissed a separate Article 78 proceeding that alleged that the 2009 MGPP, the Development Agreement and the MTA Business Agreement effected significant changes to the Project, requiring a new Determination and Findings under the EDPL. *See* Peter Williams Enterprises Inc. v. N.Y.S. Urb. Dev. Corp., 28 Misc.3d 1239(A), 2010 WL 3703264 (Sup. Ct. Kings Co. Sept. 20, 2010) (originally filed in New York County Supreme Court as Index No. 100738/2010).

H. Procedural History Of The Instant Article 78 Proceedings.

49. The Article 78 proceeding filed by petitioners Develop Don't Destroy (Brooklyn), Inc., et al. (Index No. 114631/09) challenges ESDC's determination not to prepare an SEIS in connection with its approval of the 2009 MGPP and alleges that the 2009 MGPP violated the UDCA. The Article 78 proceeding filed by petitioners

Prospect Heights Neighborhood Development Council, Inc., et al. (Index No. 116323/09) presents similar claims.

50. On November 12, 2009 (in Index No. 114631/09) and December 11, 2009 (in Index No. 116323/09), ESDC and FCRC each served an Answer and Memorandum of Law. ESDC also served the administrative record upon which the ESDC Directors affirmed the 2009 MGPP on September 17, 2009.

51. On January 6, 2010, after the Article 78 proceedings were fully briefed and the well publicized Master Closing had occurred, petitioners Develop Don't Destroy (Brooklyn), Inc., et al. moved for a preliminary injunction to stop Project construction.

52. On March 10, 2010, this Court dismissed both proceedings in a written decision, order and judgment (the "March 2010 Decision"). The March 2010 Decision also denied the motion for a preliminary injunction mentioned above.

53. On April 7, 2010, petitioners filed separate motions to reargue and renew. Both motions claimed that the Development Agreement supported their contentions that ESDC acted irrationally in determining, on June 23, 2009 and again on September 17, 2009, that an SEIS was not required for the 2009 MGPP.

54. On April 8, 2010, petitioners filed separate notices of appeal of the March 2010 Decision, but they neither perfected their appeals nor moved for interim relief before the Appellate Division, notwithstanding the intensive continued construction work at the Project site.

55. On April 27, 2010, ESDC and FCRC served their respective papers opposing the motions to reargue and renew.

56. On November 9, 2010, the Court ruled upon the motions to reargue and renew in a written decision and order (the “Remand Order”). The Remand Order (at page 18) granted the motions to the extent of remanding “to ESDC for findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted.”

57. The Court did not require an SEIS or annul any public approvals for the Project. The Court marked the Remand Order as a final disposition, indicating that, apart from the relief granted in the Remand Order, these proceedings were completed. Petitioners did not appeal, or seek leave to appeal, the Remand Order.

58. On November 29, 2010, upon petitioners’ applications, this Court issued an Order to Show Cause in each of the two proceedings directing respondents to show cause why the construction of the Project should not be enjoined until ESDC made the findings required by the Remand Order.

59. On December 10, 2010, ESDC and FCRC, in each proceeding, filed papers opposing the injunction motions and cross-moving for leave to appeal the Remand Order.

60. On December 16, 2010, the ESDC Directors made the findings required by the Remand Order.

61. On December 22, 2010, the parties appeared before the Court on the Orders to Show Cause issued on November 29, 2010. With the assistance of the Court, the parties entered into the written stipulation that stated, *inter alia*, that petitioners could seek to challenge the ESDC Directors' findings of December 16, 2010 by filing supplemental petitions pursuant to CPLR 3025(b). The parties also agreed that the petitioners' then pending injunction motions were withdrawn without prejudice.

62. On January 18, 2011, petitioners served a Supplemental Petition and supporting papers in each proceeding.

63. On January 28, 2011, the Prospect Heights petitioners served a notice of motion to enjoin continued construction of the Project. The motion was made returnable on the same date as the Supplemental Petitions.

I. ESDC's Compliance With The Remand Order.

64. After receiving the Remand Order, ESDC began working on the analysis required by that Order, with the assistance of the same environmental consultants that had prepared the FEIS and 2009 Technical Memorandum.

65. ESDC's work to comply with the Remand Order resulted in the preparation of two substantial and interrelated documents that were provided to the ESDC Directors prior to their December 16, 2010 meeting:

(a) The first document – titled “Atlantic Yards Land Use Improvement and Civic Project; ESDC Response to Supreme Court’s November 9, 2010 Order” (hereinafter “ESDC Response to Remand”) – was prepared to set forth the specific

findings required by the Remand Order and provide a detailed summary of the basis of ESDC's findings. SAR 7728-64.

(b) The second document – titled “Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project” (hereinafter the “2010 Technical Analysis”) – was prepared to determine whether the 2024 build year assumption used for certain purposes in the 2009 Technical Memorandum “was critical to that document’s conclusion that a delay in the Project’s 10-year construction schedule would not result in significant adverse environmental impacts not identified in the FEIS.” SAR 7638 (2010 Technical Analysis at 2). The 2010 Technical Analysis served as the principal basis for ESDC’s third finding in the ESDC Response to Remand.

66. On December 16, 2010, the ESDC Directors held a public meeting at which they considered these two documents. As reflected in the transcript, all members of the public who asked to speak at the meeting were heard. SAR 7778-98. Upon consideration of the documents and the statements by members of the public, the ESDC Directors enacted the Resolution dated December 16, 2010. SAR 7631-32. This Resolution made three findings, which were the same three findings set forth and explained in the ESDC Response to Remand.

67. Specifically, ESDC found as follows:

1. The Development Agreement and MTA Agreement (collectively, the “Development Contracts”) do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project. As was the case when the ESDC Directors approved and affirmed the 2009 MGPP, a key factor in the ultimate pace of development of the

Project will be the market demand for the Project's buildings. The Development Contracts contemplate that the Project will be constructed on a 10-year schedule, but they do not establish 10 years as the outside date for Project completion. The Development Contracts require that: (i) FCRC use commercially reasonable effort to achieve Project completion by 2019 and, in any event, (ii) the Project be completed not later than a 25-year outside date, subject to certain specified contingencies. The fact that the Development Contracts have outside dates for development that go well beyond 10 years was publicly disclosed by ESDC when it approved the 2009 MGPP.

2. As of the date of these findings, it appears unlikely that the Project will be constructed on a 10-year schedule, because the construction of the Project's residential buildings has lagged behind the 10-year schedule provided by FCRC to ESDC in 2009, and because of continuing weak general economic and financial conditions.

3. A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS and 2009 Technical Memorandum and would not require or warrant an SEIS. The analysis of the potential environmental impacts of a 25-year construction schedule – a delay more lengthy than that considered in the 2009 Technical Memorandum – confirms the conclusion reached by ESDC in 2009 that an SEIS is not required or warranted for the 2009 MGPP. Similarly, the Development Contracts do not require or warrant an SEIS.

AR 7631; AR 7729 (ESDC Response to Remand at 2).

68. The discussion below summarizes ESDC's explanation of the basis of these three findings.

J. ESDC's First Finding: The Effect Of The Development Agreement And Other Contractual Documents On The Construction Schedule.

69. ESDC's first finding was made in response to the Court's directive to make "findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project." Remand Order at 18.

70. In approving and then affirming the 2009 MGPP in the summer of 2009, ESDC both re-iterated the 10-year construction schedule initially used in the FEIS and acknowledged that poor market conditions could result in a delay to that schedule. *See* ¶¶ 25(c), 27-30, *supra*. ESDC asserts that it had a good and rational reason for both of these assumptions based on FCRC's continued plan to construct the Project on a 10-year schedule, ESDC's examination of the construction schedule provided by FCRC and ESDC's careful consideration of real estate market conditions and demographic trends. *See* ¶¶ 28-30, 37-38, *supra*.

71. In making the first finding, ESDC reviewed the specific terms of the contracts that were executed at the Master Closing on December 23, 2009 (the "Final Development Contracts") to determine whether they were compatible with the scheduling assumptions that ESDC had made in the summer of 2009. ESDC determined that the Final Development Contracts were consistent with those assumptions because they allowed, encouraged and facilitated the Project to proceed on a 10-year schedule or as soon thereafter as market conditions would permit the Project to be constructed. SAR 7746-48 (ESDC Response to Remand at 19-21). ESDC thus concluded that the principal

driver of the construction schedule would be real estate market conditions, just as ESDC had assumed in the summer of 2009. SAR 7729 (ESDC Response to Remand at 2).

72. ESDC reached this conclusion only after a careful summary and examination of the material terms of the:

- (a) Development Agreement (SAR 7734-37 (ESDC Response to Remand at 7-10));
- (b) Recognition Agreement (SAR 7737 (ESDC Response to Remand at 10));
- (c) Air Space Purchase Agreement (SAR 7738-39 (ESDC Response to Remand at 11-12));
- (d) Air Space Parcel Development Agreement (SAR 7739-42 (ESDC Response to Remand at 12-15));
- (e) MTA Declaration of Easements (SAR 7742-43 (ESDC Response to Remand at 15-16)); and
- (f) Yard Relocation and Construction Agreement (SAR 7744-45 (ESDC Response to Remand at 17-18)).

73. ESDC noted that the Final Development Contracts allow the Project to proceed on a 10-year schedule, and, in the case of the Development Agreement, require that FCRC use commercially reasonable efforts to achieve this goal. SAR 7734-36, 7746, 7748 (ESDC Response to Remand at 7-9, 19, 21). The contracts also establish deadlines that define the outer allowable limits for Project construction. SAR 7734-36, 7738, 7742, 7745-47 (ESDC Response to Remand at 7-9, 11, 15, 18-20). ESDC

examined the adequacy of the stipulated penalties and other contractual remedies available to ESDC and MTA if FCRC fails to meet its contractual commitments. SAR 7736-37, 7739, 7742, 7745, 7748 (ESDC Response to Remand at 9-10, 12, 15, 18, 21).

74. ESDC asserts that, in the ESDC Response to Remand, it provided a reasoned explanation as to why the business agreements executed on December 23, 2009 were compatible with the market-based scheduling assumptions for the Project that ESDC had made in the summer of 2009 when it affirmed the 2009 MGPP. The reasons cited by ESDC include, but are not limited to: (a) FCRC's contractual obligation under the Development Agreement to use commercially reasonable effort to complete construction by 2019, and the fact that this obligation is not superseded by the outside dates; and (b) the fact that the Final Development Contracts, when read in their entirety, evidence the parties' intent to encourage and facilitate Project construction as soon as market conditions allow.

K. ESDC's Second Finding: Based On The Project's Progress As Of December 2010, The Project Is Not Likely To Be Completed In 10 Years.

75. In the second finding, ESDC considered the progress made in constructing the Project as of December 2010. ESDC noted that FCRC has yet to begin construction of any of the 16 non-Arena buildings at the site, and further noted that, as of December 2010, it did not appear likely that FCRC would begin construction of more than one residential building in 2011. SAR 7749 (ESDC Response to Remand at 22). Accordingly, ESDC concluded that the Project is behind schedule, making it unlikely that the Project will be completed in its entirety by 2019. Id.

L. ESDC's Third Finding: An Extended Delay In The Construction Schedule Would Not Warrant An SEIS.

76. ESDC's third finding was made in response to the Court's directive that ESDC make findings "on whether a Supplemental Environmental Impact Statement is required or warranted." Remand Order at 18.

77. ESDC's third finding concludes that an SEIS is neither required nor warranted to study the prospect of a further delay in the construction schedule. SAR 7750 (ESDC Response to Remand at 23). The finding relied upon the information set forth in the FEIS (AR 1-3537), the 2009 Technical Memorandum (AR 4743-827), the 2010 Technical Analysis (SAR 7637-727) and the additional analysis set forth on pages 23 through 37 of the ESDC Response to Remand (SAR 7750-64).

78. The FEIS performed two distinct (but, in some cases, interrelated) types of analysis for the Project. First, the FEIS looked at the environmental impacts of the Project upon the completion of Phase I and then again upon the completion of the entire Project. For example, with respect to traffic, the FEIS examined the impacts of the Project upon completion of Phase I (*see* AR 822-44 (FEIS at 12-27–12-47)) and then the impacts of the Project upon completion of Phase I and Phase II (*see* AR 861-78 (FEIS at 12-64–12-81)). Second, the FEIS examined the impacts of the Project during the construction period. AR 1088-205 (FEIS at 17-1–17-93). Each of these issues is discussed separately below.

Impacts of the Project Upon Project Completion

79. In order to identify the Project's impacts upon its completion, for several technical areas the FEIS evaluated the Project in light of conditions projected forward to the "Build Year." The Build Year is an analytical device used to compare future environmental conditions *with the project* to future environmental conditions *without the project* in the year that the project is expected to be completed (known as the "Build Year"). AR 160 (FEIS at 2-5).

80. The first step in these types of analyses is to develop the "No Build" scenario, *i.e.*, a description of off-site background conditions as they are anticipated to exist in the Build Year without the Project. This "No Build scenario" is then used as the basis for determining the incremental impacts of the Project upon its completion in the Build Year.

81. Thus, the FEIS, before considering the impacts of the Project, created a "No Build scenario" keyed to anticipated conditions in the affected area of Brooklyn in the FEIS Build Year of 2016. This involved consideration of discrete No Build projects (*i.e.*, development projects that would occur with or without the Atlantic Yards Project) and, for some analyses, an assumption of general background growth in the area. AR 162-65 (FEIS at 2-7-2-9, Figure 2-1). The 2009 Technical Memorandum used this same methodology, keyed to a new Build Year of 2019 and a hypothetical delayed Build Year of 2024. AR 4755-59, 4809 (2009 Technical Memorandum at 6-9, Figure 6, 56). The 2010 Technical Analysis used the same method, but keyed it to the

analysis of a new hypothetical delayed Build Year of 2035. SAR 7639-43 (2010 Technical Analysis at 3-7).

82. Following this methodology, the 2010 Technical Analysis updated the background conditions and the status of anticipated development projects in the FEIS study area. SAR 7639-43 (2010 Technical Analysis at 3-7). The 2010 Technical Analysis then proceeded to assess the technical areas that were assessed in the FEIS to determine whether the Project would have new significant adverse impacts upon its completion if the Project schedule were to be delayed until 2035 (the “Extended Build-Out Scenario”).

83. Since the date for completion of the Project would not affect its ultimate program, site plan or building bulk and configuration, the 2010 Technical Analysis concluded that the Project, once completed under the Extended Build-out Scenario, would not have significant adverse impacts not previously addressed in the FEIS in the areas of Land Use, Zoning and Public Policy (2010 Technical Analysis at 7-8), Socioeconomic Conditions (*id.* at 8-9), Open Space (*id.* at 11), Shadows (*id.* at 11-12), Historic Resources (*id.* at 12), Urban Design and Visual Resources (*id.* at 12), Hazardous Materials (*id.* at 12-13), Infrastructure (*id.* at 13), Air Quality (*id.* at 32), Noise (*id.* at 32), Neighborhood Character (*id.* at 32) and Public Health (*id.* at 33). SAR 7643-45, 7647-49, 7668-69. ESDC had come to the same conclusion in the 2009 Technical Memorandum. AR 4760, 4763, 4772-73, 4775, 4797-99, 4807, 4809-12, 4815-16 (2009 Technical Memorandum at 10, 13, 22-23, 25, 47-49, 54, 56-59, 62-63).

84. Other analysis areas (particularly, Community Facilities, Traffic, Parking, Transit and Pedestrians) required more detailed consideration because, with respect to these areas, new impacts could arise due to changes in background conditions occurring as a result of the assumed delay in the Project's completion. Thus, the 2010 Technical Analysis examined carefully the operational effects of the Extended Build-Out Scenario with respect to these areas of analysis.

85. With respect to Community Facilities, the 2010 Technical Analysis focused in particular on the potential impacts of the Project on public elementary and intermediate schools. ESDC reviewed this issue carefully and concluded that it did not warrant an SEIS because: (a) a delay in the Project would not change the number of students the Project is expected to generate upon its completion; (b) the FEIS disclosed that the Project would have a significant adverse impact with respect to school seat availability in the area; (c) the FEIS imposed mitigation to address this issue (including providing free space to the School Construction Authority to construct a public school at the Project site) and outlined other measures that the Board of Education could take to address the issue; (d) the amended Memorandum of Environmental Commitments⁴ extended the deadline for the School Construction Authority to decide whether to construct the school on the Project site; (e) updated enrollment data from the Board of Education available since the preparation of the FEIS and 2009 Technical Memorandum do not alter the FEIS or 2009 Technical Memorandum conclusions with respect to

⁴ The Memorandum of Environmental Commitments (SAR 8033-56) is an exhibit to the Development Agreement, which requires that FCRC comply with its requirements. SAR 7945 (Development Agreement at 14).

elementary and intermediate schools; (f) enrollment projections are not available after 2018; (g) the Board of Education's most current capital plan identifies seven new schools to be constructed in the community school districts in which the Project site is located; and (h) future capital plans are likely to include additional schools if needed to serve the area. SAR 7645-47 (2010 Technical Analysis at 9-11). ESDC asserts that, in both the 2009 Technical Memorandum (AR 4763-68, 4810-11) and 2010 Technical Analysis (SAR 9-11), it took a hard look at the issue of how a delay in the Project would affect public schools and reasonably concluded that an SEIS was not warranted to analyze this issue further.

86. The other Community Facilities issue that ESDC studied carefully in both the 2009 Technical Memorandum and 2010 Technical Analysis was whether and how a delay in the Project schedule may affect the availability of publicly funded child care in the study area. ESDC concluded that this issue did not warrant an SEIS because: (a) a delay in the Project would not change the number of additional children who will need publicly funded child care as a result of the Project; (b) ESDC had previously required FCRC to provide a facility accommodating 100 children on the Project site and work with the New York City Administration for Children's Services to accommodate up to approximately 250 additional children either on site or in the vicinity of the site to meet Project-generated demand to the extent required to avoid a significant environmental impact; (c) the latest enrollment and capacity data for publicly funded child care facilities indicate that the study area currently has a surplus of publicly funded child care slots; and (d) service providers may construct additional facilities in the area if

due to future background growth during a delay period there is an unmet demand for publicly funded child care services. SAR 7645-47 (2010 Technical Analysis at 9-11). ESDC asserts that, in both the 2009 Technical Memorandum (AR 4768-71, 4810-11) and 2010 Technical Analysis (SAR 9-11), it took a hard look at the issue of how a delay in the Project would affect publicly funded child care slots in the area and reasonably concluded that an SEIS was not warranted to analyze this issue further.

87. ESDC undertook a detailed assessment of whether the Extended Build-Out Scenario warranted an SEIS with respect to environmental impacts relating to traffic, parking, transit and pedestrians. In general, the conclusions of the FEIS with respect to the impacts of the Project in these areas were based upon an analysis that: (a) identified existing traffic and other conditions in the study area during each of the relevant peak hours; (b) projected how these conditions would evolve without the Project by the Build Year (the “No Build” condition); (c) estimated the additional vehicle trips, parking needs, transit patrons and pedestrians that would result from the Project upon its completion; (d) superimposed these additional vehicle trips, parking needs, transit patrons and pedestrians on the affected intersections, parking lots, parking spaces, transit facilities, sidewalks and crosswalks as of the Project’s Build Year; and (e) assessed the impact of the Project-generated traffic, parking demand, transit demand and pedestrians, as compared to the No Build conditions that would otherwise exist in the Build Year. AR 792-999 (FEIS, Chapters 12, 13). Since a delay in the year of Project completion would not increase the overall size or mix of uses proposed for the Project, such a delay would not change the number of Project-generated trips, parking demand, transit riders or

pedestrians in any of the analyzed peak hours at full build-out. Accordingly, any additional traffic, parking, transit or pedestrian impacts associated with the Project under the Extended Build-Out Scenario would be caused by a worsening of the No Build conditions in the years up to 2035. The 2010 Technical Analysis took a hard look at this issue and concluded that an SEIS was not warranted to study it further. SAR 7652-60 (2010 Technical Analysis at 16-24).

88. With respect to traffic impacts, ESDC considered whether any additional travel demand would result from changes to the discrete No Build development projects, based on new information since the preparation of the FEIS. In general, these changes were found to have reduced travel demand. *See* SAR 7659 (2010 Technical Analysis at 23). Moreover, recent travel counts in the area were found to indicate that traffic has declined in the affected area since the FEIS was prepared in 2006. *See* SAR 7653 (2010 Technical Analysis at 17). ESDC also noted that the City has, since the preparation of the FEIS, revised its projections as to the general background growth rates in Brooklyn and other areas. While the FEIS had conservatively assumed a background growth rate of 0.5% (in addition to adding the travel demand from discrete No Build projects), the City now recommends that for transportation analyses in the vicinity of Downtown Brooklyn, an annual background growth rate of 0.25% be applied for the first five years and an annual rate of 0.125% be applied for the sixth year and beyond. *Id.* ESDC noted that these rates would result in a substantially smaller increase in travel demand associated with background growth than was assumed in the FEIS analysis: based on the rates now recommended by the City, background growth in the

vicinity of Downtown Brooklyn would be 3.8% for the 25-year period through 2035 compared to the 5.1% background growth assumed in the FEIS by its Build Year of 2016. Id. Based on these and other considerations set forth in the 2010 Technical Analysis, ESDC concluded that the FEIS made sufficiently conservative assumptions concerning background conditions in its 2016 impacts analysis that the Extended Build-Out Scenario would not materially change the conclusions regarding traffic impacts. SAR 7660 (2010 Technical Analysis at 24). ESDC noted further that the FEIS disclosed that the Project would result in significant adverse traffic impacts at numerous intersections and imposed a wide variety of measures to mitigate those impacts, and that implementation of those measures would not be affected by the Extended Build-Out Scenario. ESDC asserts that, in both the 2009 Technical Memorandum (AR 4782-90, 4812-13) and 2010 Technical Analysis (SAR 7652-60), it took a hard look at the issue of how a delay in the Project would affect the FEIS conclusions with respect to the Project's traffic impacts and reasonably concluded that an SEIS was not warranted to analyze this issue further.

89. With respect to parking, ESDC noted that the Extended Build-Out Scenario is not expected to result in greater demand for off-street public parking in the vicinity of the Project site than was analyzed in the FEIS. *See* SAR 7660-61 (2010 Technical Analysis at 24-25). The analysis also noted that traffic volumes (with which parking demand is associated) have declined in the area since the preparation of the FEIS and that background traffic volume as of 2035 is not expected to be greater than the traffic volume as of the FEIS Build Year for the reasons noted in the previous paragraph.

SAR 7660 (2010 Technical Analysis at 24). The analysis further noted that much of the expected increase in traffic volumes in the area is expected to come from No Build residential projects that will generally accommodate their own parking demand by providing the accessory parking required under local zoning. *Id.* Finally, the analysis noted that the FEIS had projected a surplus of between 624 and 2,919 off-street public parking spaces in the analyzed weekday AM, midday, evening and Saturday midday peak hours. *See id.* For all of these reasons, ESDC concluded that a delay in the Project is not expected to result in shortfalls in off-street parking or new significant adverse parking impacts. ESDC asserts that, in both the 2009 Technical Memorandum (AR 4782-90, 4812-13) and 2010 Technical Analysis (SAR 7660-61), it took a hard look at the issue of how a delay in the Project would affect the FEIS conclusions with respect to parking impacts and reasonably concluded that an SEIS was not warranted to analyze this issue further.

90. As with traffic and parking, both the 2009 Technical Memorandum and 2010 Technical Analysis carefully evaluated the potential for a delay in the Project's Build Year to result in new impacts with respect to pedestrians and transit facilities. AR 4792-96, 4814-15; SAR 7661-67. ESDC asserts that, in both documents, it took a hard look at the issue of how a delay in the Project would affect the FEIS conclusions with respect to the pedestrian and transit impacts and reasonably concluded that an SEIS was not warranted to analyze these issues further.

Impacts of the Project During an Elongated Construction Period

91. The 2010 Technical Analysis also undertook a detailed evaluation of whether significant new construction-period impacts would arise under the Extended Build-out Scenario. Two related but discrete issues were assessed: (a) how environmental impacts associated with construction activities would change under a scenario in which they would take place over a longer period of time (25 years instead of 10 years), but would also be generally less intense (because fewer buildings would be under simultaneous construction at the site); and (b) whether and how the environmental impacts of the Project would change as a result of a delay in the construction of certain Project buildings and the open space. SAR 7756 (ESDC Response to Remand at 29).

92. In considering these impacts, ESDC noted that the FEIS and amended Memorandum of Environmental Commitments (which is made enforceable by the Development Agreement (*see* ¶ 85 n.4, *supra*)) impose an extensive array of environmental mitigation and other measures on the Project to minimize construction-related impacts. FCRC is required to:

- undertake a comprehensive program to minimize construction dust by restricting vehicles operating within the construction site to 5 mph, wetting down unpaved surfaces, covering or water-misting stockpiled materials, washing the tires of vehicles exiting the site and inspecting departing trucks for proper sealing or covering of loose materials;
- implement a diesel emissions reduction program requiring the use of ultra-low sulfur diesel fuel and best available tailpipe emissions reduction technologies, enforced idling restrictions and the placement to the extent practicable of stationary engines at a minimum of 50 feet from sensitive locations, and the use of electric engines, rather than diesel equipment, where practicable;

- put into place a community air monitoring plan to be implemented when a contractor is engaged in excavation or other soil-disturbance activities;
- undertake a comprehensive program to minimize noise from Project construction, including the use and proper maintenance of equipment with noise emission levels conforming to those specified in the FEIS and the provision of a minimum 8-foot high perimeter barrier (constructed of ¾" thick plywood), with a 16-foot high barrier (of ¾" thick plywood) adjacent to sensitive locations (and operation of noisy vehicles, such as concrete-mixing trucks, behind the barriers);
- at the option of potentially affected residents, provide double-glazed or storm windows and alternative ventilation for those residential locations where the FEIS identified significant noise impacts, where such windows and air conditioning units are not currently installed;
- develop Maintenance and Protection of Traffic ("MPT") plans in consultation with DOT, to minimize the effects of construction activities on the flow of vehicular and pedestrian traffic in the vicinity of construction sites;
- implement specified permanent roadway improvements designed to reduce traffic impacts during construction and operation, subject to DOT approval;
- maintain on-site designated staging areas throughout the construction period to store materials and accommodate construction vehicles that require early arrival and marshalling for immediate material delivery to high-demand construction areas, in order to reduce the presence of construction vehicles on local streets;
- provide on-site parking for construction workers at levels appropriate in light of the number of workers employed at the site during different stages of construction, to minimize construction worker parking on local streets;
- equip interim construction staging and parking areas with directional lighting angled to limit light intrusion beyond the site and provide screening of interim parking areas and construction staging areas;
- develop and implement a construction protection plan to prevent impacts on historic resources within 90 feet of any construction;
- implement vibration monitoring;

- develop and implement a construction health and safety plan to prevent potential impacts related to contamination that could be encountered during the course of environmental remediation and excavation;
- implement a rodent control program, prior to the commencement of construction activities in a particular area; and
- reimburse ESDC for the cost of its environmental monitor, who since 2007 has been inspecting the Project site on a regular basis and will continue to do so, to ensure that FCRC and its contractors comply with the commitments set forth in the Memorandum of Environmental Commitments.

SAR 7751-53 (ESDC Response to Remand at 24-26); SAR 8046-56 (Memorandum of Environmental Commitments at 13-23).

93. In determining whether an SEIS is needed to examine the potential environmental impacts of the Extended Build-Out Scenario, ESDC was also cognizant that the FEIS already had disclosed that the lengthy period of construction studied in the FEIS would result in significant adverse impacts in the immediate vicinity of the Site. Thus, the FEIS disclosed that the Project's construction traffic would result in significant adverse construction-related traffic impacts at certain intersections (AR at 1129-54 (FEIS at 17-38–17-55)) as well as significant adverse noise impacts in the immediate area, particularly at buildings across the streets from the Project site (AR 1200 (FEIS Figure 17c-2)). As noted above, numerous traffic and noise mitigation measures were imposed to address these concerns. AR 1151-53, 1191-94, 1202-03, 1318-21 (FEIS at 17-52–17-54, 17-80–17-83, 17-90–17-91, 19-77–19-80)). In addition, several measures (including dust suppression, diesel emissions minimization and monitoring) were put into place to prevent significant adverse impacts with respect to air quality, vibration and other

concerns. AR 1125-26, 1159-60, 1316-18 (FEIS at 17-34–17-35, 17-60–17-61, 19-75–19-77)).

94. Nevertheless, the FEIS concluded that “[c]onstruction activity associated with the proposed project would have significant adverse localized neighborhood character impacts in the immediate vicinity of the project site during construction” and that “[t]he degree of this change would depend on the type of construction activity being performed, the location and the length of time this disruption is expected to occur, and the character of the immediately adjacent neighborhoods.” AR 1120 (FEIS at 17-29).

95. As further explained in the FEIS:

[N]o portion of the project site, and thereby the immediately adjacent neighborhood, would be subject to the full effects of construction for the entire 10-year period. During Phase I, construction activities would take place on the arena block and Site 5 on the western end of the project site and below-grade to the east (rail yard reconfiguration). The presence of cranes, earth moving and loading equipment, and other heavy equipment used during Phase I for the development on the arena block and Site 5 would temporarily affect the residential neighborhoods to the south and west and the commercial district to the north in the immediate vicinity of the project site. Neighborhood character effects would be less on the eastern end of the project site as the activity on Block 1129, which is closest to the residential neighborhood of Prospect Heights to the south, would be limited to construction staging and parking and the construction of the rail yard would occur below grade, reducing its effects.

During Phase II, construction activities would be completed west of 6th Avenue. On the project site east of 6th Avenue, the construction activity on the project site would temporarily affect the local neighborhood in the immediate vicinity of the project site. The level of construction activity would decrease during Phase II as different buildings are constructed and the proposed project reaches completion in 2016.

....

Construction would also have significant adverse impacts on the local street network and cause construction-related noise, particularly along the Dean Street corridor just south of the project site. During construction, the project site and the immediately surrounding area would be subject to added traffic from construction trucks and worker vehicles, partial and complete street closures, and the reconstruction of two bridges over the rail yard, resulting in changes in area travel patterns and the resultant significant adverse traffic impacts. Construction traffic and noise would change the quiet character of Dean Street and Pacific Street in the immediate vicinity of the project site.

Id.

96. The FEIS concluded that “[t]he impacts would be localized and would not alter the character of the larger neighborhoods surrounding the project site. The proposed project would not result in significant adverse neighborhood character impacts during construction, except in the immediate vicinity of the project site.” AR 1121 (FEIS at 17-30).

97. In assessing the impacts of the Extended Build-Out Scenario, ESDC also considered the disclosures in the FEIS as to the impacts that the Arena’s operation would have on the immediate area and the mitigation measures put into place to address these impacts. The FEIS disclosed that the Arena’s operation would increase traffic and noise in the vicinity of the Project site as a result of Arena-related traffic on the street segments surrounding the site, including Flatbush Avenue, Dean Street, 6th Avenue and Carlton Avenue. AR 838-44 (FEIS at 12-41–12-47); AR 1052-53 (FEIS at 15-13–15-14). With respect to neighborhood character, the FEIS disclosed that the Arena’s operation will adversely affect the immediate area of Prospect Heights to the south of the Project site, but that the adverse impact would be limited to the immediate area and

would not affect the larger Prospect Heights neighborhood. AR 1078-79 (FEIS at 16-17–16-18). For example, the FEIS disclosed that “[p]edestrian volumes would increase notably, especially prior to and immediately following arena events, as a large portion of the arena parking would be located along Dean Street between Carlton and Vanderbilt Avenues. The additional traffic would lead to additional noise, and analyzed noise levels due to project-generated traffic would exceed *CEQR Technical Manual* impact criteria at a number of locations along Dean Street.” AR 1078 (FEIS at 16-17). At the same time, the FEIS found such impacts to affect a small area: “the proposed project would have localized adverse impacts in several locations close to the project site in Prospect Heights. These affected locations would be clustered in a small area adjacent to the project site. Even when considered together, they would not affect the character of the [larger] Prospect Heights neighborhood.” AR 1079 (FEIS at 16-18).

98. In assessing the impacts of the Extended Build-Out Scenario, ESDC observed that if construction were to be delayed to 2035, construction would be expected to proceed generally on a parcel-by-parcel basis, with each building being individually designed, financed and constructed. Rather than examining site conditions separately upon completion of each of the 17 Project buildings, the 2010 Technical Analysis assesses such conditions at seven stages of Project completion. These seven stages (Stages 1 through 7) are used as “snapshots” in time, showing how the Project site would appear, and how it would affect the surrounding area, at certain points in the construction process, with each stage depicting which Project elements would have been completed,

which would be under construction, and which would not have been started. SAR 7683 (2010 Technical Analysis at 47).

99. For certain technical analyses (such as construction traffic and construction equipment-generated air emissions), AKRF developed “a hypothetical schedule consistent with the Extended Build-Out Scenario based on the staging figures.” SAR 7681 (2010 Technical Analysis at 45). A copy of AKRF’s schedule, which was intended to provide a conservative basis for estimating construction traffic and construction-related air emissions in the Extended Build-Out Scenario, is included in the record. SAR at 9206-18.

100. The 2010 Technical Analysis notes that although the overall construction of the Project would be delayed under the Extended Build-Out Scenario, the amount of time and effort devoted to the construction of each of the Project buildings would be approximately the same as assumed in the FEIS, regardless of the calendar year in which such buildings are constructed. SAR 7685 (2010 Technical Analysis at 49).

101. The 2010 Technical Analysis evaluated each of the technical areas that were evaluated in the FEIS to determine whether project construction under the Extended Build-Out Scenario would change the FEIS conclusions or result in new significant adverse impacts. As an initial matter, it determined that the FEIS conclusions with respect to the construction-related impacts of the Project on socioeconomic conditions, community facilities, historic resources, hazardous materials and infrastructure “would remain unchanged since construction-related effects would be similar for these technical areas irrespective of the length of construction.” SAR 7686

(2010 Technical Analysis at 50). ESDC then provided a detailed assessment of open space, land use and urban design, traffic and transportation, air quality, noise and neighborhood character during the construction period. SAR 7686-707 (2010 Technical Analysis at 50-71).

102. With respect to open space, the 2010 Technical Analysis noted that the FEIS had disclosed a deficit in open space ratios in the “non-residential” ¼ mile study area upon the completion of Phase I of the Project due to the increased population at the Project site. SAR 7686 (2010 Technical Analysis at 50). ESDC acknowledged that in the Extended Build-Out Scenario, this FEIS-disclosed impact would extend longer, but would continue to be addressed by the incremental completion of the Phase II open space since as each of the Phase II buildings is completed, the adjacent open space would be provided incrementally in conformance with the 2006 Design Guidelines (AR 3775-85), thereby offsetting some of this temporary open space impact. SAR 7686 (2010 Technical Analysis at 50). ESDC asserts that in both the 2009 Technical Memorandum (AR 4772, 4811) and 2010 Technical Analysis (SAR 7686), it took a hard look at the impacts of a delayed construction schedule on open space resources and provided a reasoned explanation as to why this issue does not require an SEIS.

103. With respect to land use and urban design, the 2010 Technical Analysis reviewed conditions at the Project site during each of the seven stages (Stages 1 through 7) and assessed those conditions from the standpoint of land use and urban design. SAR 7687-89 (2010 Technical Analysis at 51-53). ESDC observed that the temporary surface parking lot that would be constructed on Block 1129 in Stage 1 would

be screened and landscaped around its perimeter, as illustrated by Figure 18 of the 2010 Technical Analysis. SAR 7725. ESDC noted that the fence along with the landscaping would provide a visual buffer for pedestrians and residents of the adjacent neighborhood. SAR 7688 (2010 Technical Analysis at 52). ESDC also noted that the directional lighting planned for the surface parking lot would illuminate the parking lot while minimizing off-site light intrusion onto the upper floor residences in the immediate area. Id. ESDC further took note of the fact that construction staging on Block 1129 would be located at the northeast corner of the block, adjacent to Vanderbilt Avenue (a wide thoroughfare), thereby removing the staging area from residences opposite Block 1129 on the west side of Carlton Avenue and the south side of Dean Street. SAR 7688, 7706 (2010 Technical Analysis at 52, 70). Moreover, ESDC noted that FCRC is required to maintain the building sites in a clean and secure manner, and that each individual site is expected to be individually financed, with each building then being constructed and occupied, such that an Extended Build-Out Scenario would result in the construction of individual buildings at discrete locations rather than widespread construction across the site. SAR 7689 (2010 Technical Analysis at 53). Finally, ESDC noted that the Extended Build-Out Scenario would prolong the existence of the open rail yard that has been on the site for decades, but further noted that the rail yard would be covered incrementally by construction of the platforms and buildings, albeit at a slower pace than during a 10-year construction period. SAR 7688 (2010 Technical Analysis at 52). ESDC asserts that in both the 2009 Technical Memorandum (AR 4807, 4809-11) and 2010 Technical Analysis (SAR 7686-89), it took a hard look at the impacts of a delayed construction schedule on

land use and urban design and provided a reasoned explanation as to why these issues do not require an SEIS.

104. With respect to traffic impacts related to construction activities, the 2010 Technical Analysis noted that under the Extended Build-Out Scenario, the intensity of construction would be less than that assessed in the FEIS. SAR at 7689 (2010 Technical Analysis at 53). As a result, the number of workers and truck deliveries during all stages of construction would be lower than estimated for the FEIS analysis. SAR at 7690 (2010 Technical Analysis at 54). ESDC also observed that the construction would result in fewer temporary lane and sidewalk closures throughout the Project site at any given time. Id. Nevertheless, ESDC proceeded to undertake a detailed traffic evaluation keyed to each of the seven stages depicted for the Extended Build-Out Scenario. SAR at 7690-94 (2010 Technical Analysis at 54-58). ESDC found that the reduced level of construction traffic and construction workers would result in construction traffic impacts of lower magnitude than that disclosed in the FEIS. Id. Moreover, ESDC noted that the package of permanent roadway improvements designed to partially mitigate the traffic impacts of the Project upon completion will be put into place at or near the time the Arena opens, and that subsequent to that time those measures will lessen construction-period traffic impacts affecting those roadways. SAR at 7690 (2010 Technical Analysis at 54). ESDC asserts that in both the 2009 Technical Memorandum (AR 4802-03, 4812-13) and 2010 Technical Analysis (SAR 7689-94), it took a hard look at the impacts of a delayed construction schedule on construction traffic impacts and provided a reasoned explanation as to why this issue does not require an SEIS.

105. With respect to the air quality impacts of construction activities, the 2010 Technical Analysis noted that the FEIS had included significant emission minimization measures and had determined that as a result of these measures the construction work would not result in significant adverse impacts to air quality, even during peak periods when multiple buildings were to be under construction simultaneously. AR 1159-60, 1183-84 (FEIS at 17-60–17-61, 17-73–17-74); SAR 7694 (2010 Technical Analysis at 58). ESDC also noted that the Extended Build-Out Scenario would result in fewer buildings being constructed simultaneously and therefore would reduce the level of air emissions. SAR at 7694-95 (2010 Technical Analysis at 58-59). Nevertheless, ESDC proceeded to undertake a detailed air quality evaluation keyed to each of the Extended Build-Out Scenario’s Stages (1 through 7). SAR at 7694-98 (2010 Technical Analysis at 58-62). ESDC concluded that an extended construction schedule would not be expected to increase the frequency, duration or intensity of pollutant concentrations at individual receptor locations. Id. ESDC asserts that in both the 2009 Technical Memorandum (AR 4803-04, 4815) and 2010 Technical Analysis (SAR 7694-98), it took a hard look at the construction-related impacts of a delayed construction schedule on air quality and provided a reasoned explanation as to why this issue does not require an SEIS.

106. With respect to noise, the FEIS disclosed that the Project’s construction and operation would result in significant adverse noise impacts in the vicinity of the Project. *See* AR 1194-1203 (FEIS at 17-83–17-91). The 2010 Technical Analysis noted that the Extended Build-Out Scenario would *reduce* the number of pieces

of noise-generating construction equipment in use at any one time, because fewer buildings would be under simultaneous construction at the site. SAR at 7698 (2010 Technical Analysis at 62). The 2010 Technical Analysis also noted that periods of high noise levels would be episodic as individual buildings are constructed, since some construction tasks (such as excavation and foundation work) are particularly noisy while other tasks (such as interior fit-out and finishing) generate much less noise. SAR at 7699 (2010 Technical Analysis at 63). ESDC further noted that the magnitude of noise levels produced by construction activities at the Project site are below those typically produced by major construction projects in New York City because of the construction noise mitigation measures imposed by the FEIS and the amended Memorandum of Environmental Commitments. SAR at 7700 (2010 Technical Analysis at 64). Nevertheless, ESDC proceeded to undertake a detailed noise evaluation keyed to each of the seven stages depicted for the Extended Build-Out Scenario. SAR at 7701-04 (2010 Technical Analysis at 65-68). Based on this evaluation, ESDC concluded that the construction work under the Extended Build-Out Scenario would affect the same noise receptors that were found to be affected in the FEIS and that the noise mitigation (such as the FEIS requirement that FCRC install double-glazed windows at the adversely affected receptor locations) would also address these impacts under the Extended Build-Out Scenario. SAR at 7704 (2010 Technical Analysis at 68). ESDC further noted that because significant noise level increases result primarily from the localized effect of on-site construction equipment operating in close proximity to the receptor, the *duration* of the impacts at a given receptor would extend over the period that such equipment is in

operation near the receptor, not the hypothetical 25-year schedule for the construction of the entire Project. SAR at 7699 (2010 Technical Analysis at 63). For these reasons, ESDC concluded that the magnitude of impacts would be the same as or less than those described in the FEIS during the time period that a Project element is under construction. Id. ESDC asserts that in both the 2009 Technical Memorandum (AR 4804, 4807, 4815) and 2010 Technical Analysis (SAR 7698-704), it took a hard look at the impacts of a delayed construction schedule on noise and provided a reasoned explanation as to why this issue does not require an SEIS.

107. With respect to neighborhood character, the 2010 Technical Analysis noted that (as described in paragraphs 94-97 above), the FEIS had disclosed that the Project's construction and the Arena operation would adversely affect the character of the neighborhood in the immediate vicinity of the Project site. AR 838-44, 1052-53, 1078-79, 1120-21 (FEIS at 12-41-12-47, 15-13-15-14, 16-17-16-18, 17-29-17-30); SAR at 7704-06 (2010 Technical Analysis at 68-70). Nevertheless, the 2010 Technical Analysis undertook a detailed evaluation of the effect that the Extended Build-Out Scenario would have on neighborhood character, keyed to each Stage (1 through 7) of construction under this scenario. SAR at 7705-07 (2010 Technical Analysis at 69-71). ESDC concluded that for the Extended Build-Out Scenario, there would continue to be localized adverse impacts on the nearby segments of Dean and Pacific Street, but that impacts associated with construction activity would be less intense because there would be less simultaneous construction activity at the site. SAR at 7704 (2010 Technical Analysis at 68).

108. ESDC's assessment of the neighborhood character impacts during the period of Project construction under the Extended Build-Out Scenario noted that the surface parking lot on Block 1129 would be in place for a longer period of time. SAR 7705-06 (2010 Technical Analysis at 69-70). ESDC observed, however, that pedestrian and vehicular traffic associated with the surface parking lot on Block 1129 would be *less* than that anticipated in the FEIS upon Project completion, because the surface parking lot on Block 1129 is limited to 1100 parking spaces, while the below-grade parking lot that will be operated on Block 1129 upon Project completion will have 2070 parking spaces. SAR at 7705-06 (2010 Technical Analysis at 69-70). Accordingly, a delay in the construction of the Project would also delay the construction of 970 additional parking spaces on Block 1129 (and the pedestrian and vehicular traffic associated with these spaces) for years.

109. As noted in the discussion above with respect to "land use" impacts (*supra* at ¶ 103), ESDC also noted that the surface parking lot on Block 1129 would be screened and landscaped around its perimeter, and upon completion of the Arena the construction staging area on Block 1129 would be located in a discrete area of the northeast corner of the block. SAR 7706 (2010 Technical Analysis at 70).

110. The 2010 Technical Analysis concluded that the neighborhood character impacts of the Extended Build-Out Scenario would be similar to the impacts disclosed in the FEIS, in that they would be localized in the immediate area of the site, and would not extend to larger neighborhood of Prospect Heights (or other neighborhoods). SAR 7707 (2010 Technical Analysis at 71). ESDC also noted that,

even in the Extended Build-Out Scenario, most of the 17 Project buildings and associated open space would be constructed well before 2035. SAR 7707 (2010 Technical Analysis at 71). ESDC asserts that in both the 2009 Technical Memorandum (AR 4807, 4815-16) and 2010 Technical Analysis (SAR 7704-07), it took a hard look at the impacts of a delayed construction schedule on neighborhood character and provided a reasoned explanation as to why this issue does not require an SEIS.

M. Petitioners' Allegations That ESDC Failed To Take A Hard Look At The Potential Environmental Impacts Of A Delay In The Project's Construction Schedule Are Conclusory And Meritless.

111. Notwithstanding the detailed consideration of the potential environmental impacts of a delay in the construction schedule in both the 2009 Technical Memorandum and 2010 Technical Analysis, petitioners allege that ESDC failed to take a hard look at this issue. Each of their allegations is addressed below.

112. First, petitioners allege that ESDC neglected to “take a hard look at ... the long-term impact of ... continuous construction of the health and viability of adjoining neighborhoods.” PHNDC Supp. Pet. ¶ 27(A). Petitioners ignore entirely the three rounds of analyses ESDC has performed with respect to this issue – in the FEIS, the 2009 Technical Memorandum and 2010 Technical Analysis – in making this conclusory allegation. ESDC did take a hard look at this issue, but concluded that the impacts of the construction would be limited to the immediate area of the Project site. Although ESDC did conclude (in all three environmental review documents) that the construction work would have a significant adverse impact to the character of the area immediately adjacent

to the construction site, ESDC also noted that it had imposed numerous mitigation measures on the construction work to reduce the magnitude of these impacts. Petitioners do not explain what type of additional analysis is warranted or what specific methodological or other defects supposedly exist in the analysis that ESDC actually undertook in its environmental review documents.

113. Second, petitioners allege that ESDC “dealt with neighborhood impacts on an isolated, localized basis, rather than evaluating the cumulative impacts of such an extended build-out on the broader area surrounding the Project site.” PHNDC Supp. Pet. ¶ 27(B). In making this allegation, petitioners again ignore entirely the extensive environmental impact analysis presented in the FEIS, the 2009 Technical Memorandum and 2010 Technical Analysis. These documents did not unduly limit the geographic scope of their analysis. ESDC used study areas that met or exceeded the areas recommended by the City’s CEQR Technical Manual. The land use, zoning and public policy study area was comprised of a primary study area within ½ mile of the Project site and a secondary study area within ¾ mile of the Project site. AR 174, 182, 193, 216 (FEIS, Figures 3-1, 3-3, 3-4, 3-5). The socioeconomic analysis study area extended to a ¾ mile radius. AR 232 (FEIS at 4-6). The study area for police and fire services, library services, childcare facilities and healthcare facilities extended to a 1 mile radius of the Project site, and the study area for public schools extended to a ½ mile radius but also included all of Community School Districts 13 and 15. AR 361, 365, 389, 392, 395, 400 (FEIS 5-3, Figures 5-1, 5-3, 5-4, 5-5, 5-6). The study area for open space resources extended to a ¼ mile radius for the non-residential study area and to a ½ mile

radius for the residential study area. AR 405, 407, 408 (FEIS at 6-3, Figures 6-1, 6-2). The study area for the physical impacts of the construction on historic and cultural resources was a 90-foot radius, and the study area for contextual impacts with respect to these resources was 800 feet. AR 457 (FEIS Figure 7-2). The study area for Urban Design was 800 feet, but also included certain view corridors that extended beyond this distance. AR 540 (FEIS at 8-7). The study area for shadow impacts included all areas falling within the shadow sweep of the Project buildings. AR 665 (FEIS Figure 9-1a). The study area for potential impacts to surface water included the entire catchment area of the Red Hook sewage treatment plant. AR 759 (Figure 11-1). The traffic study area extended 1.2 miles from the Project site and included a total of 93 analyzed intersections. AR 793 (FEIS Figure 12-2). The parking area extended to a ½ mile radius around the Project site. AR 795 (FEIS Figure 12-4). The transit and pedestrian study areas included all facilities that are sufficiently close to the Project site to warrant analysis. AR 896-901 (FEIS 13-5–13-10). The air quality study for mobile emissions focused on the most impacted intersections within the traffic study area, and the air quality study area for the emissions from the Project's boilers was delimited by the dispersion modeling performed for those sources. AR 1010, 1018 (FEIS at 14-13, 14-18). The study area for noise focused on receptor locations around the Project site most likely to be affected by Project-related noise. AR 1045 (FEIS at 15-7). The study area for neighborhood character was the ½ mile radius around the Project site. AR 1063 (FEIS at 16-3).

114. In most cases, the study area for construction impacts was the same for each technical analysis as the study area for operational impacts. AR 1088-1205

(FEIS Chapter 17). With respect to air quality and noise, however, additional modeling was performed to identify the areas that could be affected by air emissions and noise associated with the construction activities; the analysis found that no areas would experience significant adverse air quality impacts and that the areas that would experience significant adverse construction-related noise impacts were those close to the Project site. AR 1169-83, 1200 (FEIS 17-67–17-73, Figure 17c-2). The fact that ESDC concluded that the construction impacts of the Project would only affect the area immediately proximate to the Project site is the result of careful analysis and reasoning, not an artificial limitation placed on the geographic scope of the analysis. Indeed, petitioners do not explain how more remote areas from the Project site would be adversely affected by a delay in the construction schedule.

115. Petitioners' related allegation, quoted above, that ESDC assessed impacts on an "isolated" basis is also inconsistent with ESDC's environmental review documents. In addition to separately analyzing noise, traffic, pedestrians, land use and numerous other issues, ESDC included in its analysis a consideration of how these issues would interact so as to affect the overall character of the neighborhoods surrounding the Project site. It is precisely this holistic consideration of land use, urban design, visual resources, cultural resources, traffic, pedestrians and noise that comprised ESDC's methodology for analyzing neighborhood character. AR 1063 (FEIS at 16-3). Neighborhood character impacts – thus defined – were assessed in the FEIS, the 2009 Technical Memorandum and 2010 Technical Analysis. AR 1118-21 (FEIS at 17-27–17-

30); AR 4807, 4815-16 (2009 Technical Memorandum at 54, 62-63); SAR 7704-07 (2010 Technical Analysis at 68-71).

116. Third, petitioners allege that the 2010 Technical Analysis was not based on a “firm construction plan (in contrast to the 2006 FEIS).” PHNDC Supp. Pet. ¶ 27(C). But the sequence of Stages 1 through 7 is sufficiently definite for the analysis performed in the 2010 Technical Analysis. It is not feasible to provide a more “firm” schedule for this or any similar multi-building project that cannot be financed upfront. Petitioners have not explained why such a “firm” schedule is required or why ESDC’s methodology for assessing the Extended Build-Out Schedule – which relied on an analysis of the sequence of Stages 1 through 7 for certain analyses, supplemented by a hypothetical construction schedule for other areas of analysis (SAR 7681 (2010 Technical Analysis at 45) – was deficient.

117. Fourth, petitioners allege that ESDC failed to take a hard look at neighborhood character impacts, including the “visual, traffic and noise impacts ... of using Block 1129 as an open parking lot for 12 to 15 years, when the analyses in the 2006 FEIS ... only considered the use of the Block as a [surface] parking lot for 3 to 4 years.” PHNDC Supp. Pet. ¶ 27(D). This allegation is meritless, since ESDC specifically evaluated the impacts of the surface parking lot in both the 2010 Technical Analysis (SAR 7685, 7687-89, 7705-07, 7725-26) and ESDC Response to Remand (SAR 7762-63), in the event that the Project is delayed. *See also supra* ¶¶ 108-109. Nor do petitioners explain what additional, useful information an SEIS would provide about the impacts of a parking lot at this location. In a related allegation, petitioners claim that the

stackers on the parking lot would have visual impacts, but this was also disclosed and discussed in the 2010 Technical Analysis. SAR 7685, 7688, 7706, 7726 (2010 Technical Analysis at 49, 52, 70, Figure 19). Petitioners' claim that an SEIS is required to study the traffic and noise impacts of the stackers ignores the fact that the FEIS already disclosed significant adverse traffic and noise impacts in the immediate area of Block 1129 as a result of the construction work and the traffic and traffic-related noise associated with the operation of the Arena parking lot at this location. AR 838-44, 871-76, 1053-55, 1058, 1078, 1147-48, 1200 (FEIS at 12-41-12-47, 12-74-12-79, 15-14-15-16, 15-19, 16-17, 17-48-17-49, Figure 17c-2).

118. Fifth, petitioners allege that the 2010 Technical Analysis failed to analyze the impact of multiple daily circus events at the Arena a few weeks a year. PHNDC Supp. Pet. ¶ 27(D). The specific purpose of the 2010 Technical Analysis, however, was to comply with the Remand Order, and, accordingly, its analysis focused on whether the Extended Build-Out Scenario would result in new significant impacts not disclosed in the FEIS. The impacts, if any, of the Ringling Brothers Circus performing in the Arena (the *first* building to be constructed as part of the Project) is not related to the potential impacts of an extended Project delay. Thus, the issue raised by petitioners is not a basis for ordering an SEIS to study the impacts of a delayed schedule or for annulling the 2009 MGPP. The FEIS identified a professional basketball game as the reasonable worst case scenario for Arena usage because of its high attendance and frequency. AR 2228-29 (FEIS Appendix C). Petitioners do not establish that circus performances would result in new impacts not disclosed in the FEIS.

119. Sixth, petitioners allege that the Extended Build-Out Scenario might result in more construction staging on local streets. PHNDC Supp. Pet. ¶ 27(E). But they neither substantiate this allegation nor explain why a delayed schedule could be expected to cause on-street construction staging. Extending the construction schedule – so that fewer buildings are being constructed simultaneously at the site – *reduces* the area needed for construction staging at any one time. The amended Memorandum of Environmental Commitments made enforceable by the Development Agreement specifically requires that FCRC maintain on-site (*i.e.*, off-street) construction staging areas throughout the Project’s construction. SAR 8047 (Memorandum of Environmental Commitments at 14).

120. Finally, petitioners allege that the interim surface parking on Block 1120 has been eliminated in Stages 1 and 2. PHNDC Supp. Pet. ¶ 27(G); Butzel Affirmation ¶ 30. This is not correct, as the western portion of this area remains available for surface parking in Stage 2 if necessary, as indicated by the legend for the yellow-colored portion of Block 1120 on Figure 10 of the 2010 Technical Analysis. SAR 7717. No parking shortfall is anticipated in either Stage 1 or Stage 2. At Stage 1, it is assumed that the only Project building in operation is the Arena (SAR 7716, 2010 Technical Analysis, Figure 9); its need for 1100 on-site parking spaces (AR 846, FEIS at 12-49), would be accommodated by the 1100-vehicle surface parking lot on Block 1129. SAR 7685 (2010 Technical Analysis at 49). At Stage 2, it is assumed that Buildings 2, 3 and 4 and Site 5 would be constructed, adding 650 below-grade parking spaces (400 spaces at Site 5 and 250 spaces on the Arena Block). AR 845, 4776 (FEIS at 12-48, 2009

Technical Memorandum at 26). Under the residential parking scenario (which is the worst case), the five non-Arena Phase I buildings would generate demand for 753 additional spaces (a total that includes parking demand from Building 1, which is assumed not to be constructed at Stage 2). AR 847 (FEIS, Table 12-17, by difference of 3,270 spaces of total Phase I parking demand and the 2,517 spaces of Arena demand). In the scenario analyzed in the 2010 Technical Analysis, the Project's incremental parking demand of less than 753 spaces at Stage 2 would be accommodated by providing 650 below-grade parking spaces and 103 or more surface parking spaces on Block 1120, if necessary.

121. Petitioners make additional allegations in the affidavit of Stuart Pertz. Mr. Pertz does not claim to have read the FEIS, the 2009 Technical Memorandum or the 2010 Technical Analysis, and, like the Supplemental Petition, his affidavit does not make any specific reference to the extensive analysis included in these environmental review documents. Nevertheless, Mr. Pertz raises, in a conclusory fashion, a number of additional allegations that are addressed below.

122. First, Mr. Pertz expresses concern that a delay in the construction schedule will cause the surface parking lot on Block 1129 to remain in place for a longer time period. He claims that the "nature of the traffic generated is far different than that generated when the project is complete and the impact is measured." There is no basis for this allegation. Upon Project completion (the condition analyzed in the Phase II traffic analysis in the FEIS), the parking lot on Block 1129 would have approximately 2070 spaces; approximately 1100 spaces would be for Arena patrons. AR 4776 (2009

Technical Memorandum at 26). Mr. Pertz provides no basis for his apparent contention that the far smaller interim surface parking on Block 1129 would generate more traffic than the much larger parking lot on Block 1129 in the permanent condition. Moreover, the FEIS, 2009 Technical Memorandum and 2010 Technical Analysis contained a detailed evaluation of the Project's operational and construction-related traffic impacts (including traffic associated with any parking lots on Block 1129). *See supra* ¶¶ 88, 104, 108. Mr. Pertz ignores this analysis in asserting that more traffic-related assessment is needed in an SEIS.

123. Next, Mr. Pertz states that “drawn out construction” will have longer visual, noise and other impacts, but he does not explain why ESDC's conclusions on these issues in the 2009 Technical Memorandum or 2010 Technical Analysis are deficient or what additional information an SEIS would provide.

124. Mr. Pertz expresses concern about the delay in school construction, but he does not explain the basis of his concern and fails to acknowledge that a delayed Project would also delay the increase in Project-generated school children. At any rate, ESDC took a hard look at this issue in the 2009 Technical Memorandum and 2010 Technical Analysis, *see supra* ¶ 85, and Mr. Pertz does not identify any flaws in ESDC's analysis.

125. Next, Mr. Pertz alleges that a delayed schedule would delay “park completion,” but he does not identify what park he is referring to. To the extent that he is referring to the on-site publicly accessible open space, ESDC took a hard look at this

issue in both the 2009 Technical Memorandum and 2010 Technical Analysis, *see supra* ¶ 102, and Mr. Pertz does not identify any flaws in ESDC's analysis.

126. Mr. Pertz also complains that a delay in the schedule would delay "road improvements," but once again he does not explain what improvements he is referring to or why they would be delayed. ESDC anticipates that most of the permanent changes to the local road network will, in fact, be completed by Arena opening (*see supra* ¶ 104); it is not expected that a delay in Phase II of the Project, if such a delay were to occur, would defer the roadway improvements contemplated by the FEIS.

127. Mr. Pertz also raises a concern that a 15-year delay would change traffic, infrastructure, school demand and other facets of the No Build that is used as a "baseline for all environmental impact measures," but he ignores the fact that ESDC specifically examined this concern in the detailed evaluation of changes to the No Build in both the 2009 Technical Memorandum and 2010 Technical Analysis. *See supra* ¶¶ 81-82, 84-90. Mr. Pertz does not identify any flaws in ESDC's analysis.

128. Finally, Mr. Pertz raises a concern that the 2009 MGPP may be amended at some time in the future. As with any GPP, such changes may occur and if they do occur, ESDC anticipates that any material changes would be assessed in a future Technical Memorandum or, if necessary, a future SEIS. It would be premature (and indeed, impossible) to prepare an SEIS today to evaluate the hypothetical possibility of unidentified future changes to the 2009 MGPP.

129. In his affirmation, Mr. Butzel asserts that construction of the Project over a 25-year period is the reasonable worst-case development scenario ("RWCDs")

that should have been studied by ESDC in its environmental reviews. Although it is not clear that the RWCDs concept applies to the selection of the Build Year (as discussed in ESDC's memorandum of law submitted herewith), ESDC concluded that a 10-year schedule was the reasonable worst-case condition because: (i) a 10 year construction schedule allows the analysis to identify environmental impacts that would occur over a lengthy construction period; and (ii) a 25-year construction period would *not* be the reasonable worst-case condition for environmental impact issues such as construction impacts on traffic, parking, air quality and noise. The FEIS assessed the intensity of the construction impacts with respect to these critical technical areas by looking at the peak levels of construction activity, which would be greatly reduced if the construction work were to be spread out over a 25-year time period. Such a prolonged construction schedule would not be the reasonable worst-case condition for these areas of environmental concern. Thus, the FEIS noted that the 10-year construction schedule analyzed therein "concentrate[s] construction activities at the site and assures that the reasonable worst-case construction condition is analyzed." AR 1882 (FEIS at 24-453); *see also* AR 1877, 1883 (FEIS at 24-448, 24-454). ESDC asserts that it properly exercised its discretion to prepare the FEIS using a 10-year schedule that identified the potential adverse environmental impacts resulting from the Project's construction activities.

N. Petitioners Do Not Establish That ESDC Abused Its Discretion In Not Requiring An SEIS.

130. ESDC also considered whether the preparation of an SEIS would generate useful new information about the potential environmental impacts of a delayed construction scenario. ESDC summarized this analysis on a building by building basis, and concluded that an SEIS would not provide information that would be useful and that an SEIS is therefore not warranted. SAR at 7760-63 (ESDC Response to Remand at 33-36). ESDC submits that this judgment was a reasonable exercise of its discretion. Although it is their burden to demonstrate that ESDC abused its discretion in deciding not to prepare an SEIS, petitioners do not address this issue in their submissions to the Court.

ANSWER TO ALLEGATIONS OF THE SUPPLEMENTAL PETITION

The paragraph numbers below correspond to the paragraph numbers in the Supplemental Petition.

1. It is admitted that ESDC affirmed the 2009 MGPP for the Project on September 17, 2009. It is admitted that the project sponsors are affiliates of FCRC. The other allegations are denied.

2. It is admitted that the Verified Petition was dated November 18, 2009 and was filed on November 19, 2009. It is admitted that the Verified Petition alleged that ESDC failed to comply with SEQRA in approving the 2009 MGPP. Without conceding the propriety of the Supplemental Petition's purported incorporation of the Verified Petition by reference, ESDC responds to this allegation by incorporating by

reference its Verified Answer dated December 11, 2009. The other allegations of this paragraph are denied.

3. It is admitted that Exhibit A to the Supplemental Petition is a copy of this Court's Decision and Order of November 9, 2010. It is admitted that Exhibit B to the Supplemental Petition is a copy the resolution passed by the ESDC Directors on December 16, 2010 making findings in response to the Court's Decision and Order of November 9, 2010. It is admitted that a black and white copy of the 2010 Technical Analysis is annexed as Exhibit C to the Supplemental Petition and that the 2010 Technical Analysis supports the resolution passed by the ESDC Directors on December 16, 2010. (A more useful color copy of the 2010 Technical Analysis is included in the Supplemental Administrative Record.) It is admitted that the document titled ESDC Response to Supreme Court's November 9, 2010 Order is annexed as Exhibit D to the Supplemental Petition and that this document supports the resolution passed by the ESDC Directors on December 16, 2010. The other allegations are denied.

4. Since the allegations of this paragraph seek to characterize the relief sought in this proceeding, no response is required. To the extent a response is required, the allegations are denied.

5. Without conceding the propriety of the incorporation by reference of other pleadings in a supplemental pleading, ESDC incorporates by reference the paragraphs of its Verified Answer corresponding to the paragraphs of the Verified Petition that are purportedly incorporated by reference in the Supplemental Petition.

6. Admitted.

7. It is admitted that on April 7, 2010, petitioners served a motion for reargument and renewal, citing the Development Agreement executed on December 23, 2009. The other allegations are denied.

8. It is admitted that following submission of respondents' papers opposing the motion for reargument and renewal and the submission of petitioners' reply papers, the Court held oral argument on June 29, 2010 and thereafter granted the motion in its Remand Order. ESDC respectfully refers the Court to the Remand Order for the contents thereof. The other allegations are denied.

9. Admitted.

10. It is admitted that on December 16, 2010, the ESDC Directors met and adopted a resolution making the findings required by the Remand Order. ESDC respectfully refers the Court to that resolution for the contents thereof. The other allegations are denied.

11. It is admitted that the findings of the ESDC Directors made on December 16, 2010 were supported by the 2010 Technical Analysis, the ESDC Response to Remand, the 2009 Technical Memorandum, the Memorandum of Environmental Commitments, the FEIS and other documents in the record. ESDC posted the 2010 Technical Analysis and ESDC Response to the Remand on its web site on December 16, 2010. The allegations are otherwise denied.

12. The allegations of the first sentence are admitted. It is also admitted that the parties entered into the stipulation annexed as Exhibit E to the Supplemental Petition. ESDC respectfully refers the Court to the contents of the stipulation for the

contents thereof. Petitioners' allegations as to the terms and effect of the Stipulation are denied. The other allegations are also denied.

First Cause of Action

13. ESDC realleges its responses to paragraphs 1 through 12.

14. ESDC admits that it was required to comply with SEQRA in affirming the 2009 MGPP and that its affirmation was an "action" within the meaning of SEQRA. The other allegations are denied.

15. It is admitted that one of the documents upon which the ESDC Directors relied in determining not to prepare an SEIS for the 2009 MGPP was the 2009 Technical Memorandum. It is also admitted that the 2009 Technical Memorandum found that the 2009 MGPP would not result in new significant adverse impacts not disclosed in the FEIS. The other allegations are denied.

16. Denied.

17. Denied.

18. Denied.

19. The paragraph states legal conclusions to which no response is required.

Second Cause of Action

20. ESDC realleges its responses to paragraphs 1 through 19.

21. Denied.

22. Denied.

23. Denied.

24. Denied.
25. Denied.
26. Denied.
27. Denied.
28. Denied.
29. Denied.
30. Denied.

STATEMENT OF DEFENSES

FIRST DEFENSE

The first cause of action and the allegations pleaded in support thereof are barred by the doctrine of law of the case because they seek to re-allege claims and allegations pleaded in the initial Petition. The allegations and claims pleaded in the initial Petition were addressed in the Court's March 10 Decision, as modified by the Remand Order. The only remaining issue to be litigated in this proceeding is whether ESDC's findings of December 16, 2010, made in response to the Remand Order, were arbitrary and capricious. All other allegations and claims have been dismissed with prejudice, and relitigation of these other allegations and claims is improper and without adequate justification.

SECOND DEFENSE

The claims are barred in whole or in part by res judicata, claim preclusion and issue preclusion because they seek to re-litigate matters adjudicated in prior proceedings.

THIRD DEFENSE

The Supplemental Petition fails to set forth a cause of action upon which relief can be granted.

FOURTH DEFENSE

The claims, in whole or in part, are barred by the applicable statute of limitations and the laches and mootness doctrines. The FEIS, 2006 SEQRA Findings Statement, 2006 MGPP and other ESDC approvals that were issued in November and December of 2006 – which, collectively, provide for ESDC’s participation in the Atlantic Yards Project, including its 17 buildings, eight acres of open space, new rail yard, new transit entrance and other multiple elements – may not be challenged in this proceeding because any such challenge is barred by the applicable statute of limitations and the laches and mootness doctrines. More than \$231 million of State and City monies have been spent on the Atlantic Yards Project, or elements thereof, to date, in addition to the substantial investment made by FCRC, and substantial construction had occurred and is ongoing. The elements of the 2009 MGPP that serve as the principal basis for Petitioners’ challenge here were also set forth in the 2006 MGPP and therefore are protected from challenge by the statute of limitations, laches and mootness doctrines.

FIFTH DEFENSE

The claims, in whole or in part, are barred by the doctrine that issues cannot be raised in an Article 78 proceeding that were not raised in the proceedings before the agency.

SIXTH DEFENSE

One or more of the petitioners have not established their standing.

WHEREFORE, respondent Empire State Development Corporation respectfully requests that the Court dismiss this proceeding with prejudice, grant respondents their costs and disbursements in this proceeding, and grant such other and further relief as it may deem just and proper.

DATED: New York, New York
February 18, 2011

BRYAN CAVE LLP

By:



Philip E. Karmel

J. Kevin Healy

L. Margaret Barry

1290 Avenue of the Americas

New York, New York 10104

Telephone: (212) 541-2000

Attorneys for Respondent

Empire State Development Corporation

TO:

Albert K. Butzel, Esq.
Urban Environmental Law Center
249 W. 34th Street, Suite 400
New York, NY 10001
Telephone: 212.643.0375
albutzel@nyc.rr.com
Attorneys for Petitioners

Jeffrey L. Braun, Esq.
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036
Telephone: 212.715.9100
jbraun@kramerlevin.com
Attorneys for Respondent
Forest City Ratner Companies, LLC

Richard G. Leland, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, New York 10004-1980
Telephone: 212.859.8978
richard.leland@friedfrank.com
Attorneys for Respondent
Forest City Ratner Companies, LLC

NOTICE OF ENTRY OR SETTLEMENT

(Check and complete appropriate box and section)

Sir(s):

PLEASE TAKE NOTICE that a

- of which the within is a (true) (certified) copy
- NOTICE OF ENTRY
- was duly entered in the within named court on 20
- NOTICE OF SETTLEMENT

will be presented for settlement to the Hon. one of the judges of the within named court at the Courthouse at

on 20

at o'clock M.

Dated: 20

Yours, etc.

BRYAN CAVE LLP

Attorney(s) for
Office and Post Office Address
1290 Avenue of the Americas
New York, New York 10104

To Attorney(s) for

Index No. 116323

Year 2009

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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, et ano Respondents.

VERIFIED ANSWER OF RESPONDENT EMPIRE STATE DEVELOPMENT CORPORATION TO THE SUPPLEMENTAL PETITION

BRYAN CAVE LLP

Attorneys for RESPONDENT
Office and Post Office Address
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

To

Attorneys for

Service of a copy of the within

Dated: 20

Attorneys for

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF S.S.:

being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 20 deponent served the within upon

attorney(s) for in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to before me

this day of 20