COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., Petitioners-Respondents-Respondents, For a Judgment Pursuant to CPLR Article 78 -- against -- EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC., Respondents-Appellants-Appellants.	New York County Index Nos. 114632/09 and 116323/09 **AFFIRMATION ON BEHALF OF PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL IN OPPOSITION TO MOTIONS FOR PERMISSION TO APPEAL**
In the Matter of the Application of PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al., Petitioners-Respondents-Respondents, For a Judgment Pursuant to CPLRA Article 78 -- against -- EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC., Respondents-Appellants-Appellants.	

ALBERT K. BUTZEL, an attorney admitted to the practice of law in the courts of the State of New York, affirms and declares under penalties of perjury:

1. I am a Senior Attorney at the Urban Environmental Law Center, attorneys for the Prospect Heights Neighborhood Development Council, Inc. and the other Petitioners-Respondents-Respondents in the Prospect Heights matter (NY Co. Index No. 116323/09). I submit this Affirmation, which I make on personal knowledge, on behalf of the Prospect Heights petitioners and in opposition to the Motions for Permission to Appeal to this Court made by the Respondents-Appellants-Appellants Empire State Development Corporation ("ESDC") and Forest City Ratner Companies ("FCRC"). ESDC and FCRC seek leave to appeal from a decision and order of the Appellate Division, First Department, entered on April 12, 2012 [Exhibit A to the FCRC motion].

2. The First Department decision unanimously affirmed a final decision and order of the Supreme Court, New York County (Marcy S. Friedman, J) entered on July 19, 2011 [Exhibit D to the FCRC Motion]. The Supreme Court decision granted the supplemental petitions to the extent of directing ESDC to prepare a supplemental environmental impact statement ("SEIS") under the State Environmental Quality Review Act [Environmental Conservation Law, Article 8 ("SEQRA")] for the Atlantic Yards Project, taking account of a project construction schedule that is likely to extend for 25 years.

In addition, the Supreme Court Decision required ESDC to revisit its approval of a Modified General Project Plan for the Project (the "2009 MGPP") in light of the impacts disclosed in the SEIS.

3. The Supreme Court Decision followed a circuitous course, brought about by the misrepresentations and later cover-up by ESDC. Thus, Justice Friedman initially dismissed the petitions [Exhibit B to the FCRC Motion]. However, when it was brought to her attention that *before* it approved the 2009 MGPP, ESDC, in the face of the collapse of the real estate market, had reworked its agreements with FCRC to allow the developer 25 years to construct the Project, rather than the 10 years indentified in the MGPP and analyzed in accompanying SEQRA Technical Memorandum [Exhibit A to the ESDC Motion] – but had suppressed that fundamental change in its representations to the Court – she granted reargument, ordering ESDC to provide a reasoned explanation of why it had continued to use a 10-year build out to assess the environmental impacts of the Project [Exhibit C to the FCRC Motion]. When ESDC returned to the Court with a concocted story of why it stuck to the outdated 10-year construction schedule (which, by that time, the agency acknowledged could not be achieved) and, without any study of the impacts, asserted that the 25-year build-out would not exacerbate the turmoil in the surrounding neighborhoods [Exhibit E to the ESDC Motion], the Supreme

Court found the explanations wanting and granted the supplemental petitions to the extent noted above.

4. The Appellate Division unanimously affirmed, identifying the same lack of forthrightness and the same absence of rational basis for adhering to a 10-year build-out as the Supreme Court had found in its November 10 decision. Noting that the Development Agreement gave FCRC 25 years to complete the Project and had not mandated commencement dates for most of the buildings, the First Department continued as follows:

> However, in assessing the potential environmental impacts of the changes to the Project wrought by the MGPP, ESDC used a build date based on the same 10-year completion schedule for the Project as was used in the 2006 plan and determined that it was not required to prepare a SEIS before approving the MGPP.
>
> We agree with Supreme Court that ESDC's use of a 10-year build date under these circumstances lacks a rational basis and is arbitrary and capricious.
>
> When it approved the MGPP, ESDC was aware that, under a new agreement with the MTA, FCRC had until 2030 to acquire the air rights necessary for Phase II construction. ESDC knew that the then forthcoming Development Agreement would provide for a significantly extended substantial completion date of 2035, 25 years from then, for Phase II construction. Moreover, ESCD has acknowledged that it is unlikely that the Project will be constructed on a 10-year schedule because construction lagged behind the schedule provided in 2009 and because of the continuing weak economic conditions. When it approved the MGPP, ESDC certainly was aware that the same economic downturn that necessitated the negotiation of new agreements would prevent a 10-year build-out.

Yet in the face of all this, ESDC continued to argue in the courts below that it was entitled to hold to a 10-year construction schedule and assess the environmental impacts of construction on that basis; and just to make sure, it suppressed the Development Agreement in the first round of the proceedings before the Supreme Court, requiring the Petitioners to move to reargue and renew to bring the Agreement into the open.

5. The preceding realities, unmentioned by the appellants in their motions, are what underlay the decision of the Supreme Court and the First Department affirmance. This was not and is not, as the Appellants would have it, a case where the courts substituted their judgment for that of the agency or exceeded their review authority. This is a case where the agency acted irrationally to cover up what it knew to be an unsupported analysis and decision. The Supreme Court and the Appellate Division fulfilled the classical role of the judiciary in calling ESDC to account and requiring it to reevaluate the impacts of the Atlantic Yards Project in good faith and in accordance with the law. There is nothing novel or of substantial public importance about the issues the Appellants have raised in their Motions. The only novelty is in their insistence, against the conclusion of six judges, that ESDC is effectively free to do whatever it wants, including the suppression of critical information and misleading representations regarding the basis for its actions. Hoisted with its own petard,

ESDC has no legitimate basis for seeking review again in the Court, nor does FCRC which has been ESDC's partner throughout the case.

Background

6. None of the issues raised by either ESDC or FCRC rise to the level of novel or important questions. This is due in significant part to the nature of the decisions below, which were very much fact-based. It is ESDC's conduct – its willful failure to take a "hard look" at the impacts of 25 years of construction, with possible long delays between Phase I and Phase II, leaving the adjoining residential communities[1] burdened with vacant lots, expansive above-ground parking, construction staging and other untoward conditions for 15 more years than the agency had analyzed – that underlay the decisions below.

7. That failure and ESDC's adherence to the 10-year construction schedule in its SEQRA Technical Memorandum served a critical purpose. It allowed the agency to conclude that no SEIS need be prepared in connection with the 2009 MGPP, because the impacts of construction would not differ.

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[1] As proposed, the Atlantic Yards Project would include an 18,000 seat arena and 16 high-rise residential buildings with more than 6,400 units of housing. The development would be set down on a 22-acre site at the apex of four low-rise residential neighborhoods in Brooklyn – Prospect Heights, Boerum Hill, Park Slope and Fort Greene (Record before the Appellate Division at A. 573. The prefix "A." used hereafter denotes references to that record). Given the magnitude of the Project, the residents of these neighborhoods have understandably been concerned about the potential impacts on them and their neighborhoods.

This, in turn, was critical to FCRC securing tax-exempt financing for the Arena, because under Federal law, the exemption the developer was counting on was scheduled to expire on December 31, 2009 [U.S. Treasury Regulations, 26 CFR §1.141-15(k)(3)(iii), as amended 10/24/08], less than four months after ESDC affirmed the 2009 MGPP. If the extension of the construction schedule and the resulting impacts had been acknowledged, the outcome would have been to require the preparation of an SEIS. This would have taken several months at the least, pushing the date of possible approval of the MGPP beyond the December 31. It was for this reason, the Petitioners believe, that ignoring all the objective evidence, ESDC continued to assert that the Project would be complete in 10 years, even as it was negotiating an agreement with FCRC that extended the deadline for completion to 2035 – 25 years beyond the date when Project construction was expected to begin.

8. There can be no doubt that well before ESDC approved the 2009 MGPP, the agency recognized that the Project would never be completed in the time frame that it was using. Thus, on April 9, 2009 – five months before the MGPP was acted on by the ESDC Board – Marisa Lago, the agency's CEO, responding to a question put to her regarding the build-out of the Project in light of the recession, "recognize[ed] that it is project that is scheduled to grow out over multi-years, *decades*, not months." (A. 876-77, 894-95) (emphasis added).

This statement alone makes it clear that within ESDC, it was well understood at the time that construction would extend for 20 years, if not longer.

9. Ms. Lago's observation was not conjecture but based on then-current economic conditions: by April 2009, the real estate markets had imploded. The crash in housing began in 2007 and accelerated quickly (A. 877, 899). In the years between 2006, when the 2006 FEIS was completed, and the third quarter of 2009, when the MGPP was approved, residential sales in Brooklyn decreased from nearly 4,200 units a quarter to 1,500 units a quarter (A. 877, 899). Thus the housing market into which the Project intended to sell was only about one third the strength of the 2006 market on which the 10-year construction schedule had been based, and no one was predicting a rapid recovery. To the contrary, the commercial real estate market had also broken, with financing for major projects all but dried up by the time the MGPP was prepared (A. 877). It did not take a genius to recognize the situation – all one needed to do was walk the streets and see the many projects brought to a halt in mid-stream or to read any of the many articles appearing in the nationwide press and prominent real estate publications.

10. The arbitrariness of ESDC continuing adherence to a 10-year build out is underscored by the fact that on September 17, 2009, when the agency board approved the 2009 MGPP, it was well advanced in negotiating a master

Development Agreement (the "MDA") with FCRC, and those negotiations had progressed far enough for ESDC to identify in one of the exhibits to the 2009 MGPP that the MDA would allow FCRC 25 years to complete the Project (A. 3965). But this reference was all of three short lines in an exhibit to the 100-page MGPP; and when the Petitioners first identified the reference in the initial phase of the proceeding in Supreme Court, ESDC dismissed it as irrelevant. Nor did it disclose, at the time of oral argument when the MDA had already been signed, that the Agreement included no required "start" dates for 10 of the 11 Phase II high-rise residential buildings, or that 10 buildings, which were assumed in the SEQRA Technical Memorandum to be finished in 10 years, would not have to be completed for 25 years (A. 4046, 4050). Instead of presenting this critical information to the Court below, ESDC suppressed the documentation, and it was only as a result of the Petitioners' Motions to Reargue and Renew, and then over the continuing objections of the Appellants, that these central facts were finally presented to the Supreme Court. This attempt to continue the cover-up that had begun when ESDC chose to risk sticking to an assumed 10-year build out in assessing the environmental impacts of the Project and thus avoid having to prepare an SEIS led Justice Friedman to grant the Petitioners' motions, and led eventually to her final decision in the case.

Legal Arguments

11. The thrust of the arguments that the Appellants put forward as a basis for this Court to accept their further appeal are, first, that the courts below have failed to defer to and have usurped ESDC's rightful exercise of discretion and, second, that the decisions below would egregiously expand the scope of an agency's SEQRA obligations whenever a project was delayed. While it seems to us that both issues turn of factual matters, we address Appellants' legal points below.

12. The Appellants' "discretion" arguments turn on the proposition that the courts have virtually no role in reviewing agency decisions. In this regard, the Appellants do not mention, much less address, the facts that underlie the decisions below – facts that reveal, if ever facts revealed, the failure of ESDC to have taken a "hard look" at the impacts of a 25-year construction schedule. This is beyond dispute in our view, but the Appellants proceed as if ESDC had done all it was required to do; it is the lower courts, they assert, that have exceeded proper bounds. This is without basis – in law or in fact.

13. Both Appellants harp on the idea that in finding that ESDC failed to support its conclusions with "technical studies," the courts not only usurped the agency's powers but also set out a new standard for SEQRQ compliance. They contend that ESDC was entitled to reach its conclusions on the basis of

"common sense," as if it should have been enough for the agency to muse over the potential impacts, rather than basing its conclusion on analysis supported by facts, studies and results. If this argument were accepted, it would be a license for agencies to comply with SEQRA through simple assertions, without the support of objective evidence or analysis. There would be no standard to hold agencies to. Whatever the role of judicial review under SEQRA, the courts have never been enjoined from finding agency action arbitrary and capricious or requiring that agencies take a hard look at potential environmental impacts. As this Court stated in Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 425 (1986), the judiciary is obligated to ensure that agencies abide by the law and do not engage in conduct that is a "sham" or otherwise "without foundation." That, we believe, is precisely what transpired in this case, yet the Appellants' arguments would insulate ESDC from any meaningful review.

14. In attacking the lower courts' conclusions that ESDC had not supported its findings with technical studies, the Appellants also assert that the neither the courts nor the Petitioners identified what those studies might be and, in fact, there was nothing more that could have been done. This contention is without basis. Both the Supreme Court and the Appellate Division identified areas in which further analysis was required, notably the potential impacts of vacant lots lying fallow for years, surface parking continuing unabated for 12

years or longer, as contrasted to the four years assumed under the 10-year construction schedule and the ongoing impacts of project construction and staging over 25 years [*see* FCRC Motion, Exhibit A, pp.10-11; Exhibit D, pp. 10-14, 17-18]. Moreover, contrary to the Appellants' claims, the Petitioners did present expert affidavits identifying areas in which adverse impacts were probable and further analysis was required, as evidenced by experience at many other projects that had suffered from construction interruptions and delays.

15. Responding to criticisms of the Appellants that we had presented only generalities about such impacts, the Prospect Heights petitioners retained two highly-qualified professionals – Professor Ronald Shiffman, co-founder of the Pratt Institute Center for Community and Environmental Development and a recognized expert in planning and environmental issues,[2] and James Goldstein of the Tellus Institute in Boston[3] -- to provide specific examples of projects where construction had stalled or extended for significant periods of time.

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[2] Professor Shiffman has over 47 years of experience providing program and organizational development assistance to community-based groups in low- and moderate-income neighborhoods. The Pratt Institute Center for Community and Environmental Development, of which he was a co-founder, is the nation's largest public interest architectural, planning and community development office. Mr. Shiffman has been a member of the American Institute of Certified Planners (AICP) since 1985 and in 2002 was elected a Fellow of the AICP. He served as a mayoral appointee on the New York City Planning Commission from 1990 to 1996. He is currently a professor at the Pratt Institute School of Architecture (A. 1176).

[3] Mr. Goldstein is director of the Sustainable Communities program at Tellus Institute. He has almost 30 years of experience at Tellus in the assessment of environmental and economic

16. In his affidavit, Professor Shiffman described the extensive negative impacts that the delays in the Atlantic Terminal Renewal Area had inflicted on adjacent areas in Brooklyn, including the Atlantic Yards area, and identified similar adverse effects that had occurred due to project delay in the Upper West Side and Seward Park Renewal Areas in Manhattan (A.1178-80). In a separate affidavit, Mr. Goldstein described the consequences of three projects that had stalled or experienced lengthy build-outs, including, the Filene's redevelopment in Downtown Boston, Harvard's Alston Development and the Fort Trumbull/ Pfizer Development in New London, Connecticut (A. 1185-95). The bottom line was that due to the collapse of the real estate market, the Atlantic Yards project was in much the same situation as these other projects and the consequent impacts on adjoining neighborhoods could be severe. However, this is precisely what ESDC failed to take into account by adhering to the 10-year construction schedule and refusing to prepare an SEIS.

17. The Appellants also contend that the courts below erred because they did not defer to ESDC's conclusion that an SEIS would not provide further information of material use to the decisionmakers. It is sufficient to note in this

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impacts of major facilities and policies, with a particular emphasis in recent years on socio-economic and job impacts. The Tellus Institute has evaluated a number of delayed projects in terms of their community impacts, including the impacts of the delayed Harvard University building program in Alston, Massachusetts (A. 1185-86).

regard that ESDC, having failed to *identify* extended construction as a significant issue, much less having taken a hard look at the resulting impacts, the agency's decision not to proceed with an SEIS was arbitrary and capricious on its face. This is mainstream law that has been applied in many other SEQRA decision. *See, e.g.*, Chinese Staff & Workers Association v. City of New York, 68 N.Y.2d 359 (1986)[failure to consider gentrification impacts]; Matter of Kahn v. Pasnik, 90 N.Y.2d 569 (1997)[failure to consider nine categories of impacts connected with a mall development]; Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337 (2003)[failure to consider hazards of lead paint removal]. It is the role of the courts to identify areas of impact that have not been adequately covered, not that of the agencies to define themselves what must be analyzed. Otherwise, judicial review would have little, if any, meaning; the fox would be left guarding the henhouse, which is what the Appellants are championing in their Motions.

18. The Appellants contend that the hastily-prepared Technical Analysis put together by ESDC in response to the Supreme Court's remand order should have been accepted by the courts as sufficient to meet the mandates of SEQRA. However, as both Justice Friedman and the Appellate Division held, that report did not address, much less take a hard look at, the potential impacts of stalled or delayed construction. In addition, to the extent that the Technical

Analysis bothered to address other impacts, it was on a subjective basis only, with undocumented conclusions that any construction impacts would simply be "prolonged" and in any case would be "temporary," because at some undetermined future date the Project would be complete and the disturbances associated with the build-out would cease. Again, mere statements, reclothed in the Appellants' motions as "common sense," were presented in lieu of studied analyses. This was far from the "hard look" that SEQRA requires. In some cases, no doubt, the impacts of construction can be passed off as "temporary," because they are relatively short term and the normal incidents of living in an urban area. But when the subject is the construction of a massive project that is likely to extend over many years, the impacts imposed during the build-out become even more significant than the impacts from the completed project. "Temporary" is no answer in these cases, and especially so here, where construction could well extend 25 years and beyond. Nor is it sufficient to say, simply, that whatever the impacts, they will be "prolonged" by a longer build-out. Impacts accumulating over time can and often do have far more serious negative consequences than ESDC ever suggested, much less identified, in the belated Technical Analysis.

19. Moreover, the reality is that the Technical Analysis was an after-the-fact justification, rather than a prospective evaluation. Thus, even if it were persuasive, it could not cure the failure of the ESDC Board to have had such an

evaluation before it at the time it approved the MGPP. This is the rule set down in Matter of Tri-County Taxpayers Association v. Town Board of Queensbury, 55 N.Y.2d 41 (1982), which held that a failure to comply with SEQRA could not be cured retroactively, but that the offending agency was obligated to correct the deficiency and only then take action on the proposal. The Court of Appeals observed that if this remedy were not enforced, there was every reason to believe that an after-the-fact cure would end up as a justification for a previously-made decision. That, in the Petitioners view, is what the Technical Analysis represented. It is also what the courts below implicitly concluded.

20. The Appellants contend that a different standard applies when it comes to negative declarations, such as that involved here, made in connection with the modification of project that has been the subject of an earlier EIS. In the regard, the Appellants read Matter of Riverkeeper, Inc. v Planning Bd of the Town of Southeast, 9 N.Y. 3d 219, 231 (2007) and the SEIS regulations issued by the Department of Environmental Conservation [6 NYCRR §617.9(a)(7)] as standing for the proposition that the decision whether or not to prepare an SEIS lies entirely within the unfettered discretion of the agency. But that reading would eviscerate the statutory mandate of SEQRA that "actions" that "may have a significant impact on the environment" require the preparation of an EIS. It would also go well beyond anything suggested by the Riverkeeper opinion,

which itself invoked the Jackson standard of review, and would make meaningless the DEC regulation, which is intended to provide guidance in situations where there has been a significant project change, not to excuse an agency from complying with SEQRA.

21. Certainly, the scope of judicial review is more limited when the subject is the modification of an action; there is no reason for the courts to revisit impacts that were adequately considered in an earlier EIS. But in areas where changes in a project impose significant new impacts, the courts must be free, and they are duty bound by the law, to address the adequacy of the agency's action under the standards articulated by the Court of Appeals in Jackson. That is what the courts below did in this case. There is nothing unusual in their decisions that raises novel or important questions.

22. The second "novel" question of purported "substantial public importance" that the Appellants press is their claim that "if allowed to stand, the decisions below would fundamentally transform the administration of SEQRA in its application to previously approved projects that, like most large-scale projects, encounter delay." [FCRC Motion, p. 2]. Or as ESDC has put it in its motion papers, "the lower court's decision casts a shadow of uncertainty on Phase II of the Project" with its decision requiring ESDC to take a hard look at the environmental impacts of a construction schedule more than twice the length

of the build-out analyzed in the 2006 EIS. [ESDC Motion, p. 16-17]. The implication is that if the decisions below are not overturned, projects will have to undergo endless review under SEQRA.

23. This is nonsense. Further review was required here because the agency involved – ESDC – at the instance of FCRC, took a new "action" within the meaning of SEQRA. It approved a Modified General Project Plan, which fundamentally changed the timing of the Project's construction. When an agency takes an "action" – but only then – it is statutorily *required* to comply with SEQRA. There is no ambiguity about this in the statute; *and indeed, here that is precisely what ESDC purported to do when it issued a negative declaration for the 2009 MGPP*. The reality was, however, that the modifications of the original MGPP did have a significant impact on the environment – 15 years of additional construction, with the potential of long interludes of vacant lots, surface parking and construction staging– and that, in turn, required it to prepare an SEIS. Here, the courts below did no more than courts traditionally do in judicial review pursuant to SEQRA; they applied the statute and the standards set out by this Court in Matter of Jackson, *supra.* They did not expand the law; the simply enforced it.

24. Under the theory that the Appellants invoke, there would be no need to comply with SEQRA when there was a modification of a previously

approved plan due to changes of economic conditions or any other source of delays, no matter what the consequences in terms of impacts. But this would amend the statute, effectively saying that agency action taken due to delays of any kind was not an "action" under SEQRA. There is no basis for such a reading of SEQRA, nor do the courts have the authority to amend statutes. The position taken by the Appellants is, to put it colloquially, "off the wall." It is not "novel" or of "substantial public importance." It is a wild and unsupportable stab in the dark.

25. Moreover, the decisions below were taken because the 2009 MGPP was not simply about delay, as the Appellants contend, but because the approved changes resulted in significant NEW environmental impacts, including, contrary to FCRC's claim, changes in the Project components. The latter claim is wrong in its own right – for example, creating a huge open parking lot that would be in place for 12 or more years rather than the four years originally promised, or providing publicly accessible open space 10 to 15 years later than had been represented were certainly changes in the Project components. But more to the point, FCRC's position completely ignores the reality that the extension of time for property acquisition and project completion approved by the 2009 MGPP laid the adjoining communities open to an extension (and in all likelihood, an expansion) of negative environmental impacts for up to 25 years. So, too, did

the extension of the construction schedule inherent in the 2009 MGPP but not disclosed by ESDC. However the Appellants may characterize the changes wrought by the MGPP, those changes had the potential of inflicting severe and negative environmental impacts. As a result, the lower courts found that ESDC should have prepared an SEIS to evaluate those impacts, taking into account, among other things, the examples of project delays and long construction schedules elsewhere. In so holding, they did not depart from or expand the reach of SEQRA; they did nothing novel; they simply have held ESDC to its obligations under the statute.

26. In its Motion, FCRC places considerable emphasis on the case of Wilder v. N.Y.S. Urban Dev. Corp., 154 A.D.2d 261 (1st Dep't 1989), *app. denied* 75 N.Y.2d 709 (1990), which, it argues, is contrary to and cannot be reconciled with, the First Department's decision in this case. Clearly, however, the First Department itself found no inconsistency, due in part, no doubt, to the egregious conduct of ESDC in the current proceeding. FCRC is like a child stamping its feet in frustration because the parent does not agree, but without basis beyond pique for complaining. More to the point, it misses the legal point. Wilder concerned the revisiting of the "build year" – the year in which the impacts of the completed project are measured. The instant case is about the negative impacts that will be imposed on the neighboring community due to a

construction schedule that is likely to last 25 years, with fits and starts in between. That is what ESDC failed to evaluate; it is not an academic dispute about the year in which the full impacts of a project should be measured.

27. FCRC raises two other issues that it contends require review by this Court. In the first of these, it claims that the lower courts improperly took note of, and based their conclusions in part on, the terms of the master Development Agreement, which was only executed after the 2009 MGPP was approved and thus, in theory, was not a part of the record before the Board when it acted. There is nothing novel about the courts having done so, and there is absolutely no reason that they should not have done so.[4]

28. To begin with, if FCRC's position were accepted, it would sanction fraud and lack of disclosure. Here, as we have noted above, there was ample information available to ESDC to make it clear that the Project could not and would not be completed in a 10-year time span, including the statement of the agency's CEO that it would be "decades" before the Project was completed, as well as the available market data showing that the Brooklyn real estate market had crashed. The terms of the MDA were simply a reflection of those realities –

[4] The real improprieties were the failure of ESDC and FCRC to disclose the full terms of the MDA at oral argument, when the Agreement had already been signed; ESDC's in-complete and misleading description of the terms of the MDA at oral argument; and ESDC's initially successful effort to withhold the Agreement from Justice Freedman.

evidence that within the staff, if not the board, the terms and the recognition they reflected were well understood. If the position FCRC has taken were the law, the courts would be precluded from inquiring into the actual circumstances, even if they involved intentional withholding. That cannot be the law.

29. It is also disingenuous for FCRC to argue that the terms of the MDA could not be considered, because the crucial term was in fact before the ESDC board when it approved the 2009 MGPP. This was that construction could extend for 25 years – a term contained in the lease abstract made a part of the 2009 MGPP (A. 3965)[see paragraph 10 above]. Whether or not understood by the directors, the 25-year term was before them, albeit so obfuscated as to be virtually invisible. It was only when the MDA became public that the specific deadlines were revealed in a way that cut through the obscure reference in the 2009 MGPP. The courts below acted properly in examining the MDA and using it both to clarify that reference and to pass judgment on ESDC's claim that it had been rational in adhering to the 10-year construction schedule. This is all the more the case in light of the misleading statements made by ESDC at the initial oral argument in the Supreme Court [*see* FCRC Exhibit C, pp. 4-5, 10-13].

30. FCRC cites Featherstone v. Franco, 95 N.Y.2d 550 (2000) in support of its claim that the lower courts should not have considered the MDA,

because it was "not before" the ESDC directors when they approved the 2009 MGPP. But the reasons we have identified above clearly distinguish this case from Featherstone. Among other things, the MDA was effectively made part of the administrative record in that both the 2009 MGPP and the SEQRA Technical Memorandum referenced the fact that separate development agreements were to be drafted and executed by FCRC; and these agreements would supposedly embody the terms that would assure completion of the Project by 2019. As it turned out, the MDA included many further terms that bore on the likely completion dates, including the 25-year period FCRC would have to finish the Project, but these were suppressed. In these circumstances, the courts below clearly acted within their powers in considering the MDA.

31. Lastly, FCRC contends that the lower courts erred in referencing the lack of any financial studies to support the 10-year build-out, asserting that in this way the courts introduced financial considerations into the SEQRA process. This is silliness. As is clear from the lower courts' decisions, the references to financial capacity were simply to point out, in response to the Appellants' own financial claims, that there was nothing to support such claims [FCRC Motion, Exhibit A at 8; Exhibit D at 8]. Equally important, the courts' references were no more than passing observations regarding the lack of reality in the Appellants' adherence to the 10-year completion date, given the real estate

meltdown and the drying up of financing. They did not introduce financial requirements into the SEQRA analytic process; and in no way does the issue rise to the level of a novel question or one of substantial importance.

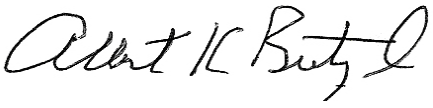
Conclusion

32. This is not an ordinary administrative law case. Rather, it is case filled with doubtful actions, unexplained lapses in disclosure and, at bottom, an agency decision that so flew in the face of market realities as to all but render it arbitrary and capricious on its face. This is not an instance where an administrative body made a reasoned decision that might or might not be correct – a decision of the sort that courts are not empowered to second-guess. Rather, it is an instance where before it acted, the agency, by the admission of its own CEO, knew that the position it was taking was wrong, endorsed it nonetheless and then, when challenged, sought to cover up that reality and hide it from the court. In such situations, the judiciary alone stands between lawfulness and lawlessness. Under well establish precedent and the fundamental concept of separation of powers, the courts are not empowered to take over the roles of agencies of the executive branch. But they are obligated to ensure that those agencies abide by the law and do not engage in conduct that is a "sham" or otherwise "without foundation." S*ee* Matter of Jackson, *supra*, 67 N.Y. 2d at 425. This is precisely what the lower courts did in this case.

33. This is also a case that raises no novel questions or issues of substantial public importance. This is so in part because the case is so significantly fact-based. But it is equally the case because, as just noted, the lower courts acted well within their prerogatives, as articulated by this Court and in a long line of precedents. They have held ESDC to its obligations under SEQRA and basic principles of administrative law. They have in no way exceeded their authority or created new law. In these circumstances, the Court should deny the Appellants' Motions for Permission to appeal.

WHEREFORE, it is respectfully requested that the Motions for Permission to Appeal be denied.

Dated: New York, New York
May 17, 2012



Albert K. Butzel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of

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

AFFIRMATION OF SERVICE

Index No. 116323/09
IAS Part 57

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC,
Respondents. .
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ALBERT K. BUTZEL, an attorney duly admitted to practice in the Courts of New York, affirms the following to be true under penalties of perjury pursuant to Section 2106 of the New York Civil Practice Law and Rules:

1. I am over 18 years of age and am not a party to this action.

2. On May 11, 2012, I served a copy of the Petitioners' Notice of Motion for an Award of Fees and the supporting affirmation of Albert K. Butzel n the above-referenced matter by placing the same in an overnight delivery postage prepaid wrapper in a depository under the exclusive care and custody of Federal Express located at New York, New York 10001, on:

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Dated: May 11, 2012

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Albert K. Butzel