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

In the Matter of the Application of DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., Petitioners, For a Judgment Pursuant to Article 78 of the CPLR – against – EMPIRE STATE DEVELOPMENT CORPORATION, et ano., Respondents.	Index No. 114631/09 IAS Part 57 Justice Marcy S. Friedman
In the Matter of the Application of 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.	Index No. 116323/09 IAS Part 57 Justice Marcy S. Friedman

MEMORANDUM OF LAW
OF RESPONDENT EMPIRE STATE DEVELOPMENT CORPORATION
IN OPPOSITION TO THE SUPPLEMENTAL PETITIONS
AND THE MOTION FOR AN INJUNCTION

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PRELIMINARY STATEMENT

Empire State Development Corporation ("ESDC") respectfully submits this memorandum in opposition to the supplemental petitions and the motion for a stay.[1]

In a decision, order and judgment issued on March 10, 2010 (the "March 2010 Decision") this Court dismissed these proceedings. In a decision and order issued on November 9, 2010 (the "Remand Order"), upon petitioners' motions to reargue and renew, the Court directed ESDC 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, and on whether a Supplemental Environmental Impact Statement is required or warranted." Remand Order at 18. ESDC issued the required findings on December 16, 2010, and petitioners, in their never-ending effort to derail the Atlantic Yards Project (the "Project"), now challenge those findings and prior Project approvals. Their supplemental petitions should be dismissed for four reasons.

First, ESDC made the findings required by Remand Order. ESDC reviewed the terms of the Development Agreement and other business agreements executed on December 23, 2009, and found them to be consistent with the scheduling assumptions that ESDC had made in affirming the 2009 Modified General Project Plan (the "2009 MGPP") because they: (i) require the developer to use "commercially reasonable effort" to construct the Project on a 10-year schedule and (ii) facilitate the Project's construction within that timeframe. In its findings, ESDC concluded that the principal driver of the construction schedule will be real estate market conditions, just as ESDC had assumed and acknowledged in affirming the 2009 MGPP. As also required by the Court, ESDC reconsidered whether a Supplemental Environmental Impact

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[1] Because this memorandum of law responds to three sets of papers in two proceedings, ESDC respectfully requests that the Court waive the 30-page limit in the local rules.

Statement ("SEIS") should be prepared for the Project to study further a delay in the original 10-year construction schedule. In its findings, ESDC confirmed that an SEIS is neither required nor warranted because an extended construction schedule will not result in any significant adverse environmental impacts not previously disclosed – essentially for the same reasons articulated in the Technical Memorandum prepared in June 2009 (the "2009 Technical Memorandum"). Accordingly, ESDC complied with the Remand Order. *See* Point I, *infra.*

Second, ESDC's findings are rational. Petitioners do not bother examining the substance of the thorough analysis that underpins ESDC's findings, as set forth in two documents: (i) "Atlantic Yards Land Use Improvement and Civic Project; ESDC Response to Supreme Court's November 9, 2010 Order" (the "ESDC Response to Remand") and (ii) "Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project" (the "2010 Technical Analysis"). Instead, they merely dispute ESDC's conclusions, presenting a handful of unsubstantiated and superficial reasons why they believe that a different outcome should have been reached. But a difference of opinion is not a basis for a SEQRA challenge. Petitioners also ignore Court of Appeals caselaw that an agency decision to prepare an SEIS is discretionary. Their challenge to ESDC's discretionary decision not to require an SEIS should be rejected. *See* Point II, *infra.*

Third, neither the Urban Development Corporation Act ("UDCA") nor SEQRA required a public hearing for the Court-ordered findings. *See* Point III, *infra.*

Fourth, in addition to challenging ESDC's findings, petitioners (in their first cause of action) seek to re-litigate issues that were adjudicated in the March 2010 Decision as modified by the Remand Order. The law of the case doctrine bars these claims from further consideration. The only issue that remains in these proceedings is whether ESDC abused its discretion in

making the findings required by the Remand Order. All other allegations and claims have been dismissed with prejudice and cannot be relitigated. Moreover, even if the claims were to be considered, they are meritless. *See* Point IV, *infra.*

Finally, no injunction should be issued because these proceedings should be dismissed. Enjoining construction of the Project's principal civic elements – the Arena, subway entrance and rail yard – would also be contrary to the public interest. *See* Point V, *infra.*

POINT I

ESDC MADE THE FINDINGS REQUIRED BY THE REMAND ORDER

ESDC made the two findings required by the Remand Order. In response to the Court's first directive, ESDC found as follows:

> 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.

Supplemental Administrative Record ("SAR") 7631.

Petitioners assert that this finding did not comply with the Remand Order because ESDC should have focused on "why it continued to use a 10-year schedule in determining [in June and September 2009] whether an SEIS was required." Butzel Aff. dated Jan. 17, 2011 ("Butzel Aff.") ¶ 6. Petitioners appear to be implying that instead of addressing how the

complete terms of the agreements executed on December 23, 2009 affect the Project schedule, ESDC should have explained why it made the scheduling assumptions it did in the summer of 2009, before those agreements had been negotiated and executed. But ESDC reasonably interpreted the Remand Order as requiring it to examine the "complete terms" of the agreements, Remand Order at 18, rather than merely to re-explain why the original 13-volume administrative record ("AR") supported its scheduling assumptions.

In response to the Remand Order's second directive, ESDC found as follows:

> 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.

SAR 7631.

Petitioners assert that the only finding ESDC was to make was why "it continued to use a 10-year schedule in determining whether an SEIS is required." PHNDC Mem. at 4. This assertion is wrong for two reasons. First, its premise is faulty because in addition to examining the need for an SEIS under a 10-year schedule, the 2009 Technical Memorandum also examined whether a substantial delay in that schedule to an illustrative delayed build year of 2024 would warrant an SEIS. In 2009, ESDC considered each of these analyses in determining not to prepare an SEIS. Second, the Remand Order's second directive was not so narrowly circumscribed and is correctly construed as requiring a finding as to whether an SEIS is warranted in light of the complete terms of the agreements. Given the concerns raised by both

the petitioners and this Court, it was reasonable for ESDC to respond to the Remand Order by investigating whether a delay all the way to 2035, however unlikely, would warrant an SEIS.

POINT II

ESDC'S FINDINGS WERE RATIONAL AND NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION

ESDC's findings should be upheld for the reasons summarized below.

A. The Decision To Prepare An SEIS Is Discretionary And Subject To A Deferential Standard Of Review.

The standard for an agency's determination whether to prepare an SEIS is well established. The agency should identify the relevant areas of environmental concern, take a hard look at them and provide a reasoned elaboration of the basis for its determination. *See* Riverkeeper, Inc. v. Planning Board of Town of Southeast, 9 N.Y.3d 219, 231-32 (2007) ("Riverkeeper"). In deciding whether to prepare an SEIS, the "hard look" is focused on whether the potential environmental impacts associated with project changes or new information have been addressed in the EIS. *See* 6 N.Y.C.R.R. § 617.9(a)(7)(ii) (decision to require an SEIS is to be made in light of the "importance and relevance of the information" and the "state of information in the EIS"). *See, e.g.*, Halperin v. City of New Rochelle, 24 A.D.3d 768, 777 (2d Dep't 2005) (there was no evidence of adverse impacts that were not addressed in the FEIS which would warrant, let alone mandate, preparation of an SEIS).

Here, the FEIS presented an exceedingly thorough analysis of the Project and its effects, describing in detail the potentially significant impacts of both the construction and operation of the Project in each and every relevant area of environmental concern, and identifying a wide-ranging program of mitigation measures to ameliorate such impacts. AR 1-3537, 3594-608. This Court and two Appellate Divisions have already held that this FEIS satisfied SEQRA in all respects. *See* Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.,

2008 WL 206942 (Sup. Ct. N.Y. Co. 2008) ("DDDB I"), *aff'd*, 59 A.D.3d 312, 312-19 (1st Dep't), *leave to app. denied*, 13 N.Y.3d 713 (2009), *rearg. denied*, 14 N.Y.3d 748 (2010); Anderson v. N.Y.S. Urb. Dev. Corp., 45 A.D.3d 583, 585 (2d Dep't 2007), *leave to app. denied*, 10 N.Y.3d 710 (2008). It is that document and its conclusions – which disclosed and addressed a number of Project-related significant adverse environmental impacts – that serves as the baseline against which to examine the reasonableness of ESDC's determination not to prepare an SEIS. Yet petitioners ignore entirely the FEIS and its disclosures in pressing their claims and thus do not even begin to establish that an SEIS is required for the Project.

The standard of judicial review is deferential to the agency. "[A]n agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence.... 'While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency....'" Riverkeeper, 9 N.Y.3d at 232 (citations omitted).

Courts are required to follow a rule of reason in determining whether environmental impacts have been adequately addressed. *See* Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d 400, 417 (1986). "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA." Id. Moreover, an EIS (or SEIS) is not required to study speculative impacts. *See* Indus. Liaison Comm. of the Niagara Falls Area Chamber of Commerce v. Williams, 72 N.Y.2d 137, 143 (1988); Neville v. Koch, 79 N.Y.2d 416, 427 (1992); *accord* WEOK Broadcasting Corp. v. Planning Board of Town of Lloyd, 79 N.Y.2d 373, 384 (1992) (annulling agency's determination of significant adverse impacts because it was based on "generalized, speculative comments and opinions of local residents"). Similarly, conclusory allegations will not suffice to support a SEQRA claim. *See* West Vill. Comm. Inc. v. Zagata,

242 A.D.2d 91, 100 (3d Dep't 1998) (deferring to agency where petitioners had not come forward with "evidentiary proof establishing that [the agency's] analysis is founded upon spurious data or is otherwise deficient").

Unlike the mandatory decision to prepare the initial EIS, the determination whether to require an SEIS is a matter that the SEQRA regulations leave to the agency's discretion. Riverkeeper, 9 N.Y.3d at 231. As in Riverkeeper, virtually every case reviewing an agency's determination not to prepare an SEIS has upheld that determination,[2] and petitioners do not cite any case where a court came to a different conclusion. In the instant case, ESDC made that decision after identifying the relevant environmental issues, taking a hard look at them and providing a reasoned elaboration of its conclusions, as documented in the 2009 Technical Memorandum and 2010 Technical Analysis. It would be utterly unprecedented to overturn the agency's discretionary determination not to prepare an SEIS in such circumstances.

B. ESDC's First Finding Rationally Concluded That The Development Contracts Do Not Have A Material Impact On The Continued Use Of A 10-Year Build Out For The Project.

With respect to the first finding, the ESDC Response to Remand begins with a thorough description of the critical provisions of the final transaction documents, and goes on to scrutinize the effect of those provisions (both individually and collectively) on the 10-year build-out schedule. The outcome of that analysis was a finding that the rights, obligations and arrangements put into place by the parties are intended to advance the Project at a commercially

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[2] *See, e.g,* Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d at 416; Eadie v. Town Board of Town of North Greenbush, 7 N.Y.3d 306 (2006); Neville v. Koch, 79 N.Y.2d 416; Muir v. Town of Newburgh Planning Board, 49 A.D.3d 742 (2d Dep't 2008); Municipal Art Society of New York, Inc. v. N.Y.S. Convention Center Development Corp., Index No. 106245/06, 2007 WL 1518932 (Sup. Ct. N.Y. Co. May 21, 2007); C/S 12th Avenue LLC v. City of New York, 32 A.D.3d 1 (1st Dep't 2006); Halperin v. City of New Rochelle, 24 A.D.3d at 777; Coalition Against Lincoln West, Inc. v. Weinshall, 21 A.D.3d 215 (1st Dep't 2005); Molly, Inc. v County of Onondaga, 2 A.D.3d 1418 (4th Dep't 2003); Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp., 291 A.D.2d 40, 55-57 (1st Dep't 2001).

reasonable pace, and "do not have a material effect on whether it is reasonable to use a 10-year construction schedule for assessing the environmental impacts of the Project." SAR 7729.

1. ESDC Identified And Described The Key Provisions Of The Agreements.

The ESDC Response to Remand confirmed that the Development Agreement includes an explicit requirement that FCRC[3] "use commercially reasonable effort to cause Substantial Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date)." SAR 7734. The ESDC Response to Remand also pointed out that FCRC is required to "develop and construct" the Project defined in the 2009 MGPP (including its provision requiring commercially reasonable efforts to achieve the 10-year completion date, *see* AR 4692) and to use "prudent and reasonable business practices" in doing so. SAR 7734. ESDC went on to describe specific terms of the Development Agreement, several of which impose outside dates that allow Project construction to go well beyond the 10-year schedule. Among other things, the "Outside Phase I Substantial Completion Date" is May 12, 2022; the outside deadline for commencement of construction of the first building on Block 1129 is May 12, 2020; and the Outside Phase II Substantial Completion Date is May 12, 2035. SAR 7734-36.[4] At the same time, ESDC pointed out that the "requirement that FCRC use commercially reasonable effort to cause the substantial completion of the entire Project by December 31, 2019 is not modified, limited or impaired by the separate and distinct contractual requirements" to meet the specified outside dates. SAR 7736. ESDC also noted that the Development Agreement subjects FCRC to a stipulated penalty of up to $10,000 per day, and

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[3] As used herein, FCRC refers to the affiliates of respondent Forest City Ratner Companies that entered into the various agreements addressed in the ESDC Response to Remand.

[4] As noted in the ESDC Response to Remand (SAR 7746), the outside dates are subject to certain specified contingencies.

allows ESDC to pursue its other equitable and common law remedies for violation of the covenant to use commercially reasonable effort to complete the Project within the 10-year timeframe. SAR 7736-37.

The MTA agreements examined in the ESDC Response to Remand include the "Air Space Parcel Purchase and Sale Agreement for Air Space Over Block 1120, Lot 1 and Block 1121, Lot 1"; the "Air Space Parcel Development Agreement"; the "Declaration of Easements by MTA for LIRR Vanderbilt Yard" (by which MTA subdivided the Vanderbilt Yard into a "Yards Parcel" lying below a specified horizontal plane in the air space above the yard, and an "Air Space Parcel" lying above that plane); the "Yard Relocation and Construction Agreement"; and the "Sale Purchase Agreement between MTA, FCRC and ESDC (Tax Block 1119, Lot 7)." SAR 7737-45. Under these agreements (collectively, the "MTA Agreements"), the parties transferred title to Block 1119, Lot 7 on the Arena Block, allowing work on the Arena to proceed pursuant to the Development Agreement, and created a framework for the: (i) relocation and reconstruction of the Vanderbilt Yard under the supervision of MTA and LIRR (the "MTA Parties"); (ii) parcel-by-parcel sale and purchase of the air space over the Vanderbilt Yard; (iii) modular development of the platform needed to construct the Project within that air space, in accordance with plans and schedules approved by the MTA Parties; and (iv) operation and maintenance of the platform by multiple owners as and after the Project is completed.

The ESDC Response to Remand noted that the Yard Relocation and Construction Agreement imposes specific design and construction requirements with respect to the yard relocation work, and creates a phased process for MTA's review of the design and schedule for that work. SAR 7744-45. Once the yard improvements are made, the MTA Agreements allow FCRC to purchase separately up to six "Air Space Subparcels" over the Vanderbilt Yard at any

time up to the outside date of June 1, 2031. SAR 7738. The purchase price for the air space is to be paid in a combination of annual installments and accelerated lump sum payments due at the closing for each Air Space Subparcel. Id. Among other things, the Air Space Parcel Development Agreement puts into place an iterative process for the MTA Parties' review and approval of the design and schedule for the platform construction work. SAR 7740. ESDC acknowledged that the MTA Agreements establish outside dates for: (i) completion of the New Yard Construction (September 1, 2016); (ii) the purchase of all Air Space Subparcels (June 1, 2031); and (iii) the construction of the entire platform (May 12, 2035). SAR 7745, 7738, 7742.

2. ESDC Carefully Considered The Key Contractual Provisions And Rationally Concluded That They Do Not Materially Affect The Construction Schedule For The Project For The Purpose Of Assessing Its Environmental Impacts.

ESDC reviewed thoroughly the business agreements noted above to assess whether and how they would affect the 10-year timetable that had been assumed as one element of its environmental review of the Project. The analysis began with ESDC noting that outside dates incorporated into heavily negotiated agreements are not to be equated with the parties' reasonable expectations as to a project's actual construction schedule. This observation was grounded in simple common sense, since outside dates serve an entirely different function than a construction schedule, and "reflect the prudent business judgment of the parties and their transactional lawyers seeking to anticipate any and all of the possible risks [that could derail construction], however unlikely." SAR 7746.

However, ESDC's assessment was grounded on considerably more than that reasonable observation. ESDC observed that the interlocking agreements create legally binding arrangements that "(i) require construction to proceed towards completion ... at a commercially reasonable pace, with the goal being completion in 2019; and (ii) in addition, establish deadlines

to define the outer allowable limits for Project completion." SAR 7746. As to the first requirement, ESDC cited FCRC's "commercially reasonable effort" obligation under the Development Agreement and the provision making clear that this obligation is not superseded by the outside dates. SAR 7746. Under ESDC's reasoning, these provisions, combined with the outside deadlines in the Development Agreement, establish "a two-tiered duty with respect to the schedule for the Project. First, FCRC must make commercially reasonable efforts to achieve completion of the Project by 2019, and second, it may not, in any event, go beyond the outside limits established by the agreement (except for specifically defined reasons)." SAR 7746.

The ESDC Response to Remand discerned this two-tiered structure in the MTA Agreements, as well. ESDC noted that the Yard Relocation and Construction Agreement imposes deadlines for the completion of the yard construction work, but also calls for FCRC to prepare a "proposed preliminary schedule," which upon the approval of the MTA Parties becomes mandatory. SAR 8960 (FCRC must "utilize all commercially reasonable efforts to complete construction of the New Yard" in accordance with the approved schedule).[5] As noted by ESDC, nothing in the agreement ties the *actual* schedule for completion of the Yard work under the approved schedule to the *outside* date provided by the agreement. Likewise, ESDC noted that the Air Space Parcel Development Agreement imposes an outside deadline of 2035 for completion of the platform, but at the same time contemplates the development, approval and mandatory implementation of *actual* construction schedules based on FCRC's then "current estimate" of the duration of the work. SAR 7747. Thus, the ESDC Response to Remand noted that the agreement "imposes a dual obligation on FCRC: to (i) Substantially Complete ... the

[5] *See also* SAR 8958-59 ("Construction of the New Yard shall be ... prosecuted by Developer (subject to Force Majeure, Railroad Emergency and Owner's Delay) with all reasonable diligence and without interruption (with the Construction Milestones at various stages each being substantially completed in accordance with the Construction Schedule).").

Platform Work ... in accordance with the approved Baseline Schedule ... and (ii) in any event, to complete all platform work by 2035." SAR 7747 (internal quotations omitted).

ESDC further noted that the agreements do not simply impose an obligation on FCRC to use commercially reasonable effort to complete the Project in 10 years; they are "structured to *facilitate* construction of the Project at a commercially reasonable pace." SAR 7747. From a general perspective, ESDC noted that the phased approach embodied in the agreements was created "to get the Project going in a difficult economic climate." Id. More specifically, it noted that the MTA Agreements set up streamlined design review procedures, whereby LIRR is to provide comments on major design and scheduling submittals within specified deadlines, and to dedicate LIRR staff needed to meet those deadlines, at FCRC's expense. Id. Various Project coordination measures and financial safeguards – designed to assure that construction, once commenced is completed on time – are cited as demonstrating the parties' overarching intention to speed Project construction. SAR 7748.

Finally, the ESDC Response to Remand addressed: (i) the discrepancy in the amount of the liquidated penalty imposed for FCRC's breach of the covenant to use commercially reasonable effort to complete the Project in a 10-year timetable, as compared to the penalties imposed for FCRC's failure to meet the outside dates; and (ii) the complexities ESDC would face in enforcing the covenant to implement the Project with commercially reasonable effort. SAR 7748. ESDC determined, in light of the hundreds of millions of dollars FCRC has poured into the Project to date, that the Developer has a "significant incentive, separate and apart from ESDC remedies, to pursue it to a successful conclusion because undeveloped land, the acquisition cost of which has been borne entirely by FCRC, does not earn any substantial return." Id. Under such circumstances, ESDC found that "more substantial

stipulated penalties or additional enforcement remedies" are not required to "induce FCRC to pursue the Project with commercially reasonable diligence." Id.

In light of the considerations summarized above, ESDC found that the agreements "both require and encourage construction to take place at a commercially reasonable pace" and neither preclude nor are inconsistent with a 10-year schedule for Project construction. Id.

The soundness of that determination is elucidated by an understanding that selection of the 2019 Build Year in the 2009 Technical Memorandum was based on considerably more than FCRC's contractual commitments. With the assistance of its construction and financial consultants, ESDC considered the technical feasibility of a 10-year construction schedule, projections of population growth in Brooklyn over the 10-year period, the extremely low residential vacancy rate in Brooklyn, the urgent and well-recognized need for affordable units, and the Project's convenient, transit-accessible location, in concluding that it was reasonable to assume Project completion in a 10-year horizon. *See* ESDC Answer ¶¶ 29, 37-38 (citing AR 4658-65 (Earth Tech/AECOM Report); AR 7036-38 (Response to Comments at 7-9); AR 7075-122 (KPMG Report)). ESDC's rationale for a 10-year build out thus included the fact that "1) FCRC has made a substantial financial investment to date in acquisition costs and has an incentive to recognize a return on its investment as soon as possible; and 2) it is reasonable to expect that the market will absorb the units called for in the Project." March 2010 Decision at 9-10. At the same time, ESDC recognized explicitly that "market conditions may impact the Project schedule," AR 7036 (Response to Comments at 7), and therefore took a hard look at a substantial delay in the 10-year schedule, with Project completion in 2024. *See* AR 4808-16 (2009 Technical Memorandum at 55-63). ESDC's decisionmaking in 2009 was wholly consistent with the business agreements executed later that year, when read in their entirety.

3. Petitioners' Superficial Arguments Concerning The Effect Of The Business Agreements On The Build Year Have No Merit.

Reading petitioners' papers, one would never guess that in response to the Court's directive to consider the "complete terms" of the business agreements (Remand Order at 18), ESDC had assembled, summarized and presented a detailed analysis of those agreements. Petitioners disregard the details of the agreements, making no mention of the "commercially reasonable effort" provisions of the Development Agreement, the two-tiered obligations of FCRC in building out the Project, the streamlined process for advancing the Project design, or any other aspect of the agreements.

Petitioners characterize ESDC's careful analysis as "clearly an after-the-fact attempt to justify the erroneous 10-year construction schedule ... rather than a rational explanation for its use" and assert that it does not provide the required "reasoned elaboration." PHNDC Mem. of Law at 6-9. But they offer no specific criticism of the analysis, except to deride ESDC for drawing a distinction between the anticipated timetable for Project construction and "drop dead" dates included in heavily negotiated development agreements. Thus, they contend that ESDC's explanation "effectively suggests that the outside dates are abstractions," Butzel Aff. ¶ 12, rendering them "meaningless" and reducing them to "irrelevance." PHNDC Mem. of Law at 7. But petitioners mischaracterize ESDC's analysis: outside dates set contract "breakpoints" of immense importance when projects go awry but they are set beyond the end date of the anticipated construction schedule. Although petitioners equate outside dates with the schedule for construction, the Court need only look to the terms of the agreements, as explained in the ESDC Response to Remand, to see the distinction. *See* Point II.B.2, *supra.*

Petitioners turn the rhetorical heat up another notch with the claim that "ESDC's assertion ... that the [Development Agreement] ... had no material effect on the reasonableness

of using a 10-year construction schedule is arbitrary and irrational, if not dishonest." Supp. Pet. ¶ 26. With nothing to support this charge in the terms of the business agreements (other than the undisputed fact that such agreements have outside dates going beyond 2019), petitioners focus on ESDC's purported failure to consider "market realities" that existed in 2009. Id. ¶ 23. Ignoring that ESDC had assessed *long-term* market conditions at the time it approved the 2009 MGPP, petitioners cite a few news articles that highlight the poor state of the market that existed in 2009. Butzel Aff. ¶ 11. Market conditions were, indeed, down that year, as ESDC acknowledged in determining that it would take a hard look at the environmental impacts of a potentially delayed construction schedule. AR 4808 (2009 Technical Memorandum at 55). But a market downturn *in 2009* does not establish that ESDC erred in its assessment of *long-term* market conditions through 2019, which relied upon such broad demographic factors as the expected increase in Brooklyn's population during that time frame and the Borough's tight housing market. SAR 7732-33, 7749 (ESDC Response to Remand at 5-6, 22); AR 7036-38 (ESDC Response to Comments 7-9).[6] Petitioners do not even discuss ESDC's analysis, much less demonstrate that it was irrational.

4. A 10-Year Construction Schedule Is The Reasonable Worst Case Condition For Analyzing The Project's Environmental Impacts.

Petitioners argue that the use of 2019 as a Build Year in the 2009 Technical Memorandum was inconsistent with the reasonable worst-case development scenario ("RWCDS") methodology called for by New York City's CEQR Technical Manual. *See* PHNDC Mem. of Law at 9-10. In pressing this point, petitioners ignore that ESDC came to a

[6] Petitioners also cite newspaper accounts of out-of-court statements by Bruce Ratner and Marisa Lago. This Court has already ruled that such news accounts are not admissible in this proceeding. *See* Short-Form Order dated November 8, 2010 (consideration of press accounts of out-of-court statements of Bruce Ratner not proper and the statements will not be considered). Nor do the purported statements at issue address the analytical basis for ESDC's scheduling assumptions as set forth in the administrative record.

contrary conclusion in the FEIS, finding that a 10-year construction schedule does, in fact, represent the reasonable worst case for examining construction impacts because it "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).

The reason that the FEIS came to this conclusion is that a compressed construction schedule is the reasonable worst-case condition for such potentially critical construction impacts as air quality, construction traffic and construction noise. *See* ESDC Answer ¶ 129. In re-hashing arguments made unsuccessfully in the previous litigation upholding the 10-year construction schedule (DDDB I, 59 A.D.3d at 318), petitioners focus myopically on the duration of construction as the sole factor affecting the significance of construction impacts. ESDC reasonably and correctly balanced other factors such as the intensity and scope of construction activities in deciding what conditions to analyze.

Moreover, although a lead agency is surely permitted to select a Build Year using reasonable worst-case methodology, no court has held that this is required. Rather, the courts have focused their review on "whether the lead agency's selection of build dates ... may be deemed irrational or arbitrary and capricious." Id.; *see also* Fisher v. Giuliani, 280 A.D.2d 13, 21 (1st Dep't 2001) ("To adopt a 10-year time frame was hardly an irrational examination of the long-term foreseeable future."). To the extent the RWCDS concept is applicable to the selection of the Build Year,[7] that concept supports the approach taken in the FEIS and 2009 Technical

[7] The RWCDS concept is applied to define the project characteristics to be analyzed where an action would permit multiple types of *uses, physical development* or *design*. *See* 2010 CEQR Technical Manual at 2-3, 2-8. Contrary to petitioners' assertions, the concept is not mentioned in the context of selecting a Build Year. Id. at 2-4.

Memorandum, which studied and identified the Project's critical construction impacts under reasonable worst-case conditions.

C. ESDC Rationally Concluded That An SEIS Is Not Required Or Warranted To Study The Environmental Impacts Of A Potential Delay To The Project's Construction Schedule.

ESDC responded to the Remand Order's second directive – that ESDC determine whether, in light of the relevant business agreements, an SEIS is required or warranted – with two findings. First, ESDC acknowledged that construction has lagged behind the 10-year schedule FCRC proposed in 2009, making it unlikely that the Project will be completed according to that schedule. Second, to determine whether the 2024 Build Year used for certain purposes in the 2009 Technical Memorandum's delay analysis "was critical to that document's conclusion" (SAR 7750, 7638), ESDC put aside any consideration of FCRC's contractual and financial incentives to complete the Project sooner, and examined the environmental consequences of a delay in the construction schedule to 2035, the outside date allowed by the Development Agreement. The new analysis confirms ESDC's previous conclusion, set forth in the 2009 Technical Memorandum, that a delay in the construction schedule would not require or warrant preparation of an SEIS.

ESDC was informed in its effort by the exceedingly rigorous 2010 Technical Analysis. That 71-page document carefully examined the environmental impacts of the Project upon its completion in a hypothetical 25-year construction schedule (referred to in the 2010 Technical Analysis as the "Extended Build-Out Scenario"). In addition, it examined the impacts of the Project prior to completion, during a hypothetical 25-year construction period. Each relevant environmental area was discussed individually, but "the evaluation and conclusions considered both the individual and collective effects of each component of the analysis." SAR 7643 (2010 Technical Analysis at 7).

1. The 2010 Technical Analysis Presents A Thorough Analysis Of The Impacts Of An "Extended Build-Out Scenario."

a. Analysis Of The Project's Operational Impacts Upon Completion.

With respect to operational impacts upon Project completion, the 2010 Technical Analysis noted that the Extended Build-Out Scenario would not affect the ultimate program, site plan or building dimensions, so that any operational effects of a delayed completion date would be in areas affected by background conditions unrelated to the Project's program and design, such as Community Facilities, Traffic, Parking, Transit and Pedestrians. Each of those areas is discussed thoroughly in the 2010 Technical Analysis (SAR 7645-47, 7649-68 (2010 Technical Analysis at 9-11, 13-31) and analyzed further in the ESDC Response to Remand (SAR 7754-56). *See* ESDC Answer ¶¶ 84-90.

b. ESDC's General Approach To The Analysis Of The Potential For Impacts During An Extended Period Of Construction.

In examining the construction-related effects of a delay in Project completion, ESDC was mindful that the FEIS had studied intensively construction period impacts. That analysis, as set forth in a separate 118-page chapter of the document, identified a number of significant impacts that would occur during the construction of the Project, and also identified a program of measures to minimize such impacts. AR 1088-1205 (FEIS at 17-1–17-93 and accompanying figures); ESDC Answer ¶ 92. The ESDC Response to Remand noted that FCRC is contractually bound to implement those measures, which include, among other things: (i) implementation of comprehensive and specifically defined dust control and diesel emissions reduction measures, along with a community air monitoring program; (ii) a broad program to minimize construction noise; (iii) the provision of double-glazed or storm windows and alternative means of ventilation for locations not so equipped where significant noise impacts

were identified in the FEIS; and (iv) implementation of a number of permanent roadway improvements designed to reduce traffic impacts, subject to the approval of the New York City Department of Transportation. *See* id.; SAR 7751-53 (ESDC Response to Remand at 24-26); SAR 7945, 8046-56 (Development Agreement at 14 and annexed Memorandum of Environmental Commitments at 13-23); AR 1125-26, 1151-53, 1159-60, 1191-94, 1202-03, 1316-21 (FEIS at 17-52–17-54, 17-60–17-61, 17-80–17-83, 17-90–17-91, 19-75–19-80). ESDC also noted that an environmental monitor engaged by ESDC is overseeing the developer's compliance with these mitigation requirements. ESDC Answer ¶ 92; SAR 7758 (ESDC Response to Remand at 31).

To assess the construction-related effects of the Extended Build-Out Scenario, ESDC developed a hypothetical sequence of construction activities aimed at completing the Project by 2035. That sequence assumed that construction will proceed sequentially "with each building being individually designed, financed and built," but with some buildings being under construction simultaneously. SAR 7683 (2010 Technical Analysis at 47). Rather than examining conditions separately upon completion of each of the 17 Project buildings, ESDC assessed how the Project would appear, and how the surrounding area would be affected, at seven different stages of Project completion. SAR 7683-85 (2010 Technical Analysis at 47-49).

ESDC analyzed two issues in assessing whether extending Project construction to 2035 would give rise to new construction-period impacts: (i) how the impacts of the construction work would change, under circumstances where the same overall amount of work would take place over a longer period and (ii) whether and how the impacts of the Project itself would differ during the construction period as a result of a delay in its completion. ESDC discussed each of issue separately. SAR 7756-64 (ESDC Response to Remand at 29-33 and 33-37).

c. Impacts Related To Construction Activities Under The Extended Build-Out Scenario.

The 2010 Technical Analysis and ESDC Response to Remand paid particular attention to the potential impacts of extended construction activities on traffic, air emissions (including diesel emissions and dust), noise levels and neighborhood character. Each of these areas of environmental concern previously had been examined by ESDC in the FEIS and 2009 Technical Memorandum; for air quality, traffic and noise, the FEIS undertook this analysis using quantitative models based on identified peak periods when multiple buildings were assumed to be under construction and impacts would be most intense. ESDC Answer ¶ 31; AR 1094-99, 1130, 1155, 1164, 1191 (FEIS at 17-7–17-10, 17-39, 17-56, 17-64, 17-80). The 2010 Technical Analysis found that with the same amount of work being spread over an additional 15 years, the peak periods of construction in the Extended Build-Out Scenario would generally be less intense, and with respect to each technical area peak period impacts generally would be no more severe. Thus, the analysis found that with fewer construction vehicles using roadways during peak periods, significant traffic impacts would occur at fewer intersections and cause less delay at the intersections affected; that with fewer units of construction equipment in operation at any one time, noise levels associated with Project construction generally would be less; and that with fewer diesel-fired engines in operation during peak periods, air emissions would be likely to be lower. SAR 7689-704 (2010 Technical Analysis at 53-68).

At the same time, the 2010 Technical Analysis and ESDC Response to Remand acknowledged that under the Extended Build-Out Scenario, traffic, noise and air emissions associated with construction activities would affect the area for an additional 15 years. However, this was found not to warrant preparation of an SEIS, for several reasons.

Construction under the Extended Build-Out Scenario generally would be episodic, with buildings being individually financed and constructed, albeit with some overlap. *See* SAR 7683 (2010 Technical Analysis at 47); SAR 7753 (ESDC Response to Remand at 26). Thus, the noise-related impacts of construction activities generally would move from one area to another across the 22-acre site as particular buildings are constructed. SAR 7699 (ESDC Response to Remand at 7699); SAR 7757 (ESDC Response to Remand at 30). As a result, the 2010 Technical Analysis found that under the Extended Build-Out Scenario most receptor locations would experience construction-related noise impacts only during certain stages of the construction schedule, when noise-producing construction work is underway in proximity to the noise receptor, rather than for the entire 25-year duration. SAR 7699 (2010 Technical Analysis at 63). Moreover, the analysis noted that high levels of noise do not occur throughout the entire period during which a building is under construction. Id. Although ESDC noted that significant construction noise impacts would persist for a longer period at some locations under the Extended Build-Out Scenario, it also noted that the FEIS had identified measures to address those impacts to the extent practicable (i.e., window and ventilation improvements), and ESDC has required FCRC to implement that mitigation. SAR 7700, 7704 (2010 Technical Analysis at 64, 68); SAR 7757-58 (ESDC Response to Remand at 30-31).

With respect to air quality, the FEIS previously had found that with implementation of the state-of-the-art diesel emission and dust control measures required under the Memorandum of Environmental Commitments, no significant adverse air pollution impacts would be caused by construction activities, and the 2010 Technical Analysis found that increasing the duration of construction would not disturb that finding. SAR 7694 (2010 Technical Analysis at 58). The 2010 Technical Analysis further noted that dust-generating

activities and equipment-related air emissions would not occur continuously at any single location throughout the construction period. SAR 7695 (2010 Technical Analysis at 59).

With respect to more extended (but less intense) construction-related traffic impacts, ESDC found that most of the permanent roadway improvements required upon Project completion are to be in place by the date the Arena opens, and would thereafter mitigate construction-related traffic during the period of extended construction to the extent practicable. SAR 7691, 7691-94 (2010 Technical Analysis at 55, 55-58).

ESDC also examined the overall effects of traffic, noise and air pollution associated with construction of the Project on neighborhood character. The FEIS had found that construction activities would have "localized neighborhood character impacts in the immediate vicinity of the Project during construction," but also indicated that "the impacts would be localized and would not alter the character of the larger neighborhoods surrounding the Project site." AR 1121 (FEIS at 17-30). As explained in the FEIS, "the level of activity would vary and move throughout the Project site and no immediate area would experience the effects of the Project's construction activities for the full ten year duration" of Project construction. AR 1118 (FEIS at 17-27). The same reasoning was applied in the 2010 Technical Analysis, because ESDC found that an extension of the construction schedule would not increase the duration that any specific building would be under construction. While acknowledging that certain locations would be affected by sequential construction at several building sites, and therefore would experience less intense, but more extended construction impacts under the Extended Build-Out Scenario, the analysis noted that the FEIS had already identified significant localized impacts at these locations, and practicable mitigation measures already had been imposed. SAR 7704-05 (2010 Technical Analysis at 68-69); SAR 7760 (ESDC Response to Remand at 33).

For the foregoing reasons and those stated at greater length in the record, ESDC reasonably concluded that an SEIS is not required or warranted to further study construction-related impacts on the surrounding area. *See* ESDC Answer ¶¶ 91-110; SAR 7681-707 (2010 Technical Analysis at 45-71); SAR 7760 (ESDC Response to Remand at 29-33); AR 4802-07, 4815-16 (2009 Technical Memorandum at 51-54, Figures 8-9, 62-63).

d. Impacts Of Project Elements Prior To Project Completion Under The Extended Build-Out Scenario.

ESDC also considered the potential for impacts resulting from a delay in the construction of certain Project elements. Drawing on the 2010 Technical Analysis, ESDC scrutinized – on a parcel-by-parcel basis – the urban design, neighborhood character and other effects of a delay in constructing the Project buildings, and concluded that these effects did not warrant further study in an SEIS. SAR 7760-64 (ESDC Response to Remand at 33-37). Particular attention was paid to the effects of a delay in the final development of Block 1129, and of deferring construction of the Project's open space for an extended period.

Thus, ESDC considered the environmental impacts of the extended use of Block 1129 – a previously blighted Block characterized by a mix of abandoned industrial and commercial buildings, a homeless shelter, occupied or partially occupied residential and commercial buildings, and small surface parking lots (AR 3983-4059, 4098-106, 4111-12, 4117-19, 4121-45 (Blight Study)) – for surface parking and construction staging. It noted that construction staging activities would not be adjacent to residential buildings, but would be confined to a relatively small area in the northeast corner of the parcel, at the corner of Pacific Street and Vanderbilt Avenue. SAR 7706 (2010 Technical Analysis at 70). It further noted that the interim parking facility would be large, accommodating 1,100 vehicles, but would be considerably smaller than the permanent below-grade parking facility on Block 1129 upon

Project completion. SAR 7685 (2010 Technical Analysis at 49); SAR 7763 (ESDC Response to Remand at 36). For that reason, it found that traffic and pedestrian flows to and from the facility would be no greater during the interim period than they would be in the permanent condition. SAR 7763 (ESDC Response to Remand at 36). ESDC further noted that the surface parking lot will be equipped with directional lighting to minimize light intrusion on nearby buildings, and screened by landscaping and a 10-foot tall semi-transparent fence. SAR 7688, 7706 (2010 Technical Analysis at 52, 70). The analysis concluded that the operation of the interim surface parking facility on Block 1129 will have a localized effect on the residential blocks in the immediate vicinity of Block 1129, but will not change the character of the larger neighborhoods surrounding the Project site. SAR 7704-05 (2010 Technical Analysis at 68-69). The FEIS had previously come to the same conclusion. *See* ESDC Answer ¶¶ 93-96; AR 1078-79, 1120-21 (FEIS at 16-17–16-18, 17-29–17-30.

ESDC further noted that an extended delay in Project construction would extend the duration of the temporary indirect open space impact identified in the FEIS by postponing construction of the Project's eight acres of open space. ESDC noted that this impact would be reduced incrementally as open space associated with each Phase II building is constructed. SAR 7686 (2010 Technical Analysis at 50); SAR 7760-61 (ESDC Response to Remand at 33-34).

2. Petitioners Provide No Basis To Conclude That ESDC Abused Its Discretion In Confirming Its Decision Not To Prepare An SEIS.

Petitioners belittle the well-considered and thorough 2010 Technical Analysis as a "hastily assembled" evaluation "that took less than five weeks to prepare and deliver," PHNDC Mem. of Law at 15 and 16, and which overlooked a number of supposed new impacts associated with an Extended Build-Out of the Project. As a general matter, their critique reveals a fundamental misunderstanding of the nature of ESDC's task in responding to the Remand Order.

Nowhere in their papers do petitioners acknowledge the exhaustive analysis appearing in the FEIS of the impacts of the Project over a decade-long construction period; the FEIS' disclosure of significant traffic, noise, neighborhood character and other impacts; or the comprehensive package of measures that were identified and imposed in order to minimize those impacts; nor, remarkably, do petitioners make the slightest mention that an analysis of a delayed Project build-out was incorporated into the 2009 Technical Memorandum. Reading petitioners' papers, it is as if they had neglected to read the relevant portions of either of ESDC's earlier documents at all.

In preparing the ESDC Response to Remand, ESDC was not confronting the issue of construction period impacts for the first time. Rather, it was reviewing the extensive work it had previously accomplished in the FEIS and 2009 Technical Memorandum, to determine whether new or significant impacts would arise from a 25-year build-out (as compared to the 10- or 15-year construction periods previously assessed) that warrant preparation of an SEIS.

Moreover, while petitioners take a few swipes at the 2010 Technical Analysis, their conclusory allegations do not come close to establishing that ESDC's third finding was arbitrary and capricious. *See* Point II.A, *supra*. For example, petitioners take ESDC to task for purportedly failing to "consider or evaluate the long-term cumulative effects of 25 years of ongoing construction on the health of the surrounding neighborhood." Butzel Aff. ¶ 22. But the focal point of the construction impact analysis *in all three rounds* of environmental review was whether ongoing construction activities (including, among other things, vehicle trips by workers and for deliveries, worker parking, equipment operation, excavation and other dust generating activities, as well as sidewalk and lane closures) would adversely affect the surrounding areas. The conclusion of those assessments was that construction activities *would* have a significant adverse impact on neighborhood character, but that the impact would be *localized*, and would

affect only the areas immediately adjacent to the project site. AR 1120-21 (FEIS at 17-29–17-30); SAR 7704-05 (2010 Technical Analysis at 68-69). It was in order to reduce such impacts that the comprehensive program of roadway improvements and measures aimed at minimizing diesel emissions, dust and noise was imposed and is currently being implemented by FCRC. AR 1120-21 (FEIS at 17-29–17-30); SAR 7758-60 (2010 Technical Analysis at 31-33).

Petitioners' related allegation – that ESDC "dealt with neighborhood impacts on an isolated, localized basis rather than evaluating the cumulative impacts of ... an extended build-out on the broader area," Supp. Pet ¶ 27(C) – evidences a profound misunderstanding of not only the 2010 Technical Analysis, but of both earlier environmental review documents as well. ESDC examined the impacts of the Project within study areas appropriate to the technical areas being analyzed. *See* ESDC Answer ¶¶ 113-114. It was as a result of such assessment that ESDC determined that the significant neighborhood character impacts of building-by-building construction activities over an extended period would be localized and limited to the areas in proximity to the particular buildings under construction. Petitioners' claim confuses the *conclusion* of the analysis with some artificial limitation on its *scope*. *See* ESDC Answer ¶ 114.

Petitioners' confusion is also on display in the examples they serve up of long-term projects with widespread impacts on neighborhood character. As explained in the 2009 Technical Memorandum, and as specifically depicted in the 2010 Technical Analysis' 7-stage description of how the Project could be built over 25 years: (i) construction of the Project would proceed incrementally as each building is financed, designed and constructed individually across the 22-acre site; and (ii) during periods of inactivity, major construction equipment is to be removed and parcels not needed for construction are to be used as interim open space. (AR 4693, 4701 (2009 MGPP at 10, 18); AR 4808-11 (2009 Technical Memorandum at 55-58); AR

7043-44, 7048-49 (Response to Comments at 14-15, 19-20); SAR 7687 (2010 Technical Analysis at 51). It is self-evident that the impacts of such a development plan – which would resemble the steady progress of the successful Times Square, Riverside South and Battery Park City projects – are a far cry from those that may have resulted from the "slash and burn" methods employed in constructing the Cross-Bronx or Gowanus Expressways more than a half-century ago. Moreover, what will be constructed at the Project site is an Arena, residential buildings, one or two office buildings, community facilities and open space – not an expressway.

Petitioners make the puzzling claim that ESDC failed to examine the effects of the interim parking facility over an extended build-out period, but these effects were disclosed in the 2009 Technical Memorandum (AR 4810-11, 4815), ESDC Response to Comments (AR 7047-48, 7058), 2010 Technical Analysis (SAR 7685, 7687-89, 7705-07, 7725-26) and ESDC Response to Remand (SAR 7762-63). ESDC's conclusion was that the extended presence of a well-screened parking facility in place of the previously existing blighted uses, accommodating almost a thousand fewer vehicles than will be served by the permanent facility at this location, would have a localized effect on the immediately adjacent buildings, but does not warrant preparation of an SEIS. While petitioners may not agree with that conclusion, they cannot credibly contend that the issue was not examined. Nor can petitioners deny that the FEIS disclosed that the parking lot on Block 1129 would result in vehicular and pedestrian traffic that would adversely affect the character of the immediate area. *See* ESDC Answer ¶¶ 108, 117; AR 838-44, 871-76, 959, 992 (FEIS at 12-41–12-47, 12-74–12-79, 13-61, 13-94).

Petitioners toss in a handful of additional assertions as to why the 2010 Technical Analysis supposedly was deficient, which are addressed in the Answer. *See* ESDC Answer ¶¶ 118-128. For the reasons set forth therein, those assertions are without merit.

POINT III

PETITIONERS' FIRST CAUSE OF ACTION CHALLENGING THE 2009 TECHNICAL MEMORANDUM IMPROPERLY SEEKS TO RE-LITIGATE ISSUES PREVIOUSLY DECIDED IN THIS PROCEEDING AND IS IN ANY EVENT MERITLESS

ESDC's compliance with the Remand Order is the sole remaining issue to be resolved in these proceedings. The Court should therefore dismiss petitioners' first cause of action, which re-alleges supposed defects in the 2009 Technical Memorandum and in substance merely reiterates allegations previously litigated. *See, e.g.*, Prospect Heights Verified Petition ¶¶ 65-71; DDDB Verified Petition ¶¶ 134-156. The March 2010 Decision, as modified by the Remand Order, disposed of these allegations, leaving open only the agreement-related issues the Remand Order sent back to ESDC for additional findings. The March Decision and the Remand Order constitute the law of the case, and their holdings should not be reopened. *See* Burlington Res. Inc. v. FERC, 513 F.3d 242, 246 (D.C. Cir. 2008) (in a petition challenging an agency's orders, an intervenor could not challenge a holding in the court's earlier decision remanding the matter to the agency; earlier holding became law of the case); *see also* Pantelidis v. BSA, 43 A.D.3d 314, 314 (1st Dep't 2007) (determination in prior appeal binds appellate division as law of the case on a later appeal in the same proceeding); Bernstein v. 1995 Assocs., 211 A.D.2d 560, 560 (1st Dep't 1995) (law of the case precluded plaintiff from relitigating issue argued in previous appeal). If the Court finds that ESDC complied with the Remand Order, no issues remain to be decided, and the proceedings should be dismissed.

Even if petitioners were not precluded from relitigating their arguments concerning the 2009 Technical Memorandum, ESDC has refuted those arguments in previous submissions to the Court, to which it respectfully refers. *See* Verified Answer ¶¶ 38-103 and Memorandum of Law in Opposition to Article 78 Petition at 4-53, Prospect Heights Neighborhood Development Council, Inc. v. ESDC (Index No. 116323/09); Verified Answer

¶¶ 51-88 and Memorandum of Law in Opposition to Article 78 Petition at 34-54, Develop Don't Destroy (Brooklyn), Inc. v. ESDC (Index No. 114631/09).

The pretense for petitioners' renewed challenge to the 2009 MGPP is that the Court in the Remand Order found ESDC not to have presented a "reasoned elaboration" for its determination not to require an SEIS in light of the "complete terms" of the business agreements executed on December 23, 2009. *See* Remand Order at 18 ("ESDC did not provide a 'reasoned elaboration' ... based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project."). Thus, the Court remanded the matter to ESDC to consider whether the complete terms of those agreements affect ESDC's scheduling assumptions in a way that would lead to significant environmental impacts not previously considered. Id. Petitioners take a much broader view of the Remand Order, as faulting ESDC for failing to provide an explanation of why no SEIS was required to consider potential impacts occasioned by a delay in construction. Under their theory, that ruling opened the door to a whole new round of challenges to the validity of the 2009 MGPP based on violations of SEQRA that could not be cured, regardless of ESDC's findings on remand. But as the Court specifically recognized in the March 2010 Decision, ESDC in the 2009 Technical Memorandum "undertook an analysis of the potential for a delayed build out based on prolonged adverse economic conditions" and "concluded that the delay would not result in significant adverse environmental impacts that had not previously been considered in the FEIS." March Decision at 8. Moreover, ESDC had provided a detailed explanation of the basis for its scheduling assumptions. Id. at 9-10; AR 4658-65 (Earth Tech/AECOM Report); AR 7036-38 (Response to Comments at 7-9); AR 7075-122 (KPMG Report). Thus, the "reasoned elaboration" the Court found lacking related only to the "complete terms" of the agreements

executed on December 23, 2009, rather than the assessment of impacts in the event of a delay in construction. To the extent such an explanation was not included in the record for ESDC's September 2009 MGPP approval – made months before the business agreements were finalized and executed – such an omission does not give rise to a SEQRA violation at all, and certainly not an incurable one. Moreover, while ESDC, in complying with the Remand Order, amplified the assessment previously performed in the 2009 Technical Memorandum, both the conclusions, and the rationale presented for those conclusions, remained fundamentally unchanged.

POINT IV

NEITHER THE UDCA NOR SEQRA REQUIRED ESDC TO HOLD A HEARING FOR THE COURT-ORDERED FINDINGS

The DDDB petitioners allege that ESDC was required to hold a public hearing before making the findings required by the Remand Order. They do not cite anything in the Remand Order that required ESDC to hold such a public hearing. Instead, they claim that section 16 of the UDCA, Unconsol. L. § 6266, imposed that requirement. But that provision requires ESDC to hold a hearing before affirming a general project plan. The Court-ordered findings are not a general project plan; nor do they amend the 2009 MGPP.

ESDC held a duly noticed public hearing on the 2009 MGPP, *see* ESDC Answer ¶ 35, AR 4983-85, and petitioners have not heretofore challenged that notice or the public hearing that ensued as inadequate. It is far too late in these proceedings – which but for the findings required by the Remand Order, have been dismissed – for petitioners to do so now. Finally, SEQRA does not require a hearing or public comment for the determination not to prepare an SEIS. *See* Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d at 430; Coalition Against Lincoln West, Inc. v. Weinshall, 21 A.D.3d at 223. Accordingly, there is no statutory or other basis for the public hearing claim.

POINT V

THE MOTION TO ENJOIN CONSTRUCTION SHOULD BE DENIED

These proceedings should be dismissed with prejudice, and it follows that no injunction should be issued. Yet even if this Court were to hold that ESDC violated SEQRA, it should allow construction to proceed during any further environmental review.

A. There Is A High Threshold For Issuance Of An Injunction

Even in the case of a finally established statutory violation by an agency, the issuance of "[i]njunctive relief, which had its origins in the courts of equity, has always been perceived as discretionary, to be granted or withheld by ... courts in the exercise of responsible judicial discretion." Gerges v. Koch, 62 N.Y.2d 84, 94-95 (1984). A plaintiff seeking an injunction must establish that the defendant's continued wrongful conduct would cause plaintiff "serious and irreparable injury" that the injunction would prevent. Thomas v. Musical Mut. Protective Union, 121 N.Y. 45, 52 (1890). Consideration is also to be given to whether the injunction "would substantially harm the defendants" or "subject the ... [defendants] to great inconvenience and loss." Forstmann v. Joray Holding Co., 244 N.Y. 22, 30 (1926). Finally, a court must consider the public interest. *See* Gerges v. Koch, 62 N.Y.2d at 94-95.

Thus, even if a SEQRA violation is identified, the decision whether to grant injunctive relief "is one that lies within the sound discretion of the trial court." Chatham Towers, Inc. v. Bloomberg, 6 Misc.3d 814, 825-26 (Sup. Ct. N.Y. Co. 2004) (finding that full EIS should be prepared but refusing to grant petitioners' request for injunctive relief), *aff'd*, 18 A.D.3d 395 (1st Dep't 2005). *See also* King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 350 (1996) (declining to nullify an action taken in violation of SEQRA where the agency had subsequently complied with the statute's dictates); Segal v. Town of Thompson, 182 A.D.2d 1043, 1047 (3rd Dep't 1992) (declining to annul sewer and water district during the required

environmental review to avoid disruption of water and sewer service); Golden v. MTA, 126 A.D.2d 128, 130-33 (2nd Dep't 1987) (declining to enjoin new toll system on the Verrazano Narrows Bridge, notwithstanding the SEQRA violation, because such relief would disrupt established traffic patterns and add expenses for a public agency); Silvercup Studios, Inc. v. Power Auth. of the State of New York, 285 A.D.2d 598, 601 (2nd Dep't 2001) (declining to enjoin construction or operation of turbine generators, notwithstanding SEQRA violation).

B. The High Threshold For Issuance Of An Injunction Is Not Met Here.

The principal concern raised by the Court in the Remand Order is that construction of Phase II of the Project may fall behind the 10-year schedule. This issue in no way establishes that petitioners would be irreparably harmed by the continued construction work on the Arena, the new subway entrance, the LIRR rail yard, the Carlton Avenue Bridge and the continued utility work and other ongoing construction activities on Phase I of the Project.

Since the delay in the Project is the very circumstance that petitioners have alleged would cause them harm, the potential for such delay would not warrant an injunction further delaying construction. Such relief would exacerbate, not remedy, the harm cited as its predicate, and is sought simply to damage the Project. This is particularly so because the Project elements currently under construction – all of which were included in the 2006 MGPP and studied in the FEIS – would not be the subject of any SEIS on the potential impacts of a delayed Phase II construction schedule, if one were required.

Petitioners' central argument in these proceedings is their contention that ESDC should have assumed that FCRC – after having paid for acquisition of the First-Phase Properties on March 1, 2010, paid for the MTA properties acquired on March 4, 2010, obligated itself contractually to develop the site in conformance with the 2009 MGPP and invested many years and hundreds of millions of dollars in the Project – will seek to delay its development as long as

possible, to the very end of the 25-year outside date in the Development Agreement. Although petitioners have not cited evidence that FCRC would seek to so delay the Project, they have asserted that any other assumption is so unreasonable as to be beyond ESDC's discretion.

Whatever the merits of this dispute, there is no caselaw of which ESDC is aware in which a court stopped construction of a major public or private project because of the potential for a delay in the construction of certain project elements. To the contrary, the caselaw holds that delays in project completion do not invalidate a SEQRA review and do not require it to be updated, even if its conclusions were based on older data. *See* Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d at 425; Wilder v. N.Y.S. Urb. Dev. Corp., 154 A.D.2d 261, 262-63 (1st Dep't 1989). Indeed, the Wilder case addressed a prior ESDC project whose construction was delayed by a downturn in the real estate market; in that case, the court rejected the contention that the delay in the construction schedule required that construction be stopped for preparation of an SEIS. As in Wilder, any delay in the Atlantic Yards Project would be the result of the decline in the New York real estate market, not the 2009 MGPP that is challenged here.

Petitioners suggest that they would be harmed by the removal of the remaining buildings on Block 1129. Most of the buildings on that block have already been demolished; only four remain standing. One (752 Pacific Street, on Lot 13) is being used as a field office and is not slated for imminent demolition. The other three are vacant. None of them are of historical interest or architectural distinction, nor do they contribute to the character of the neighborhood. Recent photographs of the buildings on Block 1129 are provided to the Court as exhibits to the affidavit of Ricardo G. DePaoli. As is evident in these photographs, the neighborhood will not be harmed by removing these buildings from the site. Moreover, their removal has always been an element of the Project; it was not added in the 2009 MGPP challenged in these proceedings.

Construction activities for this Project have been ongoing for years, and construction has been proceeding intensively since ESDC acquired title to most of the Project site on March 1, 2010. *See* ESDC Answer ¶¶ 15-18, 45. Yet between the dismissal of this proceeding in March 2010 and November 29, 2010, petitioners sat back and watched the construction continue without seeking relief from this Court or the Appellate Division. Their own inactivity establishes that what is occurring does not cause them substantial injury.

Finally, by delaying the Project, an injunction would defer the realization of the Project's significant public benefits and thus be contrary to the public interest. ESDC and the City of New York have determined that the Project will have many significant social, environmental, civic and economic benefits for the City and Brooklyn, including the Project's neighborhood: the elimination of long-standing blight, the creation of eight acres of publicly accessible open space, the creation of visual and physical links between neighborhoods currently divided by an open rail yard and blighted conditions, a new subway entrance, an improved LIRR rail yard, a new arena that will bring back a major professional sports team to Brooklyn and provide a venue for other recreational, cultural, educational and civic events, thousands of new housing units, including affordable units, and the creation of thousands of sorely needed jobs and stimulation of the economy. AR 3634-37, 3663-64 (2006 MGPP at 3-6, 32-33); AR 4686-89, 4716-17 (2009 MGPP at 3-6, 33-34). The Project would also foster efficient regional growth by locating a significant new development at a major transit hub, thereby encouraging the use of mass transit. AR 4686, 4689, 4691-92, 4717 (2009 MGPP at 3, 6, 8-9, 34).

The courts have upheld ESDC's findings with respect to such benefits in a multiplicity of litigations brought by Project opponents. To achieve the Project's well-established public benefits, the State Legislature and City have provided more than $231 million

in public monies to jump start the Project's construction, and ESDC has exercised its power of eminent domain, resulting in its ownership today of significant portions of the Project site.

If an injunction were to be issued, the State-owned Project site would sit idle. The work now underway to transform Blocks 1118, 1119 and 1127 at the site into a professional sports arena and venue for civic events would be brought to a standstill, and realization of the Project's significant public benefits would be delayed.

An injunction would also harm the large number of construction workers presently employed at the site, and their families, by closing down the job site. This would frustrate one purpose of the Project, which is to stimulate the economy.

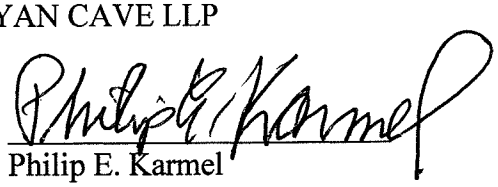
CONCLUSION

ESDC respectfully requests that the Court dismiss the Supplemental Petitions with prejudice, deny the motion for an injunction, grant respondents their costs and disbursements and grant such other and further relief as it may deem just and proper.

DATED: New York, New York
February 18, 2011

Respectfully submitted,

BRYAN CAVE LLP

By: 

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