To be argued by:
Jeffrey L. Braun

New York County Clerk's Index Nos. 114631/09 and 116323/09

Supreme Court of the State of New York

APPELLATE DIVISION — FIRST DEPARTMENT

Index No. 114631/09

In the Matter of the Application of

DEVELOP DON'T DESTROY (BROOKLYN), INC., COUNCIL OF BROOKLYN NEIGHBORHOODS, INC., ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC., BROOKLYN BEARS COMMUNITY GARDENS, INC., BROOKLYN VISION FOUNDATION, INC., CARLTON AVENUE ASSOCIATION, INC., CENTRAL BROOKLYN INDEPENDENT DEMOCRATS, by its President Lucy Koteen, CROWN HEIGHTS NORTH ASSOCIATION, INC., DEAN STREET BLOCK ASSOCIATION, INC., DEMOCRACY FOR NEW YORK CITY, EAST PACIFIC BLOCK ASSOCIATION, INC., FORT GREENE ASSOCIATION, INC., FRIENDS AND RESIDENTS OF GREATER GOWANUS, PARK SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS ACTION COALITION, by its President Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, and SOUTH PORTLAND BLOCK ASSOCIATION, INC.,

Petitioners-Respondents,

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

(Additional Caption On the Reverse)

BRIEF FOR RESPONDENT-APPELLANT FOREST CITY RATNER COMPANIES LLC

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against

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES LLC,

Respondents-Appellants.

Index No. 116323/09

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 MEMBER LETITIA JAMES, ALAN ROSNER, EDA MALENKY, PETER KRASHES, JUDY MANN, RHONA HESTRONY, JAMES GREENFIELD, MICHAEL ROGERS, ANURAG HEDA, ROBERT PUCA, SALVATORE RAFFONE, RHONA HETSTONY, ERIC DOERINGER, JILLIAN MAY and DOUG DERRYBERRY,

Petitioners-Respondents,

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Preliminary Statement

Respondent-appellant Forest City Ratner Companies LLC ("FCRC") appeals (A 7-10) from the final decision and order (one paper) of the Supreme Court, New York County (Marcy S. Friedman, J.) (A 15-43), entered in both of these cases on July 19, 2011. Respondent-appellant New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") appeals from the same paper (A 1-6).[1] These two cases were not formally consolidated in the motion court but were jointly administered and were disposed of by the same final decision and order, which was made under a double caption and filed in both cases (*see* A 17). On these appeals, the parties are filing single sets of briefs and one appendix for both cases pursuant to a stipulation and the order made by Justice Saxe of this Court on November 21, 2011.

Insofar as appealed from, the motion court's final decision granted the petitions in these CPLR Article 78 proceedings to the extent of directing ESDC to prepare a Supplemental Environmental Impact Statement ("supplemental EIS" or "SEIS"), and make further findings, in connection with ESDC's adoption on September 17, 2009 of a Modified General Project Plan (the "2009 MGPP") for the Atlantic Yards project (the "Atlantic Yards Project" or the "Project"). The

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[1] These appeals are being prosecuted by the appendix system. Citations to "A" refer to the Appendix.

Project is being constructed for ESDC on a 22-acre site in Brooklyn by FCRC affiliates. The Project had received final approvals in 2006, and these approvals by ESDC, the Metropolitan Transportation Authority (the "MTA") and the Public Authorities Control Board were upheld by the courts, without exception, in numerous lawsuits. Among other things, a Final Environmental Impact Statement (the "FEIS") prepared for the Project in 2006 under ESDC's leadership pursuant to the State Environmental Quality Review Act (Env. Cons. Law § 8-0101, *et seq.*) ("SEQRA") was sustained by this Court in *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *app. denied*, 13 N.Y.3d 713, *rearg. denied*, 14 N.Y.3d 748 (2010) ("*DDDB II*").[2]

Construction of the Project began in 2007 and has proceeded since then. The petitions in these cases were denied to the extent that they sought additional relief – *i.e.*, a determination that the 2009 MGPP does not satisfy the Urban Development Corporation Act (McKinney's Unconsol. Laws of N.Y. § 6251, *et seq.*) (the "UDC Act"), annulment of ESDC's adoption of the 2009 MGPP and an injunction against further construction of the Project. No cross-appeals were taken by petitioners-respondents ("petitioners") from these determinations.

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[2] The motion court referred to this Court's decision sustaining the FEIS for the Project as "*DDDB I*" (*see* A 70), but it is more accurately referred to as "*DDDB II*" in recognition of this Court's prior Project-related decision in *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *app. denied*, 8 N.Y.3d 802 (2007).

These cases had a tortured history in the motion court, which rendered three separate decisions. Initially, by decision dated March 10, 2010 (A 67-86), the motion court denied the petitions in their entirety, holding, *inter alia*, that ESDC's decision that no supplemental EIS was necessary was supported by sufficient environmental analysis. Then, in a decision dated November 9, 2010 (A 44-66), the motion court granted reargument and renewal and reversed itself on the basis of a Development Agreement between ESDC and FCRC that did not exist when ESDC approved the 2009 MGPP. By this second decision, the motion court remanded these cases to ESDC for further findings as to the relevance of the Development Agreement (and agreements between FCRC and the MTA) to ESDC's determination that no supplemental EIS was required for the 2009 MGPP. On remand, ESDC conducted a comprehensive environmental analysis and a thorough legal analysis of the relevant agreements, and again concluded that no supplemental EIS was warranted.

In its final decision (A 15-43), the motion court annulled ESDC's determination and directed ESDC to prepare a supplemental EIS and make further findings as to Phase II of the Project, although the court declined to annul ESDC's adoption of the 2009 MGPP or enjoin work on the Project.[3]

[3] As discussed below, the Project frequently is divided into "Phase I" and "Phase II" for analytical purposes.

Question Presented

The question on this appeal is whether the motion court exceeded its authority and improperly substituted its judgment for that of ESDC when it directed ESDC to prepare a supplemental EIS and make further findings regarding adoption of the 2009 MGPP.

Summary of Argument

The motion court's decision is an unprecedented expansion and distortion of SEQRA, and an improper substitution by the court of its judgment for that of ESDC, the responsible "lead agency" under SEQRA. Among other errors, and in direct contravention of a prior decision by this Court in one of many Times Square cases, the motion court twisted a partial change in the timing of property acquisition for the Project into a change in the Project itself, and used it as the basis for requiring further environmental study of part of the Project notwithstanding the exhaustive FEIS completed in 2006, and notwithstanding the fact that the change in property acquisition did not modify any actual components of the previously-approved Project and merely resulted from the intervening deterioration in global economic conditions.

In addition, although ESDC performed a robust environmental review of actual Project changes in 2009, the motion court improperly used post-review contractual documents to second-guess and impeach the hypothetical "build year"

that had been used by ESDC in its environmental review. Having been directed to reconsider its prior determination that no supplemental EIS was required, on remand ESDC conducted a further environmental review of the adverse impacts that reasonably could be expected if the Project was constructed over 25 years rather than 10 years. This review was thorough and well-reasoned and led ESDC to adhere to its prior determination that no supplemental EIS was warranted. However, the motion court improperly rejected this further environmental study on the basis of purported defects that do not withstand analysis, and that only confirm that the motion court far exceeded its lawful powers of judicial review.

Statement of the Case

A. The Atlantic Yards Project and the 2006 Approvals

These proceedings are the latest of numerous legal challenges to the Atlantic Yards Project, an ambitious public-private undertaking to transform central Brooklyn by redeveloping a derelict 22-acre swath of underutilized land. The site was selected for its adjacency to Atlantic Terminal, the third busiest mass transit hub in New York City (after Grand Central Terminal and Pennsylvania Station). About one-third of the site is occupied by an open, below-grade transit yard operated for the MTA's Long Island Rail Road commuter service.

The Project is intended to eliminate blight and create an arena that will be an important entertainment and civic venue and the home of the Nets

basketball team (thereby ending the 50-year absence of a major sports franchise from Brooklyn), important new mass transit facilities, eight acres of publicly accessible open space, and more than 6,400 units of housing, including 2,250 units of affordable housing. The Project is expected to create thousands of construction jobs and, eventually, thousands of permanent jobs. It also is expected to generate billions of dollars in tax revenues for the City and the State over the next 30 years.

On December 8, 2006, following a lengthy review process and public hearings, ESDC approved the Project. This review was conducted pursuant to the UDC Act, the Eminent Domain Procedure Law ("EDPL") and SEQRA, and included the preparation of the FEIS under ESDC's leadership. ESDC concluded this process by (1) affirming a previously approved Modified General Project Plan under the UDC Act (the "2006 MGPP") to establish the basic parameters of the Project, (2) issuing a determination and findings required by the EDPL for the use of eminent domain for the Project, and (3) adopting a statement of findings under SEQRA, including a finding that it had complied with SEQRA.

The 2006 MGPP established the Project as including the arena and 16 other buildings, significant mass transit improvements and eight acres of open space on a 22-acre site occupying all or part of eight city blocks. Multiple maps of the Project appear in the record (*see*, *e.g.*, A 89, 3890, 3892). For analytical purposes, the 2006 MGPP and the FEIS divided the Project into two phases.

Phase I consists of (a) consolidation of three city blocks (Blocks 1118, 1119 and 1127) into a single block known as the "Arena Block," (b) construction of the arena (to be known as Barclays Center), four other buildings (at least three of which will be residential buildings) and a major new subway entrance on the Arena Block, (c) construction of a fifth building at "Site 5" across Flatbush Avenue from the Arena Block, (d) construction of a new rail yard for the LIRR on the eastern portion of the Arena Block and on Blocks 1120 and 1121 to the east of the Arena Block, and (e) construction of permanent underground parking facilities on the Arena Block and Site 5 and temporary surface parking lots on part of Block 1120 and most of Block 1129.

Phase II consists of eleven buildings with residential, retail and community facility uses, and eight acres of publicly accessible open space. Six Phase II buildings (and the adjacent open space) are to be built on a platform to be constructed by FCRC over the rail yard, in air space acquired from the MTA.

On December 13, 2006, the MTA's Board of Directors approved the MTA's participation in the Project. This approval authorized the sale by the MTA to FCRC of real property on part of the Arena Block and the development rights over the LIRR rail yard, reconstruction of the rail yard by FCRC, and construction by FCRC of the new subway entrance on the Arena Block.

The FEIS's analysis of the Project's environmental impacts was based on the assumption that the Project would be completed in 10 years, or by 2016. The FEIS disclosed that, upon completion, the Project would have significant adverse environmental impacts (*see*, *e.g.*, A 1239). The FEIS provided for mitigation measures for each of these adverse impacts to the extent practicable, but further disclosed that, once completed, the Project still would have several unmitigated or partially unmitigated adverse impacts.

The FEIS also disclosed significant adverse temporary environmental impacts during construction, consisting of construction-related traffic and noise and impacts on neighborhood character (A 2286, 2288-89, 2290-91), some of which would be mitigated but some of which could not be mitigated.

B. <u>Litigations Challenging the 2006 Project Approvals</u>

The 2006 MGPP and other Project approvals were challenged in a barrage of lawsuits by Project opponents, led by the umbrella group Develop Don't Destroy (Brooklyn), Inc. ("DDDB"). These lawsuits were unsuccessful. The courts thus determined that ESDC's use of eminent domain for the Project does not violate the federal constitution (*Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 554 U.S. 930 (2008)), that ESDC's use of eminent domain and its financial contribution to infrastructure costs for the Project do not violate the state constitution (*Goldstein v. N.Y.S. Urban Dev. Corp.*, 13 N.Y.3d 511 (2009), *rearg.*

denied, 14 N.Y.3d 756 (2010)), and that the 2006 MGPP made appropriate arrangements for the relocation of the Project site's residential occupants (*Anderson v. N.Y.S. Urban Dev. Corp.*, 45 A.D.3d 583 (2d Dep't 2007), *app. denied*, 10 N.Y.3d 710 (2008)).

The 2006 approvals also were the subject of appeals to this Court in *DDDB II* and *Anderson v. N.Y.S. Urban Dev. Corp.*, 44 A.D.3d 437 (1st Dep't 2007). In *DDDB II*, this Court held that ESDC and the MTA had fulfilled their obligations under SEQRA and, in the case of ESDC, under the UDC Act. In upholding the sufficiency of the FEIS, this Court specifically sustained ESDC's use of an assumed 10-year construction schedule as the basis for the FEIS's analysis of the Project's environmental impacts. *DDDB II*, 59 A.D.3d at 318.

C. <u>The Commencement of Construction at the Site</u>

The pendency of multiple litigations delayed until 2010 the condemnation by ESDC of properties on the Project site that had not been acquired by FCRC through private transactions (A 995). Nevertheless, in 2007, FCRC began full-time construction activities for the Project, including extensive infrastructure improvements for the entire Project, consisting of the construction and relocation of conduits and electricity, gas, telephone and cable lines, and water mains and sewers (A 995-96).

To the extent possible, FCRC also demolished vacant buildings that it had acquired on the Project site (*id*.).

D. The 2009 Modifications to the Project Approvals

In the meantime, the global economic collapse of 2008 made it significantly more difficult for FCRC to obtain financing for the Project and forced FCRC to seek modifications to the business terms of the contracts that it was negotiating with ESDC and the MTA (A 920-21).

The principal modifications agreed to by ESDC and the MTA allowed acquisition of properties for the Project in phases rather than all at once at the outset. Although the 2006 MGPP and the FEIS both contemplated that the Project would be built incrementally over a period of years, the 2006 Project approvals also contemplated that FCRC would purchase all land and necessary property rights from the MTA at the outset, and that ESDC would condemn the rest of the Project site at the outset and immediately lease it to FCRC affiliates, with FCRC immediately reimbursing ESDC for all condemnation costs, including compensation awards (A 920). FCRC thus was expected to obtain – and pay for – immediate possession of the entire Project site at once, after which it would warehouse for future use those portions of the Project site on which construction was to be deferred.

However, once the economy had collapsed in 2008 and financing for development projects became difficult, this plan no longer was feasible.

ESDC's Board of Directors adopted the 2009 MGPP (A 3843-88) on June 23, 2009, submitting it for public comment. The 2009 MGPP did not change the Project site, or the number, locations or uses of the Project's 17 buildings, or the Project's eight acres of open space, or the Design Guidelines that had been approved for the Project as part of the 2006 MGPP, or the requirements for the new LIRR yard and the new subway station entrance. The 2009 MGPP included some minor modifications to physical components of the Project, but as the motion court recognized (A 35-36), these changes had no significant environmental effects, and petitioners never have claimed otherwise.

Of particular significance to these litigations, the 2009 MGPP also authorized condemnation of properties on the Project site in multiple stages rather than all at once at the outset (A 3865).

In addition, on June 24, 2009, the MTA's Board of Directors approved revised business terms for the MTA's proposed agreements with FCRC (A 3905-10). Like the prior terms, the modifications provided for FCRC's immediate acquisition of the MTA property on the Arena Block. Unlike the prior terms, however, the modified terms provided for FCRC's acquisition of (and payment for) the air rights to Blocks 1120 and 1121 – *i.e.*, the right to build a

platform over the new LIRR rail yard and then build improvements on the platform – in six separate stages. While the outside date specified for FCRC's last purchase of these rights was in 2030, FCRC also could elect to acquire (and pay for) these rights on an accelerated schedule.

E. The 2009 Technical Memorandum

Prior to adoption of the 2009 MGPP, ESDC and its environmental consultants prepared an 85-page, single-spaced Technical Memorandum (the "2009 Technical Memorandum") (A 87-170). This document examined whether changes effectuated by the 2009 MGPP would be likely to have significant adverse environmental impacts different from the impacts previously examined in the FEIS, which would warrant the preparation of a supplemental EIS.

In conducting this analysis, the 2009 Technical Memorandum – like the FEIS that had been sustained by this Court – proceeded on the assumption that the Project would be completed in 10 years, but it further assumed that, due to delays resulting from litigation and deteriorated economic conditions, the anticipated completion date of the Project had shifted by three years from 2016 (as anticipated in the FEIS) to 2019 (A 95, 98). Similar to what had been done for the FEIS, FCRC provided ESDC with a construction schedule for the Project that then was reviewed for ESDC by independent construction consultants, who agreed that a 10-year build-out was feasible (A 3820). ESDC also retained the accounting and

consulting firm of KPMG LLC to advise it as to whether, given current economic conditions, the market realistically could be expected to absorb the Project's residential units within a 10-year period. KPMG advised ESDC that the market could do so (A 4013).

The 2009 Technical Memorandum concluded that the phased acquisition of the Project site, the minor design changes and the three-year shift in the anticipated completion date would not result in significant adverse environmental impacts that had not been examined in 2006 in the FEIS (A 170).

Despite this conclusion, ESDC acknowledged that economic conditions could lead to further delay of the Project. Therefore, the 2009 Technical Memorandum also analyzed whether further delay would have significant impacts that warranted preparation of a supplemental EIS (A 151-59). This "Delayed Schedule Analysis" assumed that completion of the Project could be delayed by up to five years – *i.e.*, from 2019 to 2024. It concluded that this elongated construction schedule would not result in new significant adverse impacts (A 159).

Based on the analyses in the 2009 Technical Memorandum, ESDC concluded that the adoption of the 2009 MGPP did not warrant preparation of a supplemental EIS (A 172).

F. ESDC's Affirmation of the 2009 MGPP

ESDC conducted a two-day public hearing on the 2009 MGPP on July 29 and 30, 2009, and also received and reviewed extensive written comments. ESDC determined that the public comments did not necessitate revisions to the 2009 Technical Memorandum or call into question the determination that no supplemental EIS was required (A 4022). On September 17, 2009, ESDC's Board of Directors completed its consideration of the 2009 MGPP by formally affirming it (A 4022-23).

In the resolution affirming the 2009 MGPP (*id*.), ESDC's directors also authorized ESDC's staff to enter into contracts and take other actions appropriate to effectuating the 2009 MGPP.

G. The "Master Closing" and Further Work on the Project

Between September and December 2009, documents pertaining to construction, financing, leasing and other aspects of the Project were finalized by ESDC, the MTA, FCRC and other interested parties.

On December 21-23, 2009, a "master closing" for the Project occurred among ESDC, FCRC, the MTA, the City of New York, various affiliates and subsidiaries of these entities, a bond trustee and an escrow agent (A 923). Several hundred documents were executed at the master closing, including a final Development Agreement (the "Development Agreement') among ESDC, FCRC

and various affiliates to establish FCRC's obligations to ESDC for development of the Project (A 4024-211). FCRC also delivered letters of credit totaling more than $150 million to secure its obligations and those of its affiliates to ESDC, the MTA and their affiliates, and the sale of more than $500 million in tax-exempt bonds to finance construction of the arena was closed (A 996).

Consistent with both the 2009 MGPP and the 2006 MGPP, the Development Agreement requires FCRC to use "commercially reasonable effort" to cause substantial completion of the Project within 10 years, *i.e.*, "by December 31, 2019" (A 4034 [§ 2.2]). The Development Agreement also establishes outside dates for various Project milestones, with monetary penalties for FCRC's failure to meet those milestones for reasons that are not excusable. For example, the "Outside Phase I Substantial Completion Date" is May 12, 2022 (A 4046 [§ 8.6]), and the "Outside Phase II Substantial Completion Date" is May 12, 2035 (A 4050 [§ 8.7]). However, the Development Agreement provides that the requirement that FCRC use commercially reasonable effort to substantially complete the entire Project by December 31, 2019, "is not modified, limited or impaired by the separate and distinct contractual requirements" that FCRC meet the specified milestone dates (A 4045 [§ 8.1(d)]).

The master closing opened the way for ESDC's commencement of proceedings to actually acquire title to properties to be condemned for the first

stage of the Project. ESDC acquired title on March 1, 2010, and vacant possession was delivered to an FCRC affiliate later in the spring (A 4620-26). At the same time, FCRC's acquisition of the MTA's property on the Arena Block was completed. These accomplishments allowed construction of the arena – the Project's first building – to begin (A 1156).

Construction of the arena and related public improvements on the Arena Block is now far along, in anticipation of the arena's opening for its first event in the summer of 2012 (A 1144). The new subway entrance is being constructed, and construction of a temporary replacement rail yard for the LIRR was completed in 2009. FCRC also has remediated environmental contamination at the former rail yard and has performed substantial additional work in preparation for construction of a permanent new rail yard for the LIRR (A 1166). All buildings on the Arena Block and on Block 1129 have been demolished, except for one building that is being used temporarily for construction support activities.

H. The 2009 Approvals' Precipitation of New Litigation

ESDC's adoption of the 2009 MGPP and the MTA board's approval of modified business terms led to a second wave of litigation by Project opponents, consisting of five separate proceedings. Three were quickly disposed of, while the two cases at bar were not.

In an Article 78 proceeding joined in by petitioner DDDB, Justice Michael D. Stallman refused to annul the MTA board's approval of modified business terms, holding that the new terms reflected "essentially the same plan" that the MTA had approved in 2006. *Montgomery v. Metropolitan Transp. Authority*, 25 Misc.3d 1241(A), 2009 WL 4843782 (Sup. Ct. N.Y. Co. Dec. 15, 2009).

In the proceeding brought by ESDC pursuant to EDPL Article 4 to condemn properties for the Project, Justice Abraham G. Gerges dismissed counterclaims interposed by condemnees on the basis of ESDC's adoption of the 2009 MGPP. *Matter of N.Y.S. Urban Dev. Corp.*, 26 Misc.3d 1228(A), 2010 WL 702319 (Sup. Ct. Kings Co. March 1, 2010).

Justice Gerges also dismissed a separate Article 78 proceeding that asserted that the 2009 MGPP, the Development Agreement and the MTA board's approval of modified business terms so significantly changed the Project that a new determination and findings under the EDPL were required. *Peter Williams Enterprises, Inc. v. N.Y.S. Urban Dev. Corp.*, 28 Misc.3d 1239(A), 2010 WL 3703257 (Sup. Ct. Kings Co. Sept. 20, 2010). In reaching that conclusion, the court heeded ESDC's warning that a contrary determination would "create an endless loop of litigation," and quoted this Court's proscription in *Leichter v. N.Y.S. Urban Dev. Corp.*, 154 A.D.2d 258 (1st Dep't 1989), that a second round of

EDPL proceedings about changes to the previously approved Times Square project only would bring further "legal challenges, thereby extending the review procedure *ad infinitum*." 154 A.D.2d at 261.[4]

The 2009 approvals also precipitated the Article 78 proceedings at bar. In the *Develop Don't Destroy (Brooklyn)* case, Index No. 114631/09 ("*DDDB III*"), commenced in the Supreme Court, New York County, on October 19, 2009, the petition (A 306-39) challenged ESDC's determination not to prepare a supplemental EIS for the 2009 MGPP, and further asserted that the 2009 MGPP was inconsistent with the UDC Act. The *Prospect Heights Neighborhood Development Council* case, Index No. 116323/09 ("*Prospect Heights*"), was commenced in the same court on November 19, 2009, with a petition asserting similar claims (A 572-618). Both cases were assigned to Justice Marcy S. Friedman. In both cases, the petitioners' contention that a supplemental EIS should have been prepared essentially was based on the argument that the environmental analysis in the 2009 Technical Memorandum was inadequate, because the assumed 10-year build-out that had been used in the analysis was unrealistic, particularly in view of the modified business terms approved by the MTA's board, which allowed FCRC until 2030 to complete its acquisition of

[4] Appeals from Justice Stallman's decision and Justice Gerges's two decisions never were perfected.

development rights from the MTA. The petitioners argued that a supplemental EIS was necessary in light of the failure of the 2009 Technical Memorandum to consider the impacts on the surrounding neighborhood of a 25-year build-out for the Project.

On November 12 and December 11, 2009, ESDC and FCRC served their respective answers in *DDDB III* (A 414-81, 482-540) and *Prospect Heights* (A 657-720, 721-67), and ESDC also served the administrative record for the 2009 MGPP. On January 6, 2010, after the master closing, the *DDDB III* petitioners moved for a preliminary injunction halting further work on the Project. On January 15, 2010, Justice Friedman heard oral argument. While the cases were *sub judice*, the Justice held a telephonic conference call during which the *DDDB III* petitioners advised the court that they had obtained the Development Agreement from ESDC pursuant to the Freedom of Information Law. These petitioners requested permission to make a supplemental submission based on the Development Agreement, but the court denied their request (*see* A 81 [fn. 2]).

I. The March 10, 2010 Decision

By decision and order dated March 10, 2010 (A 67-86), Justice Friedman denied both petitions and the motion for an injunction.

The court concluded that, "[u]nder the limited standard for SEQRA review," it "was constrained to hold that ESDC's elaboration of its reasons for

using a 10-year build-out and for not requiring an SEIS was not irrational as a matter of law" (A 79). The court reasoned that ESDC "was aware of" the revised MTA-FCRC business terms when it approved the 2009 MGPP but "determined ... to continue to use the 10 year build-out, based on its intent to require FCRC to commit to use commercially reasonable efforts to build-out the Project within 10 years, and based on its real estate consultant's opinion that, notwithstanding the economic downturn, the market could reasonably be expected to absorb the units over the 10 year period" (A 80).

J. The November 9, 2010 Decision

On April 7, 2010, petitioners in both cases filed separate motions to reargue and renew (A 771-82, 784-804), claiming that the Development Agreement, which had been executed after ESDC's final approval of the 2009 MGPP, supported their claim that ESDC had acted irrationally when it determined that adoption of the 2009 MGPP did not require a supplemental EIS. ESDC and FCRC served opposition papers on April 27, 2010 (A 806-11). The court heard oral argument on June 29, 2010.

By decision and order dated November 9, 2010 (A 44-66), Justice Friedman granted reargument and renewal, reversed the court's prior denial of the Article 78 petitions and remanded the cases to ESDC "for findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its

continued use of a 10 year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted" (A 63). The court adhered to its prior determination denying petitioners' claims under the UDC Act (A 48).

In its decision, the court acknowledged that, when ESDC approved and then affirmed the 2009 MGPP, the Development Agreement was not in existence, and therefore was not part of the record before ESDC (A 49). Nevertheless, the court reviewed and assessed "the detailed provisions of the Development Agreement regarding scheduling of construction" (A 51). According to the court, "the Development Agreement is needed to enable the court to undertake meaningful review of ESDC's representation that its use of the 10 year build-out in assessing environmental impacts of the [2009] MGPP was reasonable, based on its intent to require FCRC to make a contractual commitment to use commercially reasonable efforts to complete the Project by 2019" (A 57-58). The court acknowledged that the Development Agreement required FCRC to use commercially reasonable effort to complete the Project by 2019, but concluded that the remedies for failure to comply with that obligation were "uncertain or appear to be significantly less stringent than the remedies provided for FCRC's failure to meet the deadlines for Phase I work" (A 53). The court further asserted that "the Development Agreement has cast a completely different light on the Project build

date," because the specific terms of the Development Agreement and the revised MTA business terms raised "a substantial question as to whether ESDC's continuing use of the 10 year build-out has a rational basis" (A 61-62).

K. ESDC's Compliance with the Remand Order

In compliance with the remand order, ESDC prepared an analysis of the Development Agreement and the final agreements between FCRC and the MTA. This analysis is a 37-page single-spaced memorandum entitled "ESDC Response to Supreme Court's November 9, 2010 Order" (the "ESDC Response") (A 265-301).

The ESDC Response examined the salient provisions of these agreements, summarized them in detail and analyzed their possible relevance to the Project's build-out schedule. It concluded that the contractual provisions regarding timing were not intended "to extend the schedule for construction of the Project to the outside dates" that trigger penalties and defaults, but instead "create a legally binding framework of rights and obligations designed to: (i) require construction to proceed towards completion of the Project 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" (A 283). The ESDC Response further concluded that, in fact, "the agreements are structured to facilitate construction of the Project at a commercially reasonable pace" (A 284) (emphasis

in original), and "also put into place the safeguards needed to assure that the work, once commenced is pursued and completed on time" (A 285). The ESDC Response therefore summarized its conclusions as follows:

> In sum, the Development Contracts do not preclude the Project from being constructed in 10 years and both require and encourage construction to take place at a commercially reasonable pace. In light of these considerations, the Development Contracts are not inconsistent with a ten year schedule for Project construction.

(A 285.)

In further compliance with the remand order, ESDC directed its environmental consultants to perform an analysis of any significant adverse environmental impacts not previously disclosed in the FEIS that reasonably could be expected to result from a delay in the Project's completion until 2035, with no changes in the Project's size, mix of uses, site plan or building configurations. This analysis was set forth in a 91-page single-spaced document entitled "Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project" (the "2010 Technical Analysis") (A 174-264).

To determine whether new adverse impacts would result from this extended delay, the 2010 Technical Analysis considered each technical area that had been studied in the FEIS. For some areas of potential impact, no detailed analysis was required. However, detailed analyses were conducted of the potential impacts on traffic and parking, and transit and pedestrians. Based on these

analyses, the 2010 Technical Analysis concluded that, with a delay in the Project's completion to 2035, the completed Project would have no significant adverse impacts beyond those identified in the FEIS.

The 2010 Technical Analysis also assessed the potential temporary construction-related impacts of this "Extended Build-Out Scenario." A hypothetical schedule consistent with the Extended Build-Out Scenario was created (A 220-22, 253-59), and the 2010 Technical Analysis considered site conditions at seven different hypothetical stages of construction to examine how the Project would affect surrounding areas at progressive stages of construction. On this basis, the 2010 Technical Analysis concluded that the FEIS's conclusions regarding construction-related impacts on socioeconomic conditions, community facilities, historic resources, hazardous materials and infrastructure "would remain unchanged since constructed-related effects would be similar for these technical areas irrespective of the length of construction" (A 223).

More detailed analyses of potential construction-related impacts on open space, land use and urban design, traffic and transportation, air quality, noise and neighborhood character also were undertaken to determine whether the FEIS's conclusions regarding these impacts remained valid under the Extended Build-Out Scenario (A 222-44). The 2010 Technical Analysis assessed potential construction-related impacts during each of the seven hypothetical stages of

construction on land use and urban design (A 223-26), traffic and transportation (A 226-31), air quality (A 231-35), noise (A 235-41), and neighborhood character (A 241-44).

Based on these analyses, the 2010 Technical Analysis concluded that construction with an outside completion date of 2035 would not have significant adverse impacts substantially different from those addressed in the FEIS.

On December 16, 2010, based on the 2010 Technical Analysis, the ESDC Response, the FEIS, the 2009 Technical Memorandum and other Project documents, ESDC's Board of Directors adopted three formal findings in response to the court's remand order (A 302-303).

First, ESDC found that the Development Agreement and the agreements between FCRC and the MTA "do not have a material effect on whether it is reasonable to use a 10-year construction schedule to assess the environmental impacts of the Project," pointing out that "a key factor in the ultimate pace of development of the Project will be the market demand for the Project's buildings."

Second, ESDC found that, as of December 16, 2010, "it appears" that it was "unlikely that the Project will be constructed on a 10-year schedule, because construction of the Project's residential buildings has lagged behind the 10-year schedule provided by FCRC to ESDC in 2009, and because of continuing weak general economic and financial conditions."

Third, ESDC found that "[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," and further, that the Development Agreement and FCRC's agreements with the MTA "do not warrant an SEIS."

L. The Supplemental Petitions Challenging ESDC's Compliance

On January 18, 2011, the petitioners in both cases served virtually identical supplemental petitions (A 837-50, 856-69). These petitions asserted, *inter alia*, that ESDC had failed to take a "hard look" at the long-term impact of construction on the health and viability of the neighborhood (¶ 27(A)); that the 2010 Technical Analysis "dealt with neighborhood impacts on an isolated, localized basis, rather than evaluating the cumulative impacts of such an extended build-out on the broader area surrounding the Project site" (¶ 27(B)); that the 2010 Technical Analysis was not based on a "firm construction plan" (¶ 27(C)); that ESDC had failed to take a "hard look" at the impact on neighborhood character "of using Block 1129 as an open parking lot for 12 to 15 years" (¶ 27(D)); and that the 2010 Technical Analysis did not analyze the impact of multiple circus performances at the arena (¶ 27(D)).

On January 28, 2011, the *Prospect Heights* petitioners moved to enjoin construction of the Project.

ESDC and FCRC served their answers to the supplemental petitions (A 908-960, 974-1129) on February 18, 2011, at which time ESDC also served a supplemental administrative record. The court heard oral argument on March 15, 2011.

M. <u>The Court's Final Decision and Order</u>

On July 13, 2011, Justice Friedman issued a written decision and order (A 15-43) in which she directed ESDC to conduct "further environmental review," including "preparation of a Supplemental Environmental Impact Statement assessing the environmental impacts of delay in Phase II construction of the Project" (A 37). The court also directed ESDC to conduct "further environmental review proceedings pursuant to SEQRA in connection with the SEIS, including a public hearing if required by SEQRA," and to make "further findings on whether to approve the MGPP for Phase II of the Project" (A 37).

In its decision, the court concluded that ESDC's reliance on a 10-year build-out was arbitrary and capricious, based on the court's determination that (a) FCRC's obligation to use "commercially reasonable effort" to complete the Project within 10 years was not consistent with deadlines in the Development Agreement (A 24-25), and (b) there was no "financial analysis" supporting ESDC's assertion

that "FCRC has the financial incentive to pursue the Project to a 'speedy conclusion'" and no "detail showing" FCRC's "ability" to "complete the Project in 10 years" (A 24). According to the court, a supplemental EIS was required "because the phased acquisition authorized by the MTA Agreement, and the extended deadlines contemplated by the Development Agreement, made a major change to the construction schedule for Phase II of the Project," while "ESDC has failed to give adequate consideration to the environmental impacts resulting from this change" (A 33-34). The court rejected ESDC's reliance on the 2010 Technical Analysis, holding that it was largely premised on considerations of "common sense" rather than "technical studies" (A 27), and contained "an inadequate analysis of the effects of the change in schedule on neighborhood character" (A 34).

The court refused to invalidate ESDC's approval of the 2009 MGPP or enjoin the ongoing work on Phase I of the Project, "given the extent to which construction of Phase I has already occurred, under a plan which has been subjected to and withstood challenge" (A 36). The court also declined to issue a stay of Phase II construction, because "it is undisputed that Phase II work will not commence for many years." *Id*.

ESDC and FCRC served and filed timely notices of appeal (A 1-6, 7-10). No cross-appeals were taken by petitioners.

Argument

I.

THE MOTION COURT'S REQUIREMENT OF A SUPPLEMENTAL EIS CONTRAVENES BASIC SEQRA PRINCIPLES AND IS COMPLETELY INCONSISTENT WITH THIS COURT'S PRIOR DECISION IN A SIMILAR CASE

Although couched otherwise, the motion court's requirement that ESDC prepare a supplemental EIS for a project that previously was approved in compliance with SEQRA is based on changes in the general economic climate, not changes to the Project. The court's decision is an unprecedented – and entirely wrong – expansion of SEQRA's scope, because it uses the approval of inconsequential changes to the Project as a pretext to require a supplemental EIS that examines the impact of changes in over-all economic conditions.

The motion court's decision also cannot be reconciled with this Court's decision in *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). The change in property acquisition reflected in the 2009 MGPP is essentially identical to a change in ESDC's Times Square redevelopment project that was considered by this Court in *Wilder*. There, similar to here, project opponents claimed that a change in plans for the project's implementation that substituted "phased acquisition and construction of building sites" for "simultaneous acquisition and construction" necessitated the preparation

of a new EIS. This Court disagreed, and held that the change did not warrant further environmental review. The Court explained:

> As to the sequential acquisition of building sites and the likelihood of staggered construction as sites are acquired, it is reasonably clear that the simultaneous construction contemplated in the original plan (adopted Oct. 4, 1984) was rendered impractical by events which took place during the period that various legal challenges wound their way through the courts, culminating in the project's approval in *Matter of Jackson v. New York State Urban Dev. Corp.* (67 NY2d 400 [1986]).

154 A.D.2d at 262-63. After making clear that the intervening "events" that rendered the "simultaneous construction contemplated in the original plan ... impractical" were a change in the economic situation resulting from "an unprecedented building boom" that had occurred while the original project approvals were in litigation (*id.* at 262-63), this Court continued as follows:

> ... [I]t would be most inappropriate to permit an unsuccessful challenge to a public benefit project to nevertheless thwart its completion by requiring the condemning authority to review the project *de novo* because of circumstances resulting from delay attendant on the litigation. Such a result renders a baseless challenge as effective as a meritorious one in defeating public development projects and cannot be tolerated.

Id. (emphasis added). These principles are consistent with controlling Court of Appeals precedent and apply with equal force here, where they compel reversal of the motion court's decision.[5]

The Atlantic Yards Project was the subject of an exhaustive FEIS, 3,500 pages in length, which was completed in 2006 and sustained by this Court as fulfilling ESDC's obligations under SEQRA. *DDDB II*, 59 A.D.3d at 316-19. The Court of Appeals recognized in its seminal SEQRA decision in *Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400 (1986), that "[t]he EIS process necessarily ages data," but "[a] requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives." *Id.* at 425.

Since *Jackson*, the Court of Appeals has consistently manifested a determination to protect the finality of determinations made in accordance with

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[5] The motion court sought to distinguish *Wilder* by asserting that the "directive to ESDC to prepare an SEIS" in these cases "is not based on the mere fact [of] phased acquisition" or even "routine delays in the construction process or delays occasioned by the SEQRA review process," but because "the phased acquisition" and the Development Agreement "made a major change to the construction schedule for Phase II of the Project" (A 33-34). This distinction is a false one, because the "change" in these cases is not a change in the Project and is not different from the change from simultaneous to sequential acquisition in *Wilder*. In fact, the change in *Wilder* was more substantial than the change at bar, because, while acquisition of the entire site for the Atlantic Yards Project initially had been contemplated as simultaneous (like the Times Square project in *Wilder*), actual construction of the Atlantic Yards Project (unlike the project in *Wilder*) always had been expected to be sequential.

SEQRA. Specifically, the Court has rendered numerous decisions halting post-approval environmental reviews that were sought by project opponents to perpetuate the review process. For example, in *Sutton Area Community v. Board of Estimate*, 78 N.Y.2d 945 (1991), the Court reversed a decision in which this Court had annulled an agency determination and directed further environmental review on the theory that the late correction of a factual error in a final EIS had not allowed sufficient opportunity to consider the corrected information. In *Neville v. Koch*, 79 N.Y.2d 416 (1992), the Court affirmed this Court's determination striking the motion court's requirement of further environmental review in the future if the project eventually proposed for a rezoned parcel was different from the hypothetical worst-case scenarios that had been examined in the EIS for the rezoning. In a similar vein, the Court has made it clear that the environmental review of a project's final stage may not reopen issues that properly could have been "addressed earlier in the environmental review process." *EFS Ventures Corp. v. Foster*, 71 N.Y.2d 359, 373 (1988).

More recently, in a case of particular interest here, the Court of Appeals reversed an Appellate Division decision requiring an agency to prepare a supplemental EIS for a previously approved project. *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219 (2007). The Court made it clear that "[a] lead agency's determination whether to require a SEIS ... is discretionary."

Riverkeeper, 9 N.Y.3d at 231 (emphasis added). The Court also differentiated this discretion whether to prepare a supplemental EIS from the standard governing an agency's decision whether to prepare an EIS, which "the lead agency must" prepare or require if a project can reasonably be expected to have any significant adverse impact. *Id.* (emphasis added). *See also Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215, 223 (1st Dep't 2005). Unlike a supplemental EIS, "the requirement to produce an [EIS] is triggered by a relatively low threshold ...." *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 397 (1995).

In reaching its decision that the lead agency had not abused its discretion in refusing to prepare a supplemental EIS, the Court in *Riverkeeper* also considered the regulations promulgated by the State's Department of Environmental Conservation ("DEC") for implementing SEQRA. Under these regulations, a lead agency may decide to prepare a supplemental EIS only in narrowly enumerated circumstances. The relevant regulation provides:

> The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in the circumstances related to the project.

6 NYCRR § 617.9(a)(7)(i) (emphasis added). Therefore, a supplemental EIS is warranted "only if environmentally significant modifications are made after issuance of an FEIS." *C/S 12th Avenue LLC v. City of New York*, 32 A.D.3d 1, 7

(1st Dep't 2006) (emphasis added). "The mere fact that a project has changed does not necessarily give rise to the need for the preparation of a supplemental EIS." *Id*.

Here, the action under attack for the alleged failure to comply with SEQRA is ESDC's adoption of the 2009 MGPP without a supplemental EIS. However, the Project's environmental impacts already had been exhaustively examined in 2006 in the judicially sustained FEIS. Furthermore, the elements of the Project that were examined in the FEIS – *i.e.*, the arena, 16 other buildings, the mass transit improvements and the eight acres of open space – remain the elements of the Project under the 2009 MGPP. The modifications to the 2006 MGPP effectuated by the 2009 MGPP reflect a commitment by FCRC to address project-generated day care enrollment (A 3859), and also some changes in the design of some Project components. Concededly, however (A 35-36), these changes were minor in scope and did not have significant adverse environmental effects.

The 2009 MGPP also changed the plan for implementation of the Project by allowing properties on the Project site to be condemned by ESDC in multiple stages rather than by a single condemnation as contemplated by the 2006 MGPP – a change that paralleled the MTA's approval of modified terms allowing FCRC to purchase land and development rights from the MTA in stages rather than all at once. These changes reflected – and resulted from – the deterioration in over-all economic conditions that occurred after the 2006 Project approvals. Delay

is a phenomenon of most construction projects, including in particular projects containing multiple buildings intended for construction over a period of years. Here, the changes in property acquisition made in the 2009 MGPP are not the cause of delay in the Project's construction, but instead are a response to economic conditions that are causing delay.

Nevertheless, the Project's opponents seized upon the change in property acquisition as a basis for attacking ESDC's environmental review of the 2009 MGPP, and the motion court erroneously accepted this premise. However, the change in property acquisition was not the cause of any change in the anticipated schedule for actually building the Project. Under the 2006 MGPP, the Project was to be constructed incrementally over a period of several years. Similarly, under the 2009 MGPP, the Project will be built incrementally, in stages, over a period of several years. Under both versions of the MGPP, the pace of the Project's actual construction would be governed primarily by market conditions and the availability of financing. The change in property acquisition reflected in the 2009 MGPP was, thus, a response to changed economic conditions – not a change to the Project or the cause of any change in the Project's construction schedule.

The applicable SEQRA regulation cited by the Court of Appeals in *Riverkeeper* (§ 617.9(a)(7)(i)) allows an agency to "require a supplemental EIS"

where "significant adverse environmental impacts not addressed or inadequately addressed in the EIS" will "arise from" carefully specified situations, including "changes proposed for the project" (¶ (a)). The agency that promulgated this regulation, DEC, explains in *The SEQR Handbook* (3d ed. 2010), an on-line manual for agencies and the public about the SEQRA process (*see Handbook* at 1), that the intention of the regulation is to not "make it easy to supplement" an EIS, because to do so "would be unreasonable" (*id.* at 6).[6]

Here, there have been no "changes proposed for the project," because the Project in the 2009 MGPP is identical in all material respects to the Project in the 2006 MGPP. The changes to a project that might trigger an obligation to prepare a supplemental EIS are physical changes, as illustrated by this Court's recent decision in *Bronx Committee for Toxic Free Schools v. N.Y.C. School Const. Authority*, 86 A.D.3d 401 (1st Dep't 2011), *lv. to app. granted*, Motion No. 2011-988, 2011 NY Slip Op. 90176 (Nov. 21, 2011), where the scope of the project was expanded to include a long-term program "for the remediation of contaminated soil and groundwater" that never had been addressed in the final EIS for the project. Here, by contrast, there has been no significant change in the Project's various components.

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[6] *The SEQR Handbook* is available on DEC's website. *See http://www.dec.ny.gov/permits_ej_operations_pdf/seqrhandbook.pdf.*

The same regulation also specifies two other situations as potentially allowing a supplemental EIS – *i.e.*, "newly discovered information" (¶ (b)) or "a change in circumstances related to the project" (¶ (c)). These have no application here. In *The SEQR Handbook*, DEC explains that a supplemental EIS may be required either (1) "at any time during review of an EIS," or (2) "[a]lternatively, if a project sponsor proposes major project changes which could change the lead agency's identification and assessment of likely significant adverse environmental impacts" (at 142). This formulation makes it clear that DEC's intention is that "new information" or "a change in circumstances" applies only while the process of reviewing and considering an EIS remains underway – a process that concluded for the Atlantic Yards Project in 2006. DEC also makes it clear in *The SEQR Handbook* that "a change in circumstances" that could lead to the preparation of a supplemental EIS is limited to a "change in the physical setting of, or regulatory standards applicable to, the proposed project" (*id.*).

In short, neither the regulation nor *The SEQR Handbook* supports the proposition that a change in the general economic climate occurring years after a project has been approved allows an agency – let alone, as the motion court did here, compels an agency – to prepare a supplemental EIS.

II.

THE MOTION COURT ERRED WHEN IT REVERSED ITSELF AND REMANDED THE MATTER TO ESDC

The motion court's initial decision, rendered on March 10, 2010 (A 67-86), correctly denied the petitions in these cases. The court's subsequent self-reversal and remand to ESDC for further findings, rendered on November 9, 2010 (A 44-66), was erroneous and founded upon a misapplication of the judicial role under SEQRA.

As the Court of Appeals made clear in *Riverkeeper*, judicial review of an agency's determination whether to prepare a supplemental EIS is limited. The paradigm for reviewing the rationality of an agency determination whether to prepare a supplemental EIS is the basic tripartite test for considering all substantive determinations under SEQRA – *i.e.*, "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Riverkeeper*, 9 N.Y.3d at 231 (quoting *Jackson*, 67 N.Y.2d at 417).

In this regard, however, the Court made it clear in *Riverkeeper* that it is for the agency, not the courts, to analyze the relevant information in order to decide whether to prepare a supplemental EIS. The Court thus stated that, "[i]n making this fact-intensive determination, the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and

must assess environmental concerns in conjunction with other economic and social planning goals." 9 N.Y.3d at 231. The Court continued:

> ... [I]t is not the province of the courts to second guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. As we have repeatedly stated, "while judicial review must be meaningful, the courts may not substitute their judgment for that of the agency ...."

Id. at 232 (quoting *Akpan v. Koch*, 75 N.Y2d 561, 570 (1990), and *Jackson*, 67 N.Y.2d at 416) (emphasis added). The motion court's remand order was inconsistent with these principles, because the 2009 Technical Memorandum took the required "hard look."

A. ESDC's 2009 Technical Memorandum Satisfied the "Hard Look" Requirement

In conjunction with the 2009 MGPP, the 2009 Technical Memorandum (A 87-170) analyzed whether any changes effectuated by the 2009 MGPP would have significant adverse environmental impacts that had not previously been examined in the FEIS. Specifically, the 2009 Technical Memorandum thoroughly analyzed the potential new impacts that reasonably could be expected from a 10-year construction schedule that concluded in 2019 instead of 2016 as anticipated in the FEIS. The 2009 Technical Memorandum considered

the potential environmental impacts of the schedule change in all areas of potential environmental concern that had been studied in the FEIS, including temporary construction-related impacts.

With regard to construction, the 2009 Technical Memorandum analyzed whether there might be new or additional adverse impacts on traffic and transportation, air quality, noise and neighborhood character (A 145-50). It concluded that a change in the Project's anticipated completion date to 2019 would not cause impacts that had not already been studied in the FEIS.

In addition, in recognition of the fact that the over-all economic climate had deteriorated since completion of the FEIS and that these unfavorable conditions could persist, the 2009 Technical Memorandum also examined whether further delays in the Project's completion of up to five additional years beyond 2019 would have significant new adverse impacts (A 151). After considering the relevant areas of potential environmental concern, including the potential impact on urban design and neighborhood character of a temporary surface parking lot remaining in place on Block 1129 for longer than anticipated in the FEIS (A 154, 158), ESDC concluded that the additional delay would not have significant adverse impacts that had not previously been addressed in the FEIS (although ESDC acknowledged that, as previously disclosed in the FEIS, there would be temporary,

localized impacts on neighborhood character due to construction activity (A 158, 159)).

ESDC's use of a 10-year anticipated construction schedule in the 2009 Technical Memorandum was reasonable and supported by expert evidence in the record before ESDC. A construction consultant retained by ESDC evaluated a detailed construction schedule that had been prepared for FCRC based on current industry practice and methodology, and agreed that this 10-year schedule was "viable and appropriate" (A 3820). In addition, ESDC's real estate consultants at KPMG reviewed FCRC's estimates of the rates at which the Brooklyn market could absorb the Project's new residential units and concluded that it was not unreasonable to expect the units to be absorbed within 10 years (A 4013).

Based on these considerations, the 2009 Technical Memorandum reflected the required "hard look" by ESDC of the potential impact of the changes effectuated by the 2009 MGPP, and a "reasoned elaboration" of ESDC's conclusion that a supplemental EIS was not warranted. *See Riverkeeper*, 9 N.Y.3d at 232. *See also Coalition Against Lincoln West*, 21 A.D.3d at 223 (concluding that a technical memorandum took the necessary "hard look" and supported a determination that no supplemental EIS was warranted).

B. The Motion Court's Use of the Development Agreement to Impeach ESDC's Environmental Analysis Was Improper

In reversing its own prior dismissal of the petitions and remanding to ESDC for further findings, the motion court improperly relied on the Development Agreement between ESDC and FCRC, a document that was not finalized and executed until the master closing, which took place on December 21-23, 2009, more than three months after ESDC's final approval of the 2009 MGPP on September 17, 2009. Therefore, the Development Agreement was not before ESDC's board when it made its final determination on the 2009 MGPP.

It is axiomatic that, as the motion court recognized, "a court reviewing an agency's determination is confined to the facts and record adduced before the agency" (A 81), citing *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). *See also, e.g., Kelly v. Safir*, 96 N.Y.2d 32, 39 (2001); *Levine v. N.Y.S. Liquor Authority*, 23 N.Y.2d 863, 864 (1969).

Ironically, in its initial decision the motion court refused to consider the Development Agreement, which had been brought to its attention subsequent to oral argument, precisely because the Agreement had not existed as of ESDC's final adoption of the 2009 MGPP. The motion court thus held that the Development Agreement

> was not in existence at the time of ESDC's June 23, 2009 approval of, and September 17, 2009 resolution affirming, the 2009 MGPP. To the extent that petitioners now claim that the

> documentation that was subsequently negotiated does not provide adequate guarantees that the Project will be built within the 10 year period, that issue is not before this Court. Under long settled authority, a court reviewing an agency's determination is confined to the facts and records adduced before the agency.

(A 81 [fn. 2].)

In later reversing itself and disregarding this fundamental tenet of administrative law, the motion court explained that, in previously denying the petitions, it had relied on ESDC's representation that FCRC would be contractually obligated to use commercially reasonable efforts to complete the Project within 10 years, while the Development Agreement called that conclusion into question in view of the milestones in that document that subjected FCRC to financial penalties, such as the 25-year outside completion date for Phase II of the Project, and the allegedly disparate enforcement provisions in the Development Agreement for failure to meet Phase I deadlines and Phase II deadlines. The motion court disparaged the provision in the Development Agreement obligating FCRC to use "commercially reasonable effort" to complete the Project within 10 years as uncertain in its practical import inasmuch as, supposedly, the "remedies provided for failure to use commercially reasonable efforts to complete the Project by 2019 are uncertain or appear to be significantly less stringent than the remedies provided for FCRC's failure to meet the deadlines for Phase I work" (A 53). The motion court therefore concluded that "[t]he Development Agreement has cast a

completely different light on the Project build date" and raised a "substantial question as to whether ESDC's continuing use of the 10 year build-out has a rational basis" (A 61-62).

So far as we are aware, the motion court's use of the terms of subsequent contracts for project implementation to impeach the assumed build-year that previously was used in the project's environmental review is without precedent under SEQRA.

This Court has recognized that "a 'build year' ... is only a non statutory baseline used by ... agencies as a device to provide assumptions" on which environmental studies may be premised. *Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Council of City of New York*, 214 A.D.2d 335, 337 (1st Dep't), *app. denied*, 87 N.Y.2d 802 (1995). *See also, e.g.*, *DDDB II*, 59 A.D.3d at 318, where this Court specifically upheld ESDC's use of an assumed 10-year build-out for the Project, and New York City's *CEQR Technical Manual* (2d ed. 2001), a publication by the City's Department of City Planning that sets forth the methodologies to be employed in environmental studies for projects in the City (at p. 2-4). A build year thus is not a hard deadline by which an action or project must be completed.

Furthermore, the use of subsequently negotiated business terms to impeach the build year previously used in an environmental analysis is inconsistent

with a fundamental goal of SEQRA, which is "to incorporate environmental considerations into the decisionmaking process at the earliest opportunity ...." *Neville*, 79 N.Y.2d at 426. Affirmance of the motion court's decision would incentivize project sponsors to defer environmental review while focusing first on business arrangements.

In addition, the motion court's evaluation of the Development Agreement's provisions was incorrect. The contractual obligation imposed upon FCRC to use "commercially reasonable effort" to complete the Project within 10 years is a real one, and encompasses both Phase I and Phase II of the Project. While the motion court denigrated this provision, the parties to the Agreement negotiated it at arm's length and considered it to be important. A review of New York case law shows that the phrase "commercially reasonable efforts" is commonly used in contracts in a wide range of contexts. *See*, *e.g.*, *Miller v. The Icon Group*, 77 A.D.3d 586 (1st Dep't 2010) (contract to purchase real property); *Five Star Development Resort Communities, LLC v. iStar RC Paradise Valley LLC*, 2010 WL 1005169 (S.D.N.Y. March 18, 2010) (project loan agreement); *Birmingham Associates Ltd. v. Abbott Laboratories*, 547 F.Supp.2d 295, 297 (S.D.N.Y. 2008), *aff'd*, 328 Fed. Appx. 42 (2d Cir. 2009) (funding agreement for a drug company).

The formulation also is enshrined in UCC § 9-267 regarding the sale of collateral, where, as the motion court acknowledged, "[t]here is a substantial body of case law" (A 53). Courts frequently interpret the term in other contexts, too. *See, e.g., Morgenroth v. Toll Bros., Inc.*, 60 A.D.3d 596 (1st Dep't 2009) (deciding whether the purchaser of a parcel had exercised "commercially reasonable efforts" to secure the best price for an adjoining parcel); *Town House Stock LLC v. Coby Housing Court*, 2007 WL 726839 (Sup. Ct. N.Y. Co. Mar. 12, 2007), *aff'd*, 49 A.D.3d 456 (1st Dep't 2008) (deciding whether a seller of real property had used "commercially reasonable efforts" to maintain the property between the contract date and the closing date); *CSI Investment Partners II, L.P. v. Cendant Corporation*, 507 F. Supp. 2d 384, 413-14 (S.D.N.Y. 2007), *aff'd*, 328 Fed. Appx. 56 (2d Cir. 2009) (interpreting a purchaser's obligation under a stock purchase agreement to use "reasonable commercial efforts" to market the purchased company's products). As these cases show, the courts are equipped to decide whether a party charged with making commercially reasonable efforts has met that standard.

The motion court's emphasis on what it called "disparate penalties" for failure to meet construction deadlines for Phase I and Phase II (A 51-52, 55) also was unfounded. The court characterized the Development Agreement as providing detailed firm commencement dates for Phase I but not Phase II and

"apparently" far stricter penalties for failure to meet Phase I deadlines, from which the court inferred that the Agreement "plainly contemplates an outside build date of 25 years for completion" of Phase II (A 54). The court's leap in logic was a substitution of its own judgment for that of ESDC, because the absence of a commencement date for Phase II does not mean a change in schedule. It simply reflects the contracting parties' inability at that time to predict with certainty what the start date would be for Phase II, which is further in the future than Phase I. It is not a basis for impeaching the build year used for a prior environmental review. In fact, if post-approval contract documents now can be scrutinized for consistency with hypothetical years previously used for environmental analysis, the Court's admonition in *Jackson*, 67 N.Y.2d at 425, that the environmental review process should not be allowed to become "perpetual" would be eviscerated.

III.

THE MOTION COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF ESDC IN ORDERING ESDC, AFTER REMAND, TO PREPARE A SUPPLEMENTAL EIS

On remand, ESDC prepared a thorough analysis of the Development Agreement and the FCRC-MTA agreements, which is set forth in the ESDC Response (A 265-301). ESDC also commissioned the 2010 Technical Analysis (A 174-264), which sets forth a comprehensive examination of the potential environmental impacts that would result if the Project's completion is delayed to

2035. On the basis of these studies, ESDC concluded that a supplemental EIS remained unwarranted. In directing ESDC to nevertheless prepare a supplemental EIS and make additional findings, the motion court overstepped its authority and improperly substituted its judgment for that of ESDC.

A. On Remand, ESDC Took a "Hard Look" at the Effects of a Delay in Project Completion to 2035

In its contractual analysis, ESDC recognized that the relevant agreements establish deadlines that define the outer allowable limits for Project construction (A 271-73, 275, 279, 282-84). ESDC also examined the adequacy of the stipulated penalties and the other remedies available to it if FCRC fails to meet its obligations (A 273-74, 276, 279, 282, 285). Based on this review, ESDC determined that the contracts were consistent with its view when it adopted the 2009 MGPP, because the contracts allow the Project to proceed on a 10-year schedule and, in the case of the Development Agreement, require FCRC to use "commercially reasonable effort" to complete the Project within 10 years (A 271-73, 283, 285). ESDC further concluded, as it had when it adopted the 2009 MGPP, that the principle determinant of the construction schedule would be economic conditions extraneous to the Project, *i.e.*, "market demand" (A 266). Ultimately, therefore, ESDC concluded that an assumed 10-year build-out remained a reasonable basis for environmental analysis of the Project.

Notwithstanding this conclusion, the 2010 Technical Analysis carefully examined the potential environmental impacts of a 25-year "Extended Build-Out Scenario." This analysis considered whether the Project, as completed, would have significant new adverse impacts if it was not completed until 2035, and also whether an extension of the construction process over 25 years would itself have previously unexamined adverse impacts.

The 2010 Technical Analysis concluded that there would be no such significant impacts. It reasoned that a 25-year build-out necessarily would mean a longer and slower construction process than the 10-year build-out assumed in the FEIS, and prolonged but less intense construction activities, because fewer buildings would be constructed concurrently (A 176). The 2010 Technical Analysis thus reasoned that, while the construction period for any particular building would not be affected, there would be "less overlap of [construction] activities for different buildings, resulting in overall lower intensity in construction activities on the Project site" (A 222).

The 2010 Technical Analysis described the Extended Build-Out Scenario, considered updated background conditions where applicable, and projected future conditions that would exist upon completion of the Project in 25 years (A 175-80). While no detailed analysis was considered necessary for evaluating the impacts of the completed Project in several areas of environmental

study, detailed analyses were performed for other areas of study, including potential impacts on traffic and parking, and on mass transit and pedestrian conditions. For example, the analysis of traffic and parking impacts entailed the identification of new projects, not previously identified in the FEIS, that could be expected in 2035, and an examination of the growth in traffic that could be expected from those projects (A 186-98).

To assess potential construction-related impacts, the 2010 Technical Analysis considered anticipated site conditions at seven different hypothetical stages of construction in order to show how the Project would affect surrounding areas at each stage (A 220-22, 253-59). On this basis, the 2010 Technical Analysis concluded that the FEIS's prior conclusions regarding construction-related impacts on socioeconomic conditions, community facilities, historic resources, hazardous materials and infrastructure "would remain unchanged since construction-related effects would be similar for these technical areas irrespective of the length of construction" (A 223).

The 2010 Technical Analysis also included detailed examinations of potential construction-related impacts on open space (A 223), land use and urban design (A 223-26), traffic and transportation (A 231), air quality (A 231-35), noise (A 235-41) and neighborhood character (A 241-44) in order to determine whether the FEIS's prior conclusions would be affected by the Extended Build-Out

Scenario (A 222-44). As to neighborhood character, the 2010 Technical Analysis assessed the potential effects during each of the seven hypothetical stages of construction (A 241-44). For example, for the analysis of the impacts during "Stage 2," it was assumed that construction of the Project's second, third and fourth buildings would occur, with some possible overlap, that construction also would proceed on portions of Blocks 1120 and 1121, and that Block 1129 would continue to be used for parking and construction staging (A 243). The 2010 Technical Analysis observed that "the presence of cranes, earth moving and loading equipment, and other heavy equipment used between Stages 1 and 2 for development on the arena block and platform construction on Blocks 1120 and 1121 would result in a temporarily localized neighborhood character impact on the areas immediately adjacent to the Project site" (A 243). It also observed that Block 1129 would continue to be used as a construction staging area and an interim surface parking lot, but that screening and landscaping around the parking lot would provide "a visual buffer" for the neighborhood (A 244). The Technical Analysis also contained similar examinations of each of the other stages of construction to determine whether there would be new construction-related impacts beyond those that had been identified in the FEIS (A 223-41).

Based on these analyses, ESDC concluded that a construction schedule with an outside completion date of 2035 would not have significant

adverse impacts that were substantially different from what previously had been addressed in the FEIS (A 266). It is axiomatic that "[a]n agency's responsibility under SEQRA must be viewed in light of a 'rule of reason,'" that "not every conceivable environmental impact ... need be addressed in order to meet the agency's responsibility," and that "only environmental effects that can reasonably be anticipated must be considered." *Neville*, 79 N.Y.2d at 417 (emphasis in original). Here, it was reasonable for ESDC to conclude that a 10-year build-out represented the reasonable worst-case scenario in terms of construction-related environmental impacts that reasonably could be anticipated – *i.e.*, that it would be no better than and likely worse than a 25-year build-out – due to the intensity of constructed-related impacts that could be expected from simultaneous construction at multiple locations within the Project site.

Therefore, assuming *arguendo* that the 2009 Technical Memorandum failed to provide the "hard look" and "reasoned elaboration" required by SEQRA for ESDC's adoption of the 2009 MGPP, the 2010 Technical Analysis plainly satisfied ESDC's obligations.

B. The Motion Court's Reasons for Rejecting the 2010 Technical Analysis Were Fallacious

While paying lip service to the standard of judicial review of an agency determination, the motion court held that ESDC's use of a 10-year build date "lacked a rational basis, given the major change in deadlines reflected in the

MTA and Development Agreements" (A 25). The motion court's decision was an erroneous substitution of the court's judgment for that of ESDC in numerous respects.[7]

1. The motion court held that ESDC had failed to prove that FCRC can complete the Project within 10 years. The court thus stated that "ESDC's further assertion that ... FCRC has the financial incentive to pursue the Project to a 'speedy conclusion' is unsupported by any financial analysis," and that, "while FCRC asserts its intent to comply with its commitment to use commercially reasonable effort to complete the Project in 10 years, its papers in these proceedings are devoid of any detail showing its ability to do so" (A 24) (emphasis added).

The court's requirement of this type of proof to support an assumed build year is unprecedented under SEQRA. This Court has held repeatedly that consideration of a project's financial feasibility or the economics of a project is beyond the scope of SEQRA and not required, at least in the absence of a showing

[7] The motion court asserted that "a determination not to undertake a full environmental review will be set aside where the agency fails to address areas of environmental concern" (A 32). The cases on which the court relied for this proposition have no application here, because they all involved an agency decision not to prepare any EIS at all, not a decision to not prepare a supplemental EIS after a final EIS had been prepared and considered. *See Chatham Towers v. Bloomberg*, 18 A.D.3d 395 (1st Dep't 2005), *app. denied*, 6 N.Y.3d 704 (2006); *Segal v. Town of Thompson*, 182 A.D.2d 1043 (3d Dep't 1992).

that the project is part of a "sham." *See, e.g., Tudor City Assoc., Inc. v. City of New York*, 225 A.D.2d 367, 368 (1st Dep't 1996); *Coalition Against Lincoln West, Inc. v. City of New York*, 208 A.D.2d 472 (1st Dep't 1994); *Nixbot Realty Associates v. N.Y.S. Urban Dev. Corp.*, 193 A.D.2d 381 (1st Dep't 1993). Here, there is no claim that the Project is a sham, nor can there be in view of the hundreds of millions of dollars already spent on site acquisition and clearance and on actual construction of infrastructure, mass transit improvements and the arena.

2. The motion court imposed its own ideas as to a construction schedule to reject the schedule that ESDC examined, thus further substituting its judgment for that of ESDC. The court thus complained that the 2010 Technical Analysis "does not undertake any analysis of extensive delays between the completion of the arena, anticipated for 2012, and Phase II construction," that it "does not address the impacts of a construction period that could extend not merely for a decade but for 25 years," that it "does not evaluate the impacts of the potential 8 year or more delay between the construction of the arena and the commencement of any construction of underground parking for the arena," and that it "assumes ... that the Phase II buildings will ... proceed on a parcel-by-parcel basis, and does not examine the years of potential delays before the commencement of any of the Phase II buildings" (A 29-30).

In specifying this hypothetical timing that ESDC supposedly should have studied instead of the detailed hypothetical construction schedule examined in the 2010 Technical Analysis, the court was insisting that ESDC analyze long delays between construction of particular buildings. This insistence was an improper substitution by the motion court of its judgment for that of ESDC, because ESDC was not obligated to analyze "every conceivable eventuality." *Neville v. Koch*, 173 A.D.2d 323, 325 (1st Dep't 1991), *aff'd*, 79 N.Y.2d 416 (1992). Furthermore, analyzing the effect of a long delay between completion of the arena and the commencement of Phase II, as demanded by the motion court, would mean that construction of Phase II would be compressed into the 10-year period between 2025 and 2035. However, ESDC already has thoroughly analyzed the effects of a 10-year build-out – including construction-related impacts – in both the FEIS and the 2009 Technical Memorandum.

3. The motion court disparaged the 2010 Technical Analysis on the ground that its conclusions are not supported "with any technical studies on the effects of significantly prolonged construction on various areas of environmental concern," but only "common sense" (A 27). However, neither the motion court nor petitioners ever identified any "technical studies" that might be performed as part of an additional analysis of the impacts of prolonged construction on a neighborhood. The reason for this omission is that there are none.

The evaluation of potential construction impacts on neighborhood character is essentially an examination of qualitative considerations, not quantitative variables. It is established that, under SEQRA, while some environmental issues are amenable to quantitative analysis, other issues – such as the impact on neighborhood character – are qualitative in nature and not subject to quantitative evaluation. *See, e.g., CEQR Technical Manual* at 21-1. Therefore, a "common sense" approach to the issues of construction delay was entirely reasonable and proper. Indeed, the Court of Appeals has extolled the application of "common sense" to the subject of compliance with an agency's substantive obligations under SEQRA. *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 308 (2009).[8]

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[8] The decisions cited by the motion court for the proposition that "[a]n agency determination under SEQRA will ... be set aside where the agency's review of the environmental impacts is unsupported by studies and data or is conclusory" (A 32) are completely distinguishable. In *Tupper v. City of Syracuse*, 71 A.D.3d 1460 (4th Dep't 2010), a planning commission relied on a "whereas" clause in a resolution amending the city's zoning ordinance as the basis for its determination that there were no adverse environmental impacts. In *Baker v. Village of Elmsford*, 70 A.D.3d 181 (2d Dep't 2009), a decision to de-map streets was based solely on a conclusory statement that there would be no adverse impacts on traffic or flooding. *Serdarevic v. Town of Goshen*, 39 A.D.3d 552 (2d Dep't 2007), involved the approval of a drainage project where the town's decision to not prepare an EIS was not supported by any data, scientific authorities or explanatory information, while the opposition submitted an engineer's report indicating that the project would increase erosion and sedimentation at a local reservoir. These cases are nothing like the present case, where extensive environmental analyses make up the FEIS, the 2009 Technical Memorandum and the 2010 Technical Analysis.

4. The erroneousness of the motion court's decision is also manifested by its failure to identify any significant adverse impacts, not previously examined, that should be studied in a supplemental EIS. Nor have petitioners identified any such impacts.

To reiterate, the SEQRA regulations provide that "the lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS." 6 NYCRR § 617.9(a)(7)(i) (emphasis added). As a leading treatise on SEQRA practice explains, "when examining claims that a supplemental EIS should have been prepared, the courts ... search the record for evidence that a potentially significant adverse effect is involved." Gerrard, *Environmental Impact Review in New York*, at 3-212. *See also Jackson*, 67 N.Y.2d at 429-30.

Here, the main complaint of petitioners and the motion court is speculation that there may be a prolonged delay between completion of the arena and construction of the first building in Phase II. However, the only result of this delay that the court or petitioners identify is that a surface parking lot may persist on Block 1129 for longer than originally contemplated (*see* A 29). The court did not claim that vacant lots or a surface parking lot actually would have significant adverse impacts that were not previously studied.

In any event, the 2010 Technical Analysis examined whether a delayed build-out to 2035 would have adverse impacts on neighborhood character (A 205) and socioeconomic conditions (A 181-82) that the FEIS had not previously examined. The FEIS concluded in 2006 that there would be localized impacts on neighborhood character. The 2010 Technical Analysis concluded that these impacts would remain the same under the Extended Build-Out Scenario, which would not have new adverse impacts on neighborhood character because there were no significant changes to the Project's physical components (A 205).

The 2010 Technical Analysis also examined whether the Extended Build-Out Scenario would create adverse impacts on neighborhood character during construction (A 241-44), and concluded that there would be continued localized adverse impacts as identified in the FEIS, while "impacts associated with construction activity would be less intense because there would be less simultaneous activity on the site" (A 241). The 2010 Technical Analysis also examined the potential impacts on neighborhood character arising from the surface parking lot and staging area on Block 1129, and concluded that, although these conditions would exist for a longer period of time, they would not exist for the entire duration of construction, because as sites are developed with below-grade parking, the surface parking would be reduced (A 242). In addition, the parking lot

would be screened and landscaped around its perimeter to make it less obtrusive to the neighborhood (A 243).

As discussed above, while the court took issue with this qualitative analysis (A 28-29), no other methodology exists to study these types of impacts.

5. The motion court also was incorrect in claiming that ESDC did not consider the duration of construction activities when assessing impacts on traffic, noise, air quality, neighborhood character, open space and socioeconomic conditions (A 27). Citing the *CEQR Technical Manual*, the court repeatedly stated that the duration of construction must be considered (A 27-29), and faulted ESDC for concluding that a delayed build-out would result in prolonged but less intense construction (A 26).

However, although the *CEQR Technical Manual* indicates that a "neighborhood character assessment for construction impacts" should consider the "duration" of "construction activities" (*Manual* at 22-6), "duration" refers to the period during which actual "construction activities" occur, which would not include periods during which no such activity is underway. The motion court essentially asserted that ESDC should examine the potential impacts of 25 years of continuous construction, but this concept is fallacious. If the Project were to be built over 25 years, the duration of actual construction would not be 25 years, but would be for intermittent periods scattered through those 25 years. Therefore, the

2010 Technical Analysis appropriately analyzed a schedule under which construction would proceed gradually on a parcel-by-parcel basis (A 220). Here, again, the motion court improperly substituted its judgment for that of ESDC.

6. The motion court also complained that some mitigation measures could be delayed if the Project's completion is delayed, and asserted that this delay had not been analyzed (A 30-31). For example, the court criticized the 2010 Technical Analysis's conclusion that the temporary adverse impacts on open space would extend longer but would be eliminated as the Project progresses (A 30). However, the 2010 Technical Analysis acknowledged the impacts identified in the FEIS and the mitigation measures adopted to address those impacts. It concluded that the impacts would not be worse than or different from those previously disclosed in the FEIS (A 1601, 1620-21, 1646), but would be addressed by completion of Phase II, as described in the FEIS (A 184).

There was nothing more for ESDC to do under SEQRA. As the Court of Appeals has held, "in accordance with its balancing philosophy, SEQRA requires the imposition of mitigation measures only 'to the maximum extent practicable' 'consistent with social, economic and other essential considerations' (ECL 8-0109[8])." *Jackson*, 67 N.Y.2d at 422. The 2010 Technical Analysis's consideration of mitigation fully satisfied this obligation.

Conclusion

The motion court erred in directing ESDC to prepare a supplemental EIS and make further findings. Its final decision imposing those obligations on ESDC should be reversed, and the petitions in these cases should be denied.

Dated: December 5, 2011
New York, NY

Respectfully submitted,

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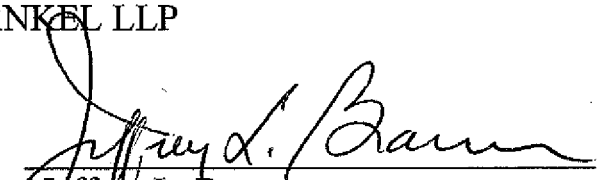
By: 
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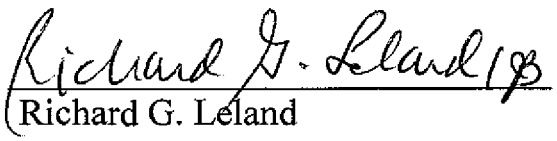
By: 
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST DEPARTMENT

In the Matter of the Application of DEVELOP DON'T DESTROY (BROOKLYN), INC., COUNCIL OF BROOKLYN NEIGHBORHOODS, INC. ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC., BROOKLYN BEARS COMMUNITY GARDENS, INC., BROOKLYN VISION FOUNDATION, INC., CARLTON AVENUE ASSOCIATION, INC., CENTRAL BROOKLYN INDEPENDENT DEMOCRATS, by its President Lucy Koteen, CROWN HEIGHTS NORTH ASSOCIATION, INC., DEAN STREET BLOCK ASSOCIATION, INC., DEMOCRACY FOR NEW YORK CITY, EAST PACIFIC BLOCK ASSOCIATION, INC., FORT GREENE ASSOCIATION, INC., FRIENDS AND RESIDENTS OF GREATER GOWANUS, PARK SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS ACTION COALITION, by its President Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, and SOUTH PORTLAND BLOCK ASSOCIATION, INC., Petitioners-Respondents, 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-Appellants.	New York County Index No. 114631/09 **STATEMENT PURSUANT TO CPLR § 5531**

In the Matter of the Application of PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., ATLANTIC AVENUE LOCAL DEVELOP-MENT 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 County Index No. 116323/09

NEW YORK CITY COUNCIL MEMBER LETITIA JAMES, ALAN ROSNER, EDA MALENKY, PETER KRASHES, JUDY MANN, RHONA HESTRONY, JAMES GREENFIELD, MICHAEL ROGERS, ANURAG HEDA, ROBERT PUCA, SALVATORE RAFFONE, RHONA HETSTONY, ERIC DOERINGER, JILLIAN MAY and DOUG DERRYBERRY,

Petitioners-Respondents,

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-Appellants.

x

1. The index numbers in the motion court are 114631/09 and 116323/09. By order dated November 21, 2011 (copy attached), the Appellate Division allowed the two appeals to be perfected on one double-captioned Appendix.

2. The full names of the original parties to the proceedings are as stated in the caption above, except that (i) the full name of respondent-appellant Empire State Development Corporation ("ESDC") is New York State Urban Development Corporation d/b/a Empire State Development Corporation and (ii) former petitioner State Assembly Member James F. Brennan discontinued his participation in the proceeding under Index No. 116323/09 and his name therefore is not listed in the caption above.

3. These proceedings were commenced in the Supreme Court of the State of New York, County of New York.

4. Petitioners-respondents Develop Don't Destroy (Brooklyn), Inc., et al. ("DDDB") commenced their proceeding (Index No. 114631/09) by filing and serving an Article 78 Petition on October 19, 2009. Respondents-appellants ESDC and Forest City Ratner Companies, LLC ("FCRC") each served an Answer on November 12, 2009. DDDB served a Supplemental Petition on January 18, 2011. ESDC served an Answer to the Supplemental Petition on February 18, 2011 and an Amended Answer to the Supplemental Petition on March 10, 2011. FCRC served an Answer on February 18, 2011.

Petitioners-respondents Prospect Heights Neighborhood Development Council, Inc., et al. ("PHNDC") commenced their proceeding (Index No. 116323/09) by filing and serving an Article 78 Petition on November 19, 2009. ESDC and FCRC each served an Answer on December 11, 2009. PHNDC served a Supplemental Petition on January 18, 2011. ESDC served an Answer to the Supplemental Petition on February 18, 2011 and an Amended Answer to the Supplemental Petition on March 10, 2011. FCRC served an Answer on February 18, 2011.

5. Both proceedings sought to annul ESDC's (i) affirmation on September 17, 2009 of a Modified General Project Plan (the "2009 MGPP") for

the Atlantic Yards Land Use Improvement and Civic Project in Brooklyn; (ii) determination of September 17, 2009 not to prepare a supplemental environmental impact statement ("SEIS") in connection with the affirmation of the 2009 MGPP; and (iii) determination made on December 16, 2010 not to disturb its prior determination not to prepare an SEIS.

6. The appeals are taken from the decision, order and judgment issued by Justice Marcy S. Friedman on July 13, 2011 and entered in the office of the New York County Clerk on July 19, 2011. The appeal of this final judgment brings up for review the interlocutory decision and order issued by Justice Friedman on November 9, 2010 and entered in the office of the New York County Clerk on November 10, 2010.

7. The appeals are being prosecuted on the original record using the appendix method.

Dated: December 5, 2011
New York, New York

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