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

In the Matter 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, 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.	Index No. 116323/09 IAS Part 57 Justice Friedman **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that respondent Forest City Ratner Companies, LLC hereby appeals to the Appellate Division of the Supreme Court for the First Judicial Department from the decision, order and judgment (one paper) entered on July 19, 2011, to the extent that it granted the supplemental petition and remanded the matter to respondent Empire State Development Corporation for further environmental review and proceedings, including but not limited to preparation of a supplemental environmental impact statement.

Dated: New York, New York
September 9, 2011

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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	
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,	New York County Index No. 116323/09
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.	**CIVIL APPEAL PREARGUMENT STATEMENT**

Respondent-appellant Forest City Ratner Companies, LLC ("FCRC") submits this civil appeal preargument statement pursuant to 22 NYCRR § 600.17:

1. Title of action.

The full title of this action at this time is set forth in the above caption, to which the Court is respectfully referred.

2. Full names of original parties and changes in the parties.

All of the named parties appear in the above caption, and there has been no change in the parties to this proceeding, except that State Assembly Member James F. Brennan has withdrawn as a petitioner.

3. Counsel for appellants.

Counsel for respondent-appellant FCRC are Kramer Levin Naftalis & Frankel, LLP, 1177 Avenue of the Americas, New York, NY 10036 (tel. 212.715.9100), and Fried, Frank, Harris, Shriver & Jacobson, LLP, One New York Plaza, New York, NY 10004 (tel. 212.859.8000). Counsel for respondent-appellant Empire State Development Corporation ("ESDC") is Bryan Cave LLP, 1290 Avenue of the Americas, New York, NY 10104 (tel. 212.541.2000).

4. Counsel for respondents.

Counsel for petitioners-respondents is the Urban Environmental Law Center, 249 West 34th Street, Suite 400, New York, NY 10001 (tel. 212.643.0375).

5. Court and county from which the appeal is taken.

This appeal is from a decision, order and judgment (one paper) of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on July 19, 2011, a copy of which is annexed hereto as Exhibit A.

6. Nature and object of the proceeding.

This proceeding was commenced on November 19, 2009 to challenge ESDC's approval on September 17, 2009 of a Modified General Project Plan (the "2009 MGPP") for the Atlantic Yards Land Use Improvement and Civic Project (the "Project"), which effected

minor changes to a Modified General Project Plan (the "2006 MGPP") that had been approved by ESDC in 2006. The Project is a public-private undertaking by ESDC and FCRC to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn. ESDC's approval of the 2006 MGPP for the Project was upheld by this Court on a prior appeal, *Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *lv. to app. denied,* 13 N.Y.2d 713 (2009).

By decision, order and judgment entered on March 11, 2010, the Supreme Court denied the petition in its entirety, denied the petition in a related proceeding (*Develop Don't Destroy (Brooklyn), Inc. et al., v. Empire State Development Corp., et ano.*, Index No. 114631/09), and denied motions by petitioners in both cases for a preliminary injunction against further construction of the Project.

On April 7, 2010, petitioners in both proceedings moved for leave to reargue and renew on the ground that the terms of a Development Agreement between FCRC and ESDC that was executed after the petition was submitted, and the terms of a renegotiated agreement between FCRC and the Metropolitan Transportation Authority (the "MTA"), necessitated the preparation of a supplemental environmental impact statement ("SEIS") to consider the potential environmental impacts of the Project's being built over 25 years rather than 10 years. On November 9, 2010, the Supreme Court granted the motions and remanded the matter to ESDC to make further findings as to the relevance of the Development Agreement and the MTA agreement on the use of an assumed 10-year build-out of the Project as the basis for ESDC's environmental analysis, and as to whether an SEIS should be prepared.

On December 16, 2010, ESDC made further findings responsive to the remand order and concluded that: (1) the Development Agreement and the MTA agreement do not

have a material effect on whether it is reasonable to use an assumed 10-year build-out; (2) it is unlikely that the Project will be constructed on a 10-year schedule due to weak general economic and financial conditions; and (3) a delay in the 10-year schedule, through and including an extended build out to 2035, would not result in any significant new adverse environmental impacts not previously identified and studied in the final EIS prepared in connection with the 2006 MGPP and a 2009 Technical Memorandum. Petitioners in this proceeding and the *Develop Don't Destroy (Brooklyn)* case filed supplemental petitions challenging ESDC's December 16, 2010 findings on January 14 and January 18, 2011, respectively. The petitioners also moved to enjoin construction of the Project.

7. Result reached in the Supreme Court.

By decision, order and judgment entered on July 19, 2011, the Supreme Court remanded the matter to ESDC for further environmental review, including preparation of an SEIS assessing the environmental impacts of a delay in construction of Phase II of the Project, and further environmental proceedings, including a public hearing on the SEIS if required, and further findings as to whether to approve the 2009 MGPP for Phase II. The Supreme Court declined to stay construction of the Project.

8. Grounds for seeking reversal.

Under SEQRA and controlling precedent, it is within the discretion of an agency to determine whether to prepare an SEIS. There is no requirement under SEQRA to guarantee a build year or construction period. An SEIS may be required if an approval that changes a project has significant adverse environmental impacts that were not adequately addressed in the final environmental impact statement. The Supreme Court erroneously disregarded these principles.

Here, there were no significant changes to the Project. ESDC determined in September 2009 that it was reasonable to use an assumed 10-year build-out as the basis for its environmental analysis and that no SEIS was necessary. This position was rational in all respects, and adequately supported by the record. Neither the terms of the Development Agreement nor the MTA agreement compelled a contrary view. Under both the 2009 MGPP and the Development Agreement, FCRC was obligated to use commercially reasonable efforts to complete both phases of the Project by 2019.

In response to the remand order, ESDC again determined in December 2010, based on a thorough Technical Analysis, that no significant adverse environmental impacts that had not already been analyzed in the final EIS and a 2009 Technical Memorandum would result from an extended build out to 2035. This position was rational in all respects, and supported by the record. The Supreme Court erroneously substituted its judgment for that of the agency by concluding that ESDC did not take a hard look at the purported extended period of construction of Phase II of the Project on various areas of environmental concern. Neither petitioners nor the Court identified any adverse impacts that need to be studied in an SEIS.

9. Related proceeding.

The decision, order and judgment in this case also was entered in a related Article 78 proceeding, *Develop Don't Destroy (Brooklyn), Inc., et al. v. Empire State Development Corp., et ano.*, Index No. 114631/09. FCRC and ESDC also are appealing from the decision, order and judgment in the other proceeding. Copies of the preargument statement are annexed hereto as Exhibit B. By permission of the Supreme Court, there also are appeals by FCRC and ESDC pending from the prior remand order entered in these matters on November 10, 2010. Copies of these appeal papers are annexed hereto as Exhibit C. FCRC is

unaware of any other related actions or proceedings pending in any court of this or any other jurisdiction.

Dated: New York, New York
September 9, 2011

KRAMER LEVIN NAFTALIS &
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By: _____
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EXHIBIT A

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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 114631/2009
DEVELOP DON'T DESTROY
VS.
EMPIRE STATE DEVELOPMENT CORP
SEQUENCE NUMBER : 006
ARTICLE 78

INDEX NO. 116323/09

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

this supplemental petition for Art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A
Answering Affidavits — Exhibits	2, 2A, 3, 3A
Replying Affidavits	Memo of Law 11-14

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this supplemental petition is decided in accordance with the accompanying decision and order of the same date.

ENTER:

FILED
JUL 19 2011
COUNTY CLERK'S OFFICE
NEW YORK

JUL 25 2011

Dated: 7-13-11

MARCY S. FRIEDMAN, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners,

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.

Index No.: 114631/09

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al.,

Petitioners,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC,

Respondents.

Index No.: 116323/09

DECISION/ORDER

JUL 15 2011

Procedural History

These Article 78 proceedings, brought under the State Environmental Quality Review Act (SEQRA), challenge modification of the plan for development of the Atlantic Yards Project in Brooklyn. In prior proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc. (DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenged the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of the modified general project plan (2009 MGPP) for the Project, which is to be constructed by respondent Forest City Ratner Companies or its affiliates (FCRC). By decision and order dated March 10, 2010, this court denied the petitions. By decision and order dated November 9, 2010, the court granted leave to reargue and renew. On reargument, the court held that ESDC did not provide a reasoned elaboration for its continuing use of a 10 year build date for the Project and its determination not to require a Supplemental Environmental Impact Statement (SEIS), based on its wholesale failure to address the impact on the build date of the complete terms of its Development Agreement with FCRC and of a renegotiated Agreement between the Metropolitan Transportation Authority (MTA) and FCRC. The court remanded the matter to ESDC for findings on the impact of the Agreements on ESDC's continued use of the 10 year build date, and on whether an SEIS is warranted or required pursuant to SEQRA. (Nov. 9, 2010 Decision at 18.)

In December 2010, in response to the court's order, ESDC's environmental consultant, AKRF, Inc., prepared a Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project (Technical Analysis) (Supplemental Administrative Record

[SAR] 7637 et seq.) (fn 1) ESDC also issued a document entitled ESDC Response to Supreme Court's November 9, 2010 Order (ESDC Response) (SAR 7728 et seq.) By resolution dated December 16, 2010, ESDC concluded:

> "1. The Development Agreement and MTA Agreement (collectively, the "Development Contracts") do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project . . . .
> 2. As of the date of these findings, it appears unlikely that the Project will be constructed *on a 10-year schedule*. . . .
> 3. A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS [Final Environmental Impact Statement] and 2009 Technical Memorandum and would not require or warrant an SEIS . . . ."

(Dec. 16, 2010 Resolution, SAR at 7631.) ESDC further resolved that "such findings do not require any modification to the Tech Memo, and do not disturb the prior determination of the Corporation that no Supplemental Environmental Impact Statement is required for the Project's Modified General Project Plan." (Id.) Petitioners' Supplemental Petitions challenging ESDC's December 16, 2010 findings followed.

The Atlantic Yards Project has been described as "the largest single-developer project in New York City history." (Matter of Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312, 326 [1st Dept 2009] [Catterson, J. concurring] [DDDB I], lv denied 13 NY3d 713, rearg denied 14 NY3d 748 [2010].) The Project extends over 22 acres and is to be built in two phases. Phase I includes a sports arena that will serve as the new home of the New Jersey Nets, four to five buildings in the vicinity of the arena, a new MTA/Long Island Railroad (LIRR) rail yard, and transit access improvements including a new subway entrance. Phase II covers construction of 11 of the Project's 16 hi-rise buildings, which will contain commercial space and

approximately 5,000 to 6,000 residential units, 2,250 of which will be affordable housing units. Phase II also includes development of eight acres of publicly accessible open space.

Petitioners contend that the MTA Agreement and the Development Agreement, negotiated by ESDC at the time of the 2009 MGPP, have significantly extended the time frame for the build-out of Phase II of the Project, rendering the 10 year build date an impermissible basis for environmental analysis. Respondents dispute the impact of the Agreements on the build date. They contend that it was reasonable for them to rely on the 10 year build date, which ESDC used as the basis for its analysis in the 2006 FEIS prepared in connection with the original plan, and continued to use in the 2009 Technical Memorandum prepared in connection with the 2009 MGPP.

ESDC claims, and petitioners do not dispute, that even under a prolonged build-out, the timing of completion of the arena, one of the buildings in the vicinity of the arena, and the other Phase I construction would not be "materially" affected. (Technical Analysis, SAR at 7638.)

The court refers to its March 10 and November 9, 2010 decisions for an extensive discussion of the parties' claims and of the bases for the court's prior determinations.

Use of 10 Year Build Date

Petitioners' initial challenge to the 2009 MGPP was based on the MTA's renegotiation in June 2009 of its agreement with FCRC to sell FCRC the air rights to the rail yard owned by the MTA. These air rights are necessary to construct 6 of the 11 Phase II buildings which are to be built on a platform to be constructed over the MTA rail yard. Under the agreement between the MTA and FCRC that was in effect at the time of ESDC's approval of the Project plan in 2006, FCRC was required to pay $100 million to the MTA at the inception of the Project for the air

rights. Under the renegotiated agreement, FCRC will pay $20 million for acquisition of the property interests necessary for the development of the arena block, will provide the MTA with a letter of credit to secure the obligation to build an upgraded MTA/LIRR rail yard, and will pay the balance of the $100 million on an installment schedule that affords FCRC until 2030 to acquire the air rights necessary for construction of 6 of the Phase II buildings, although it permits FCRC to acquire the air rights for each of the 6 parcels as the full price for the parcel is paid. (See Mar. 10, 2010 Decision at 3-4.) In connection with ESDC's approval of the 2009 MGPP, ESDC's staff characterized the change in site acquisition as a "major change" to the Project. (June 23, 2009 Memorandum, AR at 4677-4678.)

In its decision denying the petitions, this court held that under the applicable standard for SEQRA review, ESDC's elaboration of its reasons for continuing to use the 10 year build-out was supported, albeit minimally, by the factors articulated by ESDC, including its intent to obtain a commitment from FCRC, in a Development Agreement under negotiation, to use commercially reasonable effort to complete the Project in 10 years. (Mar. 10, 2010 Decision at 11.)

On the reargument motion, petitioners argued that the continuing use of the 10 year build-out was belied not only by the MTA Agreement but by the detailed terms of the Development Agreement that ESDC actually negotiated, including significantly extended dates for Phase II construction. In remanding to ESDC for findings on the reasonableness of its continuing use of the 10 year build date, this court reasoned that in approving the 2009 MGPP, ESDC claimed to have relied on a provision in the Development Agreement being negotiated with FCRC which would require FCRC to use "commercially reasonable effort" to complete the Project within 10 years, by 2019. The court found, however, that ESDC knew at the time of its approval of the

MGPP, but did not bring to the court's attention, that the Development Agreement would require the arena and Phase I buildings on the arena block to be substantially completed within or reasonably soon after the 10 year build date, but would provide for a significantly extended outside substantial completion date of 25 years, or 2035, for the Phase II construction (11 of the 16 residential hi-rise buildings on the Project site). (Nov. 9, 2010 Decision at 4-5.) The court also discussed at length the substantially greater penalties provided for delays in Phase I construction than for delays in Phase II construction, or for failure to use commercially reasonable effort to complete the Project by 2019, as well as the stringent deadlines for commencement of Phase I construction and the absence of deadlines, with limited exceptions, for commencement of Phase II construction. (Id. at 6-9.)

In determining that reargument should be granted, the decision concluded: The Development Agreement has cast a completely different light on the Project build date. Its 25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement giving FCRC until 2030 to complete acquisition of the air rights necessary to construct 6 of the 11 Phase II buildings, raise a substantial question as to whether ESDC's continuing use of the 10 year build-out has a rational basis. (Id. at 16-17.)

In its findings on the remand, ESDC claims that it disclosed, at the time of its approval of the 2009 MGPP, that the outside dates for construction would extend "well beyond 10 years." (Dec. 16, 2010 Resolution, SAR at 7631.) As discussed at length in the court's November 9, 2010 decision, that claim is patently incorrect. In what the court termed a failure of transparency, ESDC made no mention of the provision in the Development Agreement for a 25 year substantial

completion date for Phase II and, instead, repeatedly cited the provision requiring FCRC to use commercially reasonable effort to complete the Project in 10 years. (Nov. 9, 2010 Decision at 10-11, 16.) (fn 2)

In remanding the matter to ESDC for further findings on the effect of the MTA and Development Agreements on the reasonableness of the 10 year build date, the court afforded ESDC an opportunity to correct its failure to address the impact of these Agreements, and to respond to this court's preliminary reading, in the November 9, 2010 decision, of the terms of the Development Agreement affecting deadlines for construction of the Project. Significantly, in its findings on the remand, ESDC does not differ with the court's reading of the Development Agreement as providing detailed timetables and firm commencement dates for the arena and Phase I work; no commencement dates for Phase II work, other than the platform which is not required to be commenced until 2025, and one Phase II building on Block 1129 which is not required to be "initiated" until 2020; and far stricter penalties for delays in Phase I work than for delays in Phase II work. (Nov. 9, 2010 Decision at 9-10; ESDC Response, SAR at 7734-7737; Technical Analysis, SAR at 7639 [Block 1129].) Nor does ESDC contest the court's conclusion (Nov. 9, 2010 Decision at 8-9) that ESDC would face significant legal difficulties or, as ESDC puts it, "complexities . . . in establishing FCRC's failure to proceed with the Project in a commercially reasonable manner" so as to meet the 10 year build out. (See ESDC Response, SAR at 7748.) (fn 3)

ESDC nevertheless insists that it was reasonable for it to continue to rely on the Development Agreement provision requiring FCRC to use commercially reasonable effort to meet the 10 year deadline. (ESDC Response, SAR at 7746.) In support of this contention,

ESDC relies on its characterization of the outside dates for Phase II construction in the Development Agreement as the mere creation of "transactional lawyers" anticipating risks (id. at 7746), and its wan assertion that the MTA and Development Agreements do not "preclude" or are not "inconsistent" with a 10 year build-out. (Id. at 7748.) While it is correct that the Agreements do not prevent a build-out in 10 years, ESDC itself acknowledges that the negotiation of the MTA and Development Agreements was necessary due to the weak state of the economy. ESDC thus represents that the Agreements were "structured" in order "to get the Project going in a difficult economic climate," by "allow[ing] FCRC to purchase Project property in pieces and to proceed with the platform construction in three distinct phases." (Id. at 7747.) ESDC also acknowledges, as of the date of the findings on the remand (December 16, 2010), that "it appears unlikely that the Project will be constructed on a 10-year schedule, because the construction of the Project's residential buildings has lagged behind the 10-year schedule provided by FCRC to ESDC in 2009, and because of continuing weak general economic and financial conditions." (Id. at 7749.) Its suggestion that it was unaware, when it entered into the Development Agreement and approved the 2009 MGPP, that the same economic downturn would prevent a 10 year build-out, strains credulity at best. ESDC's further assertion that that FCRC has the financial incentive to pursue the Project to a "speedy conclusion" is unsupported by any financial analysis. (Id. at 7748.) Moreover, while FCRC asserts its intent to comply with its commitment to use commercially reasonable effort to complete the Project in 10 years (Gilmartin Aff. dated Dec. 9, 2010, ¶ 27 [FCRC Aff. In Opp., Ex. A]), its papers in these proceedings are devoid of any detail showing its ability to do so. (fn 4)

In short, ESDC's invocation of the commercially reasonable effort provision rings hollow

in the face of the specific deadlines in the Development Agreement – discussed at length in the November 9, 2010 decision and not disputed by ESDC on the remand – which clearly contemplate a schedule for construction of the post-arena phase of the Project that may not see even one Phase II building "initiated" until 2020, that does not require commencement of the construction of the platform on which 6 of the 11 Phase II buildings will be built until 2025, and that may extend beyond the purported 2019 build date for 16 years, until 2035.

The court accordingly finds that ESDC's use of the 10 year build date in approving the 2009 MGPP lacked a rational basis and was arbitrary and capricious. In so holding, the court recognizes, as the Appellate Division held in a prior litigation involving the Atlantic Yards Project, that a mere inaccuracy in the build date will not invalidate the basic data used in the agency's environmental assessment. (See DDDB I, 59 AD3d at 318. See also Committee to Preserve Brighton Beach v Council of City of New York, 214 AD2d 335 [1st Dept 1995], lv denied 87 NY2d 802.) However, as the Court also held, ESDC's choice of the build year is not immune to judicial review but, rather, is subject to review under the rational basis or arbitrary and capricious standard that is applicable to judicial scrutiny of any agency action in an Article 78 proceeding. (DDDB I at 318.) In the instant case, ESDC's continuing use of the 10 year build date was not merely inaccurate; it lacked a rational basis, given the major change in deadlines reflected in the MTA and Development Agreements.

SEIS

Having concluded that ESDC's use of the 10 year build date lacked a rational basis, the court turns to the issue of whether ESDC was required to prepare a Supplemental Environmental Impact Statement prior to its approval of the 2009 MGPP. In concluding that an SEIS was not

required, ESDC relies on a Technical Analysis prepared by its environmental consultant in December 2010 after the remand, and on the 2006 FEIS and the Technical Memorandum prepared at the time of the approval of the 2009 MGPP. The Technical Memorandum concluded, and the Technical Analysis affirms, that the 2009 MGPP will not result in any significant adverse environmental impacts that were not already disclosed in the FEIS. The Technical Memorandum assumed a 10 year build-out but examined environmental impacts on certain conditions such as traffic and transit under a delay scenario, due to adverse economic conditions, extending to 2024. The Technical Analysis purports to examine an "Extended Build-Out Scenario" to 2035. (Technical Analysis, Section E, "Construction Period Impacts," SAR 7669, et seq.)

The conclusion in the Technical Analysis that an extended delay to 2035 would not have significant adverse environmental impacts that were not addressed in the FEIS is, in turn, based on the repeated assertions that the delay in the build-out would result in prolonged but less "intense" construction, and that most environmental impacts are driven by intensity rather than duration. As the Technical Analysis states, "the determination of significant adverse impacts during construction relies mainly on the intensity of construction activities and their potential effects on the environment. Since these activities would move through the development area as Project components are being constructed, they would not have prolonged effects on individual uses in the area. Therefore, most areas of environmental concern would be independent of the overall duration of Project construction under the Extended Build-Out Scenario." (Technical Analysis, SAR at 7670; 7685 ["[W]ith the prolonged schedule, there would be less overlap of [construction] activities for different buildings, resulting in overall lower intensity in construction

activities on the Project site."].) The Technical Analysis concludes that for such areas of environmental concern as traffic, noise, and air quality, the adverse environmental impacts would be the same as, or less than, those identified in the FEIS. (Id. at 7689-7694 [traffic]; 7698-7704 [noise]; 7694-7698 [air quality].)

The Technical Analysis, which was prepared with marked speed in the month after the remand, does not support these findings with any technical studies on the effects of significantly prolonged construction on various areas of environmental concern. Rather, it appears to take the position that it is a matter of common sense that less intense construction will result in lower impacts for conditions such as traffic, noise, and air quality.

Even assuming arguendo that ESDC's common sense assumption is correct, under established standards for environmental impact analysis, the duration of construction activities is a factor that is required to be taken into account in assessing the impacts on both environmental conditions such as traffic, noise, and air quality, which are amenable to quantitative analysis, and conditions such as neighborhood character, open space, and socioeconomic conditions, which are largely subject to qualitative analysis. ESDC does not dispute that the CEQR Technical Manual establishes an accepted analytical framework for government agencies in assessing a project's likely environmental effects. (See Ch. 2 at 2-1.) This Manual, which provides for the "reasonable worst case scenario" to be used for the analysis (id. at 2-3), repeatedly refers to the duration of the construction as a factor to be considered in performing the environmental assessment. As to conditions such as traffic, air quality, and noise, the Manual states that duration is not the sole factor but is to be considered among other factors, including construction intensity and project location. (Ch. 22 at 22-4, 22-6.) As to neighborhood character, the Manual

provides that a construction impact analysis "looks at the construction activities that would occur on the site (or portions of the site) and their duration." (Id., at 22-6.) Similarly, the Manual provides that "[a] construction impacts analysis for open space should be conducted . . . if access to the open space would be impeded for an extended period during construction activities." (Id. at 22-7.) As to socioeconomic conditions, the Manual states that "[i]f the proposed project would entail construction of a long duration that could affect the access to and therefore viability of a number of businesses, and the failure of those businesses has the potential to affect neighborhood character, a preliminary assessment for construction impacts on socioeconomic conditions should be conducted." (Id. at 22-6.)

Notwithstanding these established guidelines for environmental analysis, the Technical Analysis does not undertake a meaningful assessment of the impacts of the potentially vastly extended period of construction on the various areas of environmental concern. As indicated above, it takes the position that the impacts on most areas of environmental concern will be "independent" of duration. (See supra at 10). Although it purports to examine construction delays to 2035 under its Extended Build-Out Scenario, in discussing areas such as traffic, noise and air quality, it in fact assumes, as did the Technical Memorandum, that Phase II construction will not be stalled or deferred for years, but will proceed continuously on a parcel-by-parcel basis, and that the impacts will accordingly be less "intense" or will move throughout the Project, minimizing the impacts. (Technical Analysis, SAR at 7683, 7685; 7689-7690 [traffic and transportation]; 7694-7696 [air quality]; 7698 [noise]. See Technical Analysis, SAR at 7677-7680 [summarizing Technical Memorandum].)

The Technical Analysis takes a similar approach to other areas of environmental concern

which were the subjects largely of qualitative analysis. The Technical Analysis does not undertake any analysis of extensive delays between the completion of the arena, anticipated for 2012, and Phase II construction – the commencement of which, as indicated by the Development Agreement, may be delayed until 2020 for the first Phase II building on Block 1129, and until 2025 for the beginning of Phase II construction of the platform that will support 6 of the 11 Phase II buildings; and the completion of which, as indicated by the Development Agreement, may be delayed until 2035. Notably, the Technical Analysis is silent as to the impacts on neighborhood character and socioeconomic conditions of vacant lots, above-ground arena parking, and construction staging which may persist not merely for a decade but, as petitioners aptly put it, for a generation.

More particularly, as to neighborhood character, the Technical Analysis fails to evaluate the impact of extensive delays in the build-out of Phase II. The Technical Analysis concludes that construction impacts on neighborhood character under the Extensive Build-Out Scenario would remain "localized" in the immediate vicinity of construction, but "would be less intense because there would be less simultaneous activity on the site." (SAR at 7704.) Again, the Technical Analysis focuses on intensity of the construction, and does not address the impacts of a construction period that could extend not merely for a decade but for 25 years. As to the above-ground parking lot and construction staging area on Block 1129, the Technical Analysis rests on the bare assertion that although it "would be prolonged with the Extended Build-Out Scenario, it would not be occupied by a 1,100-car surface parking lot for the entire construction duration. As sites are developed on Block 1129, the above-ground interim parking lot would be reduced as parking is provided below-grade. Furthermore, construction of at least one of the four buildings

on Block 1129 would be started by 2020." (Id. at 7705.) The Technical Analysis asserts that 2020 is merely an "outside date" (id.), and 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.

As to open space, the Technical Analysis notes that the provision of eight acres of publicly accessible open space is a "key component of the Project." (Id. at 7686.) As touted in the FEIS, the open space element of the Project will connect the neighborhoods to the north and south of Atlantic Avenue, for the first time in a century. (FEIS, Ch. 16, AR at 1061.) The Technical Analysis further notes that the FEIS identified a "temporary significant adverse open space impact . . . between the completion of Phase I and the completion of Phase II." (SAR at 7686.) However, the analysis of the impact of significantly delayed construction on open space is limited to the conclusory assertion that "[w]ith the Extended Build-Out Scenario, the temporary impact identified in the FEIS would extend longer, but would continue to be addressed by the incremental completion of the Phase II open space. As each of the Phase II buildings is completed, the adjacent open space would be provided in conformance with the 2006 Design Guidelines." (Id.) Again, although the Technical Analysis purports, under its Extended Build-Out Scenario, to examine the impacts of a delay until 2035 in building the Project, it assumes, as did the Technical Memorandum, that the Phase II buildings will be proceed on a parcel-by-parcel basis, and does not examine the impacts of years of potential delays before the commencement of any of the Phase II buildings.

In concluding that preparation of an SEIS is not warranted, the Technical Analysis also repeatedly cites mitigation measures imposed by the FEIS and by an Amended Memorandum of

Environmental Commitments (Amended Memo) made as part of the approval process for the 2009 MGPP. (See Technical Analysis, SAR at 7680; Amended Memo, SAR at 8034.) However, these measures were adopted to mitigate the adverse environmental impacts identified in the FEIS and Technical Memorandum, which assumed that the build-out of the Project would take 10 years. The Technical Analysis does not consider the adequacy of these mitigation measures for a significantly prolonged construction period.

The regulations which implement SEQRA provide that the lead agency – here, ESDC – "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; or [b] newly discovered information; or [c] a change in circumstances related to the project." (6 NYCRR 617.9[a][7][i][a]-[c].) As discussed in the prior decisions, the court's review of a SEQRA determination "is limited to 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." (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231-232 [2007] [citing Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986].) An agency's determination whether to require an SEIS is discretionary. (Id. at 231.) "The lead agency . . . 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." (Id. at 232.) The agency's determinations under SEQRA "must be viewed in light of a rule of reason. Not every conceivable environmental impact, mitigating measure or alternative must be identified. . . The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal." (Matter of Jackson, 67 NY2d at

417 [internal quotation marks and citations omitted]. Accord Matter of Eadie v Town Bd. of the Town of N. Greenbush, 7 NY3d 306, 318 [2006].)

As the Court of Appeals has repeatedly emphasized, "the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].) Nevertheless, judicial review must be "meaningful." (Id. at 232.) It is the court's responsibility to "ensure that, in light of the circumstances of a particular case, the agency has given due consideration to the pertinent environmental factors." (Akpan v Koch, 75 NY2d 561, 571 [1990].)

Thus, a determination not to undertake a full environmental review will be set aside where the agency fails to address affected areas of environmental concern. (See e.g. Matter of Chatham Towers v Bloomberg, 18 AD3d 395 [1st Dept 2005], modfg on other grounds 6 Misc 3d 814 [Sup Ct, NY County 2004], lv denied 6 NY3d 704 [2006] [negative declaration held improper]; Matter of Segal v Town of Thompson, 182 AD2d 1043, 1046 [3d Dept 1992] [negative declaration improper where "little or no consideration was given to a variety of potential environmental impacts"].) An agency determination under SEQRA will also be set aside where the agency's review of the environmental impacts is unsupported by studies and data or is conclusory. (See e.g. Tupper v City of Syracuse, 71 AD3d 1460 [4th Dept 2010], lv denied 74 AD3d 1880; Matter of Baker v Village of Elmsford, 70 AD3d 181 [2d Dept 2009]; Matter of Serdarevic v Town of Goshen, 39 AD3d 552 [2d Dept 2007].)

Here, ESDC's hastily prepared Technical Analysis performs a perfunctory analysis of the impacts of the extended delay in constructing the Project. As discussed above, the Technical

Analysis assumes, without any corroborating studies, that the environmental impacts will largely be independent of the duration of construction. It thus fails to undertake a meaningful analysis of the effects, on such important areas of environmental concern as neighborhood character, of the potentially protracted delays, identified in the Development Agreement, of 8 or more years after completion of the arena in commencing Phase II construction, and of more than 15 years, or until 2035, in completing Phase II construction. The court accordingly holds that ESDC failed to comply with its obligation under SEQRA to take a hard look at the environmental impacts of the 2009 MGPP, and that it must prepare an SEIS addressing the potential delays, identified in the Development Agreement, in Phase II construction. (See generally Matter of E.F.S. Ventures Corp. v Foster, 71 NY2d 359, 373 [1988] [environmental review on modification of plan should be addressed to environmental impact of proposed modification, not perceived problems which should have been or were addressed earlier in the environmental review process].)

The court notes that its directive to ESDC to prepare an SEIS is not based on the mere fact that the MTA Agreement permits FCRC's phased acquisition of the air rights necessary for construction of 6 of the Phase II buildings, rather than requiring it to acquire all of the air rights at the outset, as had been provided for in the original plan. Such a change, without more, would not require a de novo environmental review. (See Matter of Wilder v New York State Urban Dev. Corp., 154 AD2d 261 [1st Dept 1989], lv denied 75 NY2d 709 [1990].) Nor would further environmental review be required based on routine delays in the construction process or delays occasioned by the SEQRA review process. (See Matter of Jackson, 67 NY2d at 425.)

An SEIS is required here 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, but ESDC has failed to give adequate consideration to the environmental impacts resulting from this change.

Under the established standards for SEQRA review, the court must not, and does not, take a position on the desirability of the Project or the environmental impacts of the extension of the construction schedule. It is for ESDC to determine, after performing an adequate environmental review, whether the extension has significant adverse environmental effects not identified in the FEIS, or requires further mitigation measures. It is, however, the court's responsibility to ensure that ESDC performs its responsibility to comply with the statutory mandate that it take a hard look at the impacts and provide a reasoned elaboration of the basis for its decision. In approving the 2009 MGPP, ESDC failed to do so. It performed an inadequate analysis of the effects of the change in schedule on neighborhood character, although the MTA and Development Agreement potentially more than doubled the build-out of the Project. An SEIS is required under these circumstances. The public relies on a meaningful environmental review process, and SEQRA requires no less.

Stay

Although the court has determined that ESDC must prepare an SEIS, the court is unpersuaded that the Project should be invalidated and construction of the arena and other Phase I construction halted, as petitioners request, pending ESDC's further environmental review. Phase I construction is already well under way, with completion of the arena anticipated in 2012. It is undisputed that infrastructure for the Project commenced in 2007 and is nearly complete, extensive excavation and foundation work on the arena has already been performed, work on a new subway entrance is in progress, and a temporary rail yard for the MTA has been completed,

with remediation work in progress on the site of the permanent rail yard that FCRC is required to construct. (Gilmartin Aff. dated Feb, 16, 2011, ¶¶ 6-8 [FCRC Aff. In Opp.].) Extensive public and private funds have already been committed to Phase I construction.

Significantly, this is not a case in which the Project has been implemented without any prior "valid environmental review." (Compare Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 369 [1986]; Matter of Tri-County Taxpayers Assn. v Town Bd. of Town of Queensbury, 55 NY2d 41 [1982].) The 2006 plan for the Project was approved only after preparation of an FEIS and a public hearing, the sufficiency of which was affirmed on appeal. (DDDB I, 59 AD3d 312, supra.) While the 2009 MGPP made certain design changes to Phase I of the Project, including the design of the arena facade and a possible reconfiguration of the "Urban Room" subway entrance (see Technical Memorandum, AR at 4749, 4752), these changes are not the subject of petitioners' challenge. It is also undisputed that the 2009 MGPP did not change the design, configuration, or uses of the Phase II buildings. (Technical Memorandum, AR at 4749.) Nor did the MGPP change the Project's "land uses, building layout, density, [or] the amount of affordable housing and publicly accessibly open space." (Id. at 4759.) This case therefore does not involve a claim that further environmental review is required of the essential substantive features of the Project – review that ordinarily would not be permitted after-the-fact, in the event of a finding of non-compliance with SEQRA. (See Chinese Staff & Workers Assn., 68 NY2d at 369.)

Nor is environmental review required due to changes to the timing of Phase I of the Project. Although, as held above, the 2009 MGPP made a major change to the construction schedule of Phase II, petitioners do not claim that the MGPP effected a material change to the

build-out of the arena or other Phase I construction. (See supra at 4.)

Given the extent to which construction of Phase I has already occurred, under a plan which has been subjected to and withstood challenge, the court declines to stay Phase I of the Project. (See e.g. Matter of Chatham Towers v Bloomberg, 18 AD3d 395, supra; Matter of Silvercup Studios, Inc. v Power Auth. of State of New York, 285 AD2d 598 [2d Dept 2001]; Golden v Metropolitan Transp. Auth., 126 AD2d 128 [2d Dept 1987].)

It is noted that Phase I use of Block 1129 for a temporary above-ground parking lot for the arena is a use that was specifically contemplated in the FEIS (see AR at 845), and that ESDC has required certain mitigation measures for the parking lot, such as fencing and landscaping. (See Amended Memo, SAR at 8055.) As this parking lot is part of the plan that was approved for Phase I, a stay would not be appropriate at this time. However, given the potential delays in Phase II construction, including construction of underground parking that would replace the above-ground lot, further environmental review must be undertaken, in the SEIS that the court has directed, of the impacts of such delays and of whether additional mitigating measures or alternatives are needed for the Block 1129 lot.

Finally, a stay of Phase II construction would be premature, as it is undisputed that Phase II work will not commence for many years. ESDC will have an ample opportunity, before commencement of Phase II construction, to review the environmental impacts of the delay in the Phase II build-out. In the unlikely event that FCRC is ready to proceed with Phase II before the environmental review has been completed, petitioners may renew their request for a stay.

It is accordingly hereby ORDERED that the Supplemental Petitions are granted to the following extent:

It is ORDERED and ADJUDGED that the matter is remanded to ESDC for further environmental review consistent with this decision, including preparation of a Supplemental Environmental Impact Statement assessing the environmental impacts of delay in Phase II construction of the Project; the conduct of further environmental review proceedings pursuant to SEQRA in connection with the SEIS, including a public hearing if required by SEQRA; and further findings on whether to approve the MGPP for Phase II of the Project.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
July 13, 2011

ENTER:

MARCY FRIEDMAN, J.S.C.

FILED
JUL 19 2011
COUNTY CLERK'S OFFICE
NEW YORK

Norman Goodman
Clerk of the court

DATE 07/19/11
I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office on the 19 day of July 2011
County Clerk and Clerk of the Supreme Court of New York County
NO FEE - OFFICIAL USE

Footnotes

fn 1 The Supplemental Administrative Record (SAR) refers to exhibits submitted in connection with the Supplemental Petitions. The Administrative Record (AR) refers to exhibits submitted in connection with the prior Article 78 proceedings under the same index numbers.

fn 2 To the extent that ESDC claims that the MTA Agreement or development leases gave notice of a 2030 outside date for completion of the Project, ESDC took a completely contrary position in its original opposition to the petitions, claiming that "a sunset provision establishing the date on which the relationship between the developer and ESDC would come to an end with respect to a specific development parcel, whether or not a Project building has been successfully constructed on that parcel, sheds no light on the schedule for construction anticipated by the parties." (Nov. 9, 2010 Decision at 13.) In any event, as discussed in the text, ESDC was silent as to the outside date for Phase II in the Development Agreement, and the other disparities between Phase I and Phase II deadlines.

fn 3 As more specifically discussed in the prior decision:

> "As the issue before this court is the impact of the Development Agreement on ESDC's determination to use the 10 year build-out and to approve the 2009 MGPP without requiring an SEIS, the detailed provisions of the Development Agreement regarding scheduling of the construction must be reviewed: The Agreement provides for commencement and construction of the Arena well within the 10 year period. (§ 8.4; Appendix A [requiring the Arena to be the first or second building for which construction is commenced, and requiring the substantial completion of the Arena by the Outside Arena Substantial Completion Date, defined as the sixth anniversary of the Project Effective Date or by 2016].) (fn 7) It also provides for commencement of the Phase I buildings on the Arena Block well within the 10 year period (§ 8.6[d] [providing, subject to certain exceptions, for commencement of Phase I buildings

within 3 to 10 years of the Project Effective Date or from 2013 to 2020]), and for substantial completion of the Phase I buildings within a 12 year period. (§8.6 [providing for substantial completion of the Phase I construction within 12 years of the Project Effective Date or by 2022, subject to Unavoidable Delays].) (fn 8) The Agreement defines as Events of Default failure to commence or substantially complete the Arena within the preceding deadlines (§ 17.1[b], [d]) and failure to commence or substantially complete the Phase I construction within such deadlines. (§ 17.1[i], [l].) Upon the occurrence of these Events of Default, FCRC is required to pay substantial liquidated damages (Schedule 3 liquidated damages). For the Arena, these damages are set at $75 million for failure to timely commence construction. (Schedule 3 at 1.) They may amount to as much as $341 million for failure to meet the outside substantial completion deadline, depending on the length of the default. (Id. at 2-3.) For Phase I, the damages for failure to timely commence construction may reach $5 million per building per year. (Id. at 4-5.) The damages for failure to meet the outside substantial completion date are based on a formula that takes into account the length of the default and the Phase I square footage that has been completed. The Phase I damages shown in the example range from $586,000 per year to $5.5 million. (See § 17.2[a][ii]; Schedule 3 at 8-10.)

In contrast, the Development Agreement does not provide for dates for commencement of Phase II construction other than for commencement of the platform which is needed to support the construction of certain Phase II buildings. The commencement of the platform is not required until the 15th anniversary of the Project Effective Date or 2025 (§ 8.5.) While failure to commence construction of the platform is defined as an Event of Default (§17.1[g]), the significant Schedule 3 liquidated damages are not a remedy for such default. (§ 17.2[a][ii].) The Development Agreement requires Phase II Construction to be substantially complete, subject to Unavoidable Delays, by the Outside Phase II Substantial Completion Date, which is defined as 25 years following the Project Effective Date or 2035. (§ 8.7.) Failure to substantially complete the Phase II construction is defined as an Event of Default (§ 17.1[m]), but is not a basis for the payment of Schedule 3 liquidated damages. (§ 17.2[a][ii].) Rather, the remedy for such default is ESDC's option to terminate the applicable Project Lease for any portion of the Project site on which construction of improvements has not commenced. (§ 17.2[a][vi].)

The Development Agreement contains the following provision requiring FCRC to use commercially reasonable efforts to complete the project by December 31, 2019: "[The FCRC developer entities] agree to use commercially reasonable effort to cause the Substantial Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date [defined in § 8.7 as 25 years following the Project Effective Date], in each case as extended on a day-for-day basis for any Unavoidable Delays." (§ 2.2.) The Development Agreement provides that the Article VIII

deadlines for the performance of Phase I and II work shall not "modify, limit or otherwise impair" FCRC's obligations under the preceding provision. (§ 8.1[d].) However, 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.

The Development Agreement provides that in the event of FCRC's failure to use commercially reasonable efforts, ESDC may resort to remedies available through litigation – i.e., "any and all remedies available to ESDC at law or in equity under or in connection with this Agreement," including specific performance and damages. (§ 17.2[d].) If ESDC were to claim a breach of the commercially reasonable efforts provision, a mixed issue of fact and law would be presented. While courts are adept at interpreting legal standards, determination of this issue would be complicated by the absence of settled authority. There is a substantial body of case law, under UCC 9-627, interpreting the term commercially reasonable manner in connection with dispositions of collateral. (See e.g. Bankers Trust Co. v J.V. Dowler & Co., 47 NY2d 128 [1979].) However, this authority is not factually relevant to the construction context. The parties have not cited, and the court's research has not located, case law articulating standards for awarding damages or equitable relief for failure to use commercially reasonable efforts to meet construction deadlines. (Cf. 330 Hudson Owner, LLC v The Rector, Church-Wardens & Vestrymen of Trinity Church, 2009 NY Slip Op 51018[U], 23 Misc 3d 1131[A] [Sup Ct, New York County].)

The Development Agreement also does not define the failure to use commercially reasonable efforts as an Event of Default for which Schedule 3 liquidated damages are available. (§ 17.2[a][ii].) It does appear that such failure would qualify as an Event of Default for which a notice to cure is required under a catch-all provision for not otherwise specified defaults. (§ 17.1 [r].) For these unspecified defaults, the Development Agreement provides for liquidated damages in the amount of $10,000 per day until the defaults are cured, or the reduced amount of $1,000 per day if, in ESDC's "reasonable determination," the default would not have a material adverse effect on the value or use of the Project site, or result in a condition hazardous to human health, or put the Project site in danger of being forfeited, or subject ESDC to criminal or civil liability or penalties. (§ 17.2[a][x].) (fn 9) These damages are significantly lower than the Schedule 3 damages available for other specified Events of Default. In addition, imposition of these damages would require a predicate finding, subject to the legal uncertainties discussed above, that the commercially reasonable efforts provision had been breached."

(Nov. 9, 2010 Decision at 6-9 [footnotes omitted].) The November 9, 2010 decision should have added that the Development Agreement also provides for commencement of construction of one Phase II building on Block 1129 by 2020.

fn 4 In continuing to rely on the 10 year build date, ESDC also cites the feasibility of physically building the Project in 10 years, and the ability of the market to absorb the housing, especially in light of the strong demand for affordable housing units. (ESDC Response, SAR at 7748, 7749.) Petitioners have never disputed the unexceptional propositions that a 10 year construction schedule is physically possible or that the market can readily absorb affordable housing.

NOTICE OF ENTRY OR SETTLEMENT

(Check and complete appropriate box and section)

Sir(s):

PLEASE TAKE NOTICE that a

of which the within is a (true) (certified) copy

☐ *NOTICE OF ENTRY*

was duly entered in the within named court on 20

☐ *NOTICE OF SETTLEMENT*

will be presented for settlement to the Hon.

one of the judges of the within named court at the Courthouse at

on 20

at o'clock M.

Dated. 20

Yours, etc

BRYAN CAVE LLP

Attorney(s) for

Office and Post Office Address

1290 AVENUE OF THE AMERICAS

NEW YORK, NEW YORK 10104

To
Attorney(s) for

Index No. 116323 *Year 20* 09

In the Matter of the Application of PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al., Petitioners

-against-

EMPIRE STATE DEVELOPMENT CORPORATION, et al.,

JUDGMENT

BRYAN CAVE LLP

Attorneys for EMPIRE STATE DEVELOPMENT CORPORATION

Office and Post Office Address

1290 AVENUE OF THE AMERICAS

NEW YORK, NEW YORK 10104

(212) 541-2000

To

Attorneys for

Service of a copy of the within

is hereby admitted,

Dated, 20

Attorneys for

AFFIDAVIT OF SERVICE BY M.

STATE OF NEW YORK
COUNTY OF } S.S

being duly sworn, deposes and says; that de not a party to the action, is over 18 years resides at

That on the day of 2

deponent served the within

upon

attorney(s) for

in this action, at

the address designated by said attorney(purpose by depositing a true copy of same a postpaid properly addressed wrapper, in depository under the exclusive care and c. the United States post office department New York State.

Sworn to before me

this day of

FILED

JUL 19 2011

11:15 A

EXHIBIT B

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

In the Matter 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 COALTION, 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.,	Index No. 114631/09 IAS Part 57 Justice Friedman
Petitioners,	
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,	**NOTICE OF APPEAL**
Respondents.	

PLEASE TAKE NOTICE that respondent Forest City Ratner Companies, LLC hereby appeals to the Appellate Division of the Supreme Court for the First Judicial Department from the decision, order and judgment (one paper) entered on July 19, 2011, to the extent that it

granted the supplemental petition and remanded the matter to respondent Empire State Development Corporation for further environmental review and proceedings, including but not limited to preparation of a supplemental environmental impact statement.

Dated: New York, New York
September 9, 2011

KRAMER LEVIN NAFTALIS &
FRANKEL LLP

By: _____
Jeffrey L. Braun

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Attorneys for Respondent Empire State Development Corp.

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

In the Matter 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 COALTION, 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.,	New York County Index No. 114631/09
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,	**CIVIL APPEAL PREARGUMENT STATEMENT**
Respondents-Appellants.	

Respondent-appellant Forest City Ratner Companies, LLC ("FCRC") submits this civil appeal preargument statement pursuant to 22 NYCRR § 600.17:

1. Title of action.

The full title of this action at this time is set forth in the above caption, to which the Court is respectfully referred.

2. Full names of original parties and changes in the parties.

All of the named parties appear in the above caption, and there has been no change in the parties to this proceeding.

3. Counsel for appellants.

Counsel for respondent-appellant FCRC are Kramer Levin Naftalis & Frankel, LLP, 1177 Avenue of the Americas, New York, NY 10036 (tel. 212.715.9100), and Fried, Frank, Harris, Shriver & Jacobson, LLP, One New York Plaza, New York, NY 10004 (tel. 212.859.8000). Counsel for respondent-appellant Empire State Development Corporation ("ESDC") is Bryan Cave LLP, 1290 Avenue of the Americas, New York, NY 10104 (tel. 212.541.2000).

4. Counsel for respondents.

Counsel for petitioners-respondents is Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, Executive Woods, Five Palisades Drive, Albany, NY 12205 (tel. 518.438.9907).

5. Court and county from which the appeal is taken.

This appeal is from a decision, order and judgment (one paper) of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on July 19, 2011, a copy of which is annexed hereto as Exhibit A.

6. Nature and object of the proceeding.

This proceeding was commenced on November 19, 2009 to challenge ESDC's approval on September 17, 2009 of a Modified General Project Plan (the "2009 MGPP") for the Atlantic Yards Land Use Improvement and Civic Project (the "Project"), which effected minor changes to a Modified General Project Plan (the "2006 MGPP") that had been approved by ESDC in 2006. The Project is a public-private undertaking by ESDC and FCRC to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn. ESDC's approval of the 2006 MGPP for the Project was upheld by this Court on a prior appeal, *Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *lv. to app. denied,* 13 N.Y.2d 713 (2009).

By decision, order and judgment entered on March 11, 2010, the Supreme Court denied the petition in its entirety, denied the petition in a related proceeding, *Prospect Heights Neighborhood Development Council, Inc. et al., v. Empire State Development Corp., et ano.,* Index No. 116323/09), and denied motions by petitioners in both cases for a preliminary injunction against further construction of the Project.

On April 7, 2010, petitioners in both proceedings moved for leave to reargue and renew on the ground that the terms of a Development Agreement between FCRC and ESDC that was executed after the petition was submitted, and the terms of a renegotiated agreement between FCRC and the Metropolitan Transportation Authority (the "MTA"), necessitated the preparation of a supplemental environmental impact statement ("SEIS") to consider the potential environmental impacts of the Project's being built over 25 years rather than 10 years. On November 9, 2010, the Supreme Court granted the motions and remanded the matter to ESDC to make further findings as to the relevance of the Development

Agreement and the MTA agreement on the use of an assumed 10-year build-out of the Project as the basis for ESDC's environmental analysis, and as to whether an SEIS should be prepared.

On December 16, 2010, ESDC made further findings responsive to the remand order and concluded that: (1) the Development Agreement and the MTA agreement do not have a material effect on whether it is reasonable to use an assumed 10-year build-out; (2) it is unlikely that the Project will be constructed on a 10-year schedule due to weak general economic and financial conditions; and (3) a delay in the 10-year schedule, through and including an extended build out to 2035, would not result in any significant new adverse environmental impacts not previously identified and studied in the final EIS prepared in connection with the 2006 MGPP and a 2009 Technical Memorandum. Petitioners in this proceeding and the *Prospect Heights* case filed supplemental petitions challenging ESDC's December 16, 2010 findings on January 18 and January 14, 2011, respectively. The petitioners also moved to enjoin construction of the Project.

7. Result reached in the Supreme Court.

By decision, order and judgment entered on July 19, 2011, the Supreme Court remanded the matter to ESDC for further environmental review, including preparation of an SEIS assessing the environmental impacts of a delay in construction of Phase II of the Project, and further environmental proceedings, including a public hearing on the SEIS if required, and further findings as to whether to approve the 2009 MGPP for Phase II. The Supreme Court declined to stay construction of the Project.

8. Grounds for seeking reversal.

Under SEQRA and controlling precedent, it is within the discretion of an agency to determine whether to prepare an SEIS. There is no requirement under SEQRA to guarantee a build year or construction period. An SEIS may be required if an approval that

changes a project has significant adverse environmental impacts that were not adequately addressed in the final environmental impact statement. The Supreme Court erroneously disregarded these principles.

Here, there were no significant changes to the Project. ESDC determined in September 2009 that it was reasonable to use an assumed 10-year build-out as the basis for its environmental analysis and that no SEIS was necessary. This position was rational in all respects, and adequately supported by the record. Neither the terms of the Development Agreement nor the MTA agreement compelled a contrary view. Under both the 2009 MGPP and the Development Agreement, FCRC was obligated to use commercially reasonable efforts to complete both phases of the Project by 2019.

In response to the remand order, ESDC again determined in December 2010, based on a thorough Technical Analysis, that no significant adverse environmental impacts that had not already been analyzed in the final EIS and a 2009 Technical Memorandum would result from an extended build out to 2035. This position was rational in all respects, and supported by the record. The Supreme Court erroneously substituted its judgment for that of the agency by concluding that ESDC did not take a hard look at the purported extended period of construction of Phase II of the Project on various areas of environmental concern. Neither petitioners nor the Court identified any adverse impacts that need to be studied in an SEIS.

9. Related proceeding.

The decision, order and judgment in this case also was entered in a related Article 78 proceeding, *Prospect Heights Neighborhood Development Council, Inc. et al. v. Empire State Development Corp., et ano.*, Index No. 116323/09. FCRC and ESDC also are appealing from the decision, order and judgment in the other proceeding. Copies of the preargument statement are annexed hereto as Exhibit B. By permission of the Supreme Court,

there also are appeals by FCRC and ESDC pending from the prior remand order entered in these matters on November 10, 2010. Copies of these appeal papers are annexed hereto as Exhibit C. FCRC is unaware of any other related actions or proceedings pending in any court of this or any other jurisdiction.

Dated: New York, New York
September 9, 2011

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: _____
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Attorneys for Respondent-Appellant Empire State Development Corp.

EXHIBIT C

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

In the Matter 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, STATE ASSEMBLY MEMBER JAMES F. BRENNAN, 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, FOREST CITY RATNER COMPANIES, LLC, Respondents-Appellants.	**CIVIL APPEAL PREARGUMENT STATEMENT**

Respondent-appellant Forest City Ratner Companies, LLC ("FCRC") submits this civil appeal preargument statement pursuant to 22 NYCRR § 600.17:

1. Title of action.

The full title of this action at this time is set forth in the above caption, to which the Court is respectfully referred.

2. Full names of original parties and changes in the parties.

All of the named parties appear in the above caption, and there has been no change in the parties to this proceeding.

3. Counsel for appellants.

Counsel for respondent-appellant FCRC are Kramer Levin Naftalis & Frankel, LLP, 1177 Avenue of the Americas, New York, NY 10036 (tel. 212.715.9100), and Fried, Frank, Harris, Shriver & Jacobson, LLP, One New York Plaza, New York, NY 10004 (tel. 212.859.8000). Counsel for respondent-appellant Empire State Development Corporation ("ESDC") is Bryan Cave LLP, 1290 Avenue of the Americas, New York, NY 10104 (tel. 212.541.2000).

4. Counsel for respondents.

Counsel for petitioners-respondents are Albert K. Butzel, Urban Environmental Law Center, 249 West 34th Street, Suite 400, New York, NY 10001 (tel. 212.643.0375), and Reed W. Super, Urban Environmental Law Center, 131 Varick Street, Suite 1001, New York, NY 10013 (tel. 212.242.2273).

5. Court and county from which the appeal is taken.

This appeal is from a non-final decision and order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on November 10, 2010, a copy of which is annexed hereto as Exhibit A. Leave to appeal from the decision and order was granted by an

order of the same court and Justice entered on December 23, 2010, a copy of which is annexed hereto as Exhibit B.

6. Nature and object of the proceeding.

This proceeding was commenced on November 19, 2009 to challenge ESDC's approval on September 17, 2009 of minor modifications to the General Project Plan for the Atlantic Yards Land Use Improvement and Civic Project (the "Project"). The Project is a public-private undertaking by ESDC and FCRC to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn. ESDC's approval of the original General Project Plan for the Project was upheld by this Court on a prior appeal (*Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *lv. to app. denied,* 13 N.Y.2d 713 (2009)).

The petition's principal claim is that ESDC allegedly violated the State Environmental Quality Review Act ("SEQRA") by not preparing a supplemental environmental impact statement ("SEIS").

7. Result reached in the Supreme Court.

By decision, order and judgment dated March 10, 2010, and entered on March 11, 2010, the Supreme Court denied the petition in its entirety, denied the petition in a related proceeding (*Develop Don't Destroy (Brooklyn), Inc. et al., v. Empire State Development Corp., et ano..*, Index No. 114631/09), and denied a motion by both groups of petitioners for a preliminary injunction against further construction of the Project.

On April 7, 2010, petitioners in this proceeding and the *Develop Don't Destroy (Brooklyn)* case moved for leave to reargue and renew on the ground that the terms of a

Development Agreement between FCRC and ESDC that was executed after the petition was submitted, and the renegotiated agreement between FCRC and the MTA, necessitated the preparation of a SEIS to consider the potential environmental impacts of the Project's being built over 25 rather than 10 years. On November 9, 2010, the Supreme Court granted the motions and remanded the matter to ESDC to make further findings as to the relevance of the Development Agreement and the MTA agreement on the use of an assumed 10-year build-out of the Project as the basis for ESDC's environmental analysis, and as to whether an SEIS should be prepared.

8. Grounds for seeking reversal.

Under SEQRA and controlling precedent, it is within the discretion of an agency to determine whether to prepare an SEIS. It also is well settled that a reviewing court is bound by the facts and record before the agency. The Supreme Court erroneously disregarded these principles.

Here, ESDC determined in September 2009 that it was reasonable to use an assumed 10-year build-out as the basis for its environmental analysis. This position was rational in all respects, and adequately supported by the record. Neither the terms of the Development Agreement nor the MTA agreement compelled a contrary view. Under both the 2009 Modified General Project Plan and the Development Agreement, FCRC was obligated to use commercially reasonable efforts to complete the Project by 2019. The Development Agreement thus explicitly provides that FCRC "agrees to use commercially reasonable efforts to cause the substantial completion of the Project to occur by December 31, 2019," and provides for liquidated damages and other remedies at equity and law. The Development Agreement further provides that none of the other provisions in the Development Agreement

trumps FCRC's obligation to use commercially reasonable efforts to complete the Project within that time frame. The Supreme Court erroneously found that these provisions did not evidence such a commitment by FCRC.

There is no requirement under SEQRA to guarantee a build year or construction period. An SEIS may be required if an approval that changes a project has significant adverse environmental impacts that were not adequately addressed in the final environmental impact statement. Here, there were no significant changes to the Project. An SEIS is not necessary merely because a project falls behind the schedule that was contemplated in the prior environmental impact analysis for the project.

9. Related proceeding.

The November 9, 2010 decision and order also was entered in a related Article 78 proceeding, *Develop Don't Destroy (Brooklyn), Inc., et al. v. Empire State Development Corp., et ano.* (Supreme Court, New York County, Index No. 114631/09). FCRC and ESDC also have appealed the decision and order in this proceeding. Copies of the order granting leave to appeal and the preargument statement are annexed hereto as Exhibit C. FCRC is unaware of any other related actions or proceedings pending in any court of this or any other jurisdiction.

Dated: New York, New York
February 18, 2011

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Attorneys for Respondent-Appellant Empire State Development Corp.

Exhibit A

SCANNED ON 11/10/2010

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

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Index Number : 116323/2009
PROSPECT HEIGHTS
VS.
EMPIRE STATE DEVELOPMENT CORP.
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. 116323/09
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for reargue/renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memo of Law M1, M2

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER, filed under the action entitled Develop Don't Destroy (Brooklyn) v. Empire State Development Corp., Index # 114631/09, Motion Sequence #003.

FILED
NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-9-10

MARCY S. FRIEDMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners,

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.

Index No.: 114631/09

DECISION/ORDER

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al.,

Petitioners,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC,

Respondents.

Index No.: 116323/09

DECISION/ORDER

In these Article 78 proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc. (DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenged the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of a modified general project plan (2009 MGPP) for the Atlantic Yards Project in Brooklyn, to be constructed by respondent Forest City Ratner Companies (FCRC). By decision dated March 10, 2010 (prior decision), this court denied the petitions. Petitioners now move for leave to reargue and renew the petitions.

On these motions, petitioners argue that the court erred in rejecting petitioners' claim that ESDC violated the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 et seq.) by approving the 2009 MGPP without preparing a Supplemental Environmental Impact Statement (SEIS) as a result of changes to the Project. Petitioners also argue that the court erred in rejecting petitioners' claim that ESDC violated the Urban Development Corporation Act (UDCA) by finding that the Project is a plan within the meaning of § 6260(c). Petitioners' motions are based on the terms of a master Development Agreement, entered into between ESDC and FCRC on December 23, 2009 (fn 1) which, according to petitioners, shows that the Project will be built-out over a 25 year period, not the 10 year period that ESDC assumed in reviewing the 2009 MGPP.

The Prior Decision

The court refers to the prior decision for a detailed discussion of the parties' claims in these proceedings. In brief, petitioners' challenge rested primarily on the renegotiation in June 2009 by the Metropolitan Transit Authority (MTA) of its agreement with FCRC to sell FCRC air

rights necessary for development of 6 of the 11 residential buildings to be constructed in Phase II of the Project. In particular, petitioners cited MTA's agreement to permit FCRC to acquire the air rights over a 15 year period extending until 2030, rather than to require FCRC to purchase all of the air rights at the inception of the Project, as had been the case when the original Project Plan was approved in 2006. Petitioners argued that ESDC ignored the impact of the renegotiated MTA agreement on the time frame for construction, and improperly continued to use the 10 year build-out for the Project that had been used in the Final Environmental Impact Statement (FEIS) prepared in connection with the original Plan.

The prior decision set forth the court's reasons for rejecting petitioners' UDCA claim. The court is not persuaded that it misapprehended applicable facts or law governing this claim. The remainder of this opinion will accordingly address petitioners' SEQRA claim.

In the prior decision, the court found that ESDC based its use of a 10 year build-out on three main factors: the opinion of its consultant that the market can absorb the planned units over a 10 year period; ESDC's intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC's financial incentive to do so. (Prior Decision at 11.) The decision reasoned that, under the limited standard for SEQRA review, the court was "constrained to hold that ESDC's elaboration of its reasons for using the 10 year build-out and for not requiring an SEIS was not irrational as a matter of law. ESDC's continuing use of the 10 year build-out was supported – albeit, . . . only minimally – by the factors articulated by ESDC." (Id.)

Evidence of the Terms of the Development Agreement in the Prior Papers and in the Reargument Motions

At the time the petitions and ESDC's opposition papers were filed, ESDC had not yet entered into a formal agreement with FCRC for development of the Project. However, in arguing that the renegotiated MTA agreement did not extend the build-out until 2030, ESDC emphasized that the MTA agreement would be subject to a set of development agreements, to be entered into between ESDC and FCRC, in which FCRC would be contractually committed to implementing the 2009 MGPP, and would be required to use commercially reasonable efforts to complete the Project within 10 years, by 2019. (See e.g. ESDC Memo. In Opp. To DDDB Pet. at 22.) (fn 2) ESDC supported this claim with a citation to the MGPP as well as to a summary of the Development Agreement. (Id., citing AR 4692, 7070.) (fn 3) The MGPP provision that ESDC cited stated in full: "The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019. The failure to commence construction of each building would result in, inter alia, monetary penalties being imposed upon the Project Sponsors." (MGPP [AR 4692-4693].) The summary of the Development Agreement that ESDC cited was a one-page document that described the "Development Obligation" as: "To construct the project described in the Modified General Project Plan," including enumerated improvements. (AR 7070.) (fn 4)

It is undisputed that at the time ESDC approved the 2009 MGPP, the above MGPP provision and summary were the sole documents in the record before ESDC that summarized the terms of the Development Agreement. (June 29, 2010 Transcript of Oral Argument of Reargument Motions [Reargument Tr.] at 34.) As of the time ESDC filed its opposition papers to the petitions, the Development Agreement was in the process of being negotiated. (ESDC

Answer to DDDB Pet., Fact Statement ¶ 39.) However, ESDC cited no evidence of any terms of the Development Agreement other than the above MGPP provision and summary. Rather, in discussing the terms of the Development Agreement in its papers in opposition to the petitions, ESDC repeatedly cited only the MGPP provision and summary. (fn 5) By the time the oral argument of the petitions was held on January 19, 2010, the Development Agreement had been executed. However, ESDC continued to represent that the terms of the Development Agreement were those contained in the MGPP provision and summary. (See e.g. Jan. 19, 2010 Tr. at 44-46, 51, 81.)

On the reargument motions, ESDC for the first time acknowledged the existence in the Development Agreement of a 25 year outside date for substantial completion of Phase II of the Project. The reargument motions also mark the first time ESDC admitted that, at the time of its review of the 2009 MGPP, ESDC knew of the 25 year outside date and "anticipated" its inclusion in the Development Agreement. (Reargument Tr. at 35-36.) (fn 6)

Prior to these reargument motions, the above MGPP provision and summary were also the sole documents containing the terms of the Development Agreement that were furnished to this court. In seeking leave to renew, petitioners offer the full master Development Agreement. This Agreement distinguishes between construction of the Arena and Phase I buildings on the Arena block, and construction of Phase II buildings which constitute 11 of the 16 residential hi-rise buildings to be constructed on the Project site. The former are required to be substantially completed within or reasonably soon after the 10 year build date, and are the subject of heavy penalties in the event of delays. The latter are required to be substantially completed in 25 years or by 2035, and are apparently the subject of less stringent penalties in the event of failure to

meet that deadline.

Development Agreement

As the issue before this court is the impact of the Development Agreement on ESDC's determination to use the 10 year build-out and to approve the 2009 MGPP without requiring an SEIS, the detailed provisions of the Development Agreement regarding scheduling of the construction must be reviewed: The Agreement provides for commencement and construction of the Arena well within the 10 year period. (§ 8.4; Appendix A [requiring the Arena to be the first or second building for which construction is commenced, and requiring the substantial completion of the Arena by the Outside Arena Substantial Completion Date, defined as the sixth anniversary of the Project Effective Date or by 2016].) (fn 7) It also provides for commencement of the Phase I buildings on the Arena Block well within the 10 year period (§ 8.6[d] [providing, subject to certain exceptions, for commencement of Phase I buildings within 3 to 10 years of the Project Effective Date or from 2013 to 2020]), and for substantial completion of the Phase I buildings within a 12 year period. (§8.6 [providing for substantial completion of the Phase I construction within 12 years of the Project Effective Date or by 2022, subject to Unavoidable Delays].) (fn 8) The Agreement defines as Events of Default failure to commence or substantially complete the Arena within the preceding deadlines (§ 17.1[b], [d]) and failure to commence or substantially complete the Phase I construction within such deadlines. (§ 17.1[i], [l].) Upon the occurrence of these Events of Default, FCRC is required to pay substantial liquidated damages (Schedule 3 liquidated damages). For the Arena, these damages are set at $75 million for failure to timely commence construction. (Schedule 3 at 1.) They may amount to as much as $341 million for failure to meet the outside substantial completion deadline,

depending on the length of the default. (Id. at 2-3.) For Phase I, the damages for failure to timely commence construction may reach $5 million per building per year. (Id. at 4-5.) The damages for failure to meet the outside substantial completion date are based on a formula that takes into account the length of the default and the Phase I square footage that has been completed. The Phase I damages shown in the example range from $586,000 per year to $5.5 million. (See § 17.2[a][ii]; Schedule 3 at 8-10.)

In contrast, the Development Agreement does not provide for dates for commencement of Phase II construction other than for commencement of the platform which is needed to support the construction of certain Phase II buildings. The commencement of the platform is not required until the 15th anniversary of the Project Effective Date or 2025 (§ 8.5.) While failure to commence construction of the platform is defined as an Event of Default (§17.1[g]), the significant Schedule 3 liquidated damages are not a remedy for such default. (§ 17.2[a][ii].) The Development Agreement requires Phase II Construction to be substantially complete, subject to Unavoidable Delays, by the Outside Phase II Substantial Completion Date, which is defined as 25 years following the Project Effective Date or 2035. (§ 8.7.) Failure to substantially complete the Phase II construction is defined as an Event of Default (§ 17.1[m]), but is not a basis for the payment of Schedule 3 liquidated damages. (§ 17.2[a][ii].) Rather, the remedy for such default is ESDC's option to terminate the applicable Project Lease for any portion of the Project site on which construction of improvements has not commenced. (§ 17.2[a][vi].)

The Development Agreement contains the following provision requiring FCRC to use commercially reasonable efforts to complete the project by December 31, 2019: "[The FCRC developer entities] agree to use commercially reasonable effort to cause the Substantial

Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date [defined in § 8.7 as 25 years following the Project Effective Date], in each case as extended on a day-for-day basis for any Unavoidable Delays." (§ 2.2.) The Development Agreement provides that the Article VIII deadlines for the performance of Phase I and II work shall not "modify, limit or otherwise impair" FCRC's obligations under the preceding provision. (§ 8.1[d].) However, 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.

The Development Agreement provides that in the event of FCRC's failure to use commercially reasonable efforts, ESDC may resort to remedies available through litigation – i.e., "any and all remedies available to ESDC at law or in equity under or in connection with this Agreement," including specific performance and damages. (§ 17.2[d].) If ESDC were to claim a breach of the commercially reasonable efforts provision, a mixed issue of fact and law would be presented. While courts are adept at interpreting legal standards, determination of this issue would be complicated by the absence of settled authority. There is a substantial body of case law, under UCC 9-627, interpreting the term commercially reasonable manner in connection with dispositions of collateral. (See e.g. Bankers Trust Co. v J.V. Dowler & Co., 47 NY2d 128 [1979].) However, this authority is not factually relevant to the construction context. The parties have not cited, and the court's research has not located, case law articulating standards for awarding damages or equitable relief for failure to use commercially reasonable efforts to meet construction deadlines. (Cf. 330 Hudson Owner, LLC v The Rector, Church-Wardens &

Vestrymen of Trinity Church, 2009 NY Slip Op 51018[U], 23 Misc 3d 1131[A] [Sup Ct, New York County].)

The Development Agreement also does not define the failure to use commercially reasonable efforts as an Event of Default for which Schedule 3 liquidated damages are available. (§ 17.2[a][ii].) It does appear that such failure would qualify as an Event of Default for which a notice to cure is required under a catch-all provision for not otherwise specified defaults. (§ 17.1 [r].) For these unspecified defaults, the Development Agreement provides for liquidated damages in the amount of $10,000 per day until the defaults are cured, or the reduced amount of $1,000 per day if, in ESDC's "reasonable determination," the default would not have a material adverse effect on the value or use of the Project site, or result in a condition hazardous to human health, or put the Project site in danger of being forfeited, or subject ESDC to criminal or civil liability or penalties. (§ 17.2[a][x].) (fn 9) These damages are significantly lower than the Schedule 3 damages available for other specified Events of Default. In addition, imposition of these damages would require a predicate finding, subject to the legal uncertainties discussed above, that the commercially reasonable efforts provision had been breached.

Discussion

As close reading of the Development Agreement shows, the Agreement plainly contemplates an outside build date of 25 years for completion of the 11 Phase II buildings which constitute the substantial majority of the residential buildings at the Project. It provides detailed timetables, firm commencement dates for the Arena and Phase I work, no commencement dates (other than for the platform) for the Phase II residential construction, and apparently far stricter penalties for failure to meet the deadlines for the Arena and Phase I work than for failure to meet

the 2035 outside deadline for substantial completion of the Phase II buildings or for failure to use commercially reasonable efforts to complete the Project by 2019.

In its papers in opposition to the Article 78 petitions, ESDC repeatedly cited, as the basis for its continuing use of the 10 year build-out, the MGPP provision stating ESDC's intent to require FCRC to use commercially reasonable efforts to complete the Project by 2019, and the summary of the Development Agreement (AR 7070). Neither of these documents gave any indication that the Development Agreement would include a 25 year substantial completion date for the Phase II construction. While ESDC's papers acknowledged that there were mandatory commencement dates for construction of the first few buildings on the Arena Block, the papers did not discuss the absence of any deadlines for commencement of the Phase II buildings, were completely silent as to the 2035 outside date, and contained no discussion of the disparate penalties provided for failure to meet the deadlines for Phase I and II construction. ESDC's papers left the inaccurate impression that the commercially reasonable efforts provision was the focus of the Development Agreement, whereas the Agreement in fact contained numerous far more detailed construction deadlines for the Project which cannot be ignored in addressing the rationality of the build-date.

In opposing the petitions, ESDC argued that the master closing documents could not have been included in the record because they did not exist at the time of ESDC's approval of the 20009 MGPP. (Jan. 19, 2010 Tr. at 67.) Significantly, although the Development Agreement had been executed as of the date the petitions were heard, ESDC did not then claim that it was unaware, at the time of the approval, that the Development Agreement would provide the 2035 outside completion date for Phase II rather than a 2019 completion date for the entire Project.

Rather, at the oral argument, ESDC continued to represent that the terms of the Development Agreement were described in the summary (AR 7070) that was in the record before ESDC at the time of the approval. (Jan. 19, 2010 Tr. at 45.) ESDC went so far as to state that this document "summarizes many of the salient elements of the general project plan." (Id.) This summary, of course, said nothing about the 2035 outside substantial completion date for the Phase II construction, and merely stated that FCRC was obligated to construct the Project in accord with the MGPP which, in turn, contained the provision that FCRC would be required to use commercially reasonable efforts to complete the Project by 2019.

As noted above, on the reargument motions, ESDC acknowledged for the first time that it was aware, when it reviewed the 2009 MGPP, that a provision for a 2035 substantial completion date for the Phase II construction would be included in the Development Agreement that was to be negotiated. (Reargument Tr. at 35-36.) However, ESDC never discussed this provision in its review of the MGPP, and ESDC never disclosed the provision to this court in these Article 78 proceedings for review of ESDC's determination.

ESDC had an obligation to furnish the court in these Article 78 proceedings with a complete and accurate record of the proceedings before ESDC. (See generally 7804[e]; Bellman v McGuire, 140 AD2d 262, 265 [1st Dept 1988] [holding that "CPLR 7804[e] requires the respondent in an Article 78 proceeding to submit a complete record of all evidentiary facts." [emphasis in original].) It is axiomatic that ESDC also had an obligation to accurately summarize the bases for its determination in the proceedings before this court. Thus, once the Development Agreement was executed, ESDC had an obligation to bring it to the attention of this court in order to correct the totally incomplete representations, made in the summary of the

Development Agreement and in ESDC's papers in opposition to the Article 78 petitions, as to the terms that were included in Development Agreement regarding the imposition and enforcement of deadlines for completion of the Project. Given ESDC's failure to do so, leave to reargue and renew is warranted. (See Bellman, 140 AD2d at 265.)

In granting reargument and renewal, the court rejects ESDC's contention that consideration of the Development Agreement would violate the well-settled tenet of Article 78 review that the court is bound by the facts and record before the agency. (See generally Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000].) Nor would consideration of the Development Agreement violate the precept that updating of the information to be considered by the agency is "rarely warrant[ed]," given the interest in the finality of administrative proceedings. (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 425 [1986].) The Development Agreement is not accepted to show changed circumstances since ESDC's determination or to supplement the record that was before ESDC. Rather, although the Development Agreement was executed after ESDC's determination, ESDC repeatedly stated that it relied on its terms in approving the MGPP. In fact, at the oral argument of the petitions, ESDC represented that the Development Agreement was the "main thing" ESDC was relying on to get the Project built in conformance with the plan. (Jan. 19, 2010 Tr. at 45-47.) The Development Agreement is therefore accepted to correct ESDC's incomplete representations concerning the Agreement's terms regarding construction deadlines and their enforcement. Put another way, 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 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. (fn 10)

The court also rejects ESDC's contention that reargument and renewal is unnecessary because the 25 year outside date for completion of the Project is "nothing new," and that the documents that were in the record before ESDC – in particular, the summary of Project leases showing 25 year terms (see AR 7068-70) – gave notice of the 25 year outside date. (ESDC Memo. In Opp. To Reargument Motions at 21.) ESDC took a completely contrary position in opposing the petitions. It dismissed petitioners' reliance on the 25 year term leases to show that the Project would take 25 years to build, stating: "[A] sunset provision establishing the date on which the relationship between the developer and ESDC would come to an end with respect to a specific development parcel, whether or not a Project building has been successfully constructed on that parcel, sheds no light on the schedule for construction anticipated by the parties. [¶] Outer 'drop dead' dates do not supersede FCRC's contractual obligation to use commercially reasonable efforts to develop the Project by 2019." (ESDC Memo. In Opp. To PHND Pet. at 35 [internal citations omitted].)

To the extent that ESDC argues that reargument and renewal is unnecessary because ESDC has already taken a hard look at the impacts of delays in the construction of the Project, this contention is also unavailing. For this argument, ESDC relies on the Technical Memorandum (AR 4744 et seq.), prepared at the time of ESDC's review of the 2009 MGPP, in which ESDC concluded that an extended schedule would not result in significant impacts not identified in the FEIS, and that preparation of an SEIS was not needed. (ESDC Memo. In Opp. To PHND Pet. at 39.) While the Technical Memorandum reached this conclusion (AR 4808), it treated the change in the Project schedule as a change from 2016 to 2019. It assumed a 10 year

build-out, stating: "The anticipated year of completion for Phase I of the project has been extended from 2010 to 2014 due to delays in the commencement of construction on the arena block. The anticipated date of the full build-out of the project – Phase II – has been extended from 2016 to 2019 for the same reason." (AR 4752, 4755.) While the Technical Memorandum also undertook an analysis of the potential for delayed build-out, it did so on the basis of the potential for "prolonged adverse economic conditions" (id. at 4808), and not on the basis of a change in the Project schedule to provide for construction beyond 2019, much less over a 25 year period, as to which the Technical Memorandum was silent. Moreover, in considering delays due to economic conditions, the Technical Memorandum analyzed environmental impacts on traffic and parking, as well as transit and pedestrian conditions, over a five year period beyond 2019 or until 2024, not an additional 16 year period to 2035. (Id. at 4812-4815.) It did not provide a specific number of years for its analysis of other environmental impacts, including delays in the development of open space, extensions of time during which above ground parking lots would remain in existence, impacts on neighborhood character, and effects of prolonged construction. With respect to all impacts, the Technical Memorandum concluded that a delay in the build-out due to prolonged adverse economic conditions "would not result in any significant adverse environmental impacts that were not addressed in the FEIS." (Id. at 4816.)

ESDC now suggests that the construction impacts of a 10 year build-out would be the same or even more severe than the construction impacts of a 25 year build-out because, if construction were delayed, "the intensity of the construction would be greatly reduced." (ESDC Memo. In Opp. To Reargument Motions at 14-15. See also FCRC Memo. In Opp. To Reargument Motions at 11.) However, the Technical Memorandum did not compare the

environmental impacts of intense construction over a 10 year period with the impacts of ongoing construction over a 25 year period. It did not address, and the record thus lacks any expert opinion or analysis of, the impact of a potential 25 year delay in completion of the Project.

Conclusion

ESDC argues, and the court agrees, that SEQRA does not require guarantees that a Project will be completed by the build date or exactitude in the agency's selection of a build date. However, ESDC itself acknowledges that "ESDC had the responsibility to determine whether the proposed schedule was reasonable for purposes of conducting the requisite assessment of environmental impacts." (ESDC Memo. In Opp. To Reargument Motions at 5.) As the Appellate Division held in a prior litigation involving the Atlantic Yards Project, a mere inaccuracy in the build date will not invalidate the basic data used in the agency's environmental assessment. (See Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312, 318 [1st Dept 2009] [DDDB I], lv denied 13 NY3d 713, rearg denied 14 NY3d 748 [2010]. See also Committee to Preserve Brighton Beach v Council of City of New York, 214 AD2d 335 [1st Dept 1995], lv denied 87 NY2d 802.) As the Court also held, ESDC's choice of the build year is not immune to judicial review. Rather, it is subject to review under the arbitrary and capricious or rational basis standard that is applicable to judicial scrutiny of any agency action in an Article 78 proceeding. (DDDB I at 318.)

Under this standard, as applied to a SEQRA determination in particular, the court's review "is limited to 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, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231-232 [2007] [citing

Matter of Jackson, 67 NY2d at 417.) "[T]he courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].) However, judicial review must be "meaningful." (Id. at 232.) It is the court's responsibility to "ensure that, in light of the circumstances of a particular case, the agency has given due consideration to the pertinent environmental factors." (Akpan v Koch, 75 NY2d 561, 571 [1990].)

In the prior decision, this court criticized ESDC's lack of transparency and its failure even to mention the MTA agreement by name, but found, based on its review of the record, that ESDC was aware that the MTA agreement had made a "major change" in the Project, and had articulated reasons for its continued use of the 10 year build-out that were marginally sufficient to survive scrutiny under the limited standard for judicial review of a SEQRA determination. (Prior Decision at 15-16.) Now, in what appears to be yet another failure of transparency on ESDC's part in reviewing the 2009 MGPP, ESDC never directly acknowledged or addressed the impact of the Development Agreement on the build-out; and, in these Article 78 proceedings, ESDC never brought to the court's attention the extended construction schedule that the Development Agreement contemplates.

The Development Agreement has cast a completely different light on the Project build date. Its 25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement giving FCRC until 2030 to complete acquisition of the air rights necessary to construct 6 of the 11 Phase II buildings, raise a substantial question as to whether ESDC's

continuing use of the 10 year build-out has a rational basis.

In the prior decision, this court accepted ESDC's claim that because the MTA agreement permitted FCRC to acquire the air rights on a parcel-by-parcel basis, it was not inconsistent with the development scenario posited by ESDC, in which the Project would proceed incrementally within the 10 year build date rather than stall until the 2030 outside date for acquisition of the air rights. (Prior Decision at 12.) This rationale for continuing use of the 10 year build date was, in turn, dependent on ESDC's assertion that it would require a contractual commitment from FCRC to use commercially reasonable efforts to complete the Project by 2019. (See fn 2, supra.) As such, it is also called into question by the Development Agreement that was actually negotiated.

The court makes no finding, at this juncture, as to the rationality of the 10 year build-out. Its reading of the Development Agreement was undertaken not for the purpose of making a final determination as to the proper construction of the Agreement but for the purpose of determining whether the provisions of the Agreement have relevance to the rationality of ESDC's decision to continue to use the 10 year build date. The court has concluded that these provisions unquestionably must be addressed. Under the limited standard for SEQRA review, it is for ESDC to do so in the first instance. Where, as here, an agency action involves a specific project, "environmental effects that can reasonably be anticipated must be considered." (Matter of Neville v Koch, 79 NY2d 416, 427 [1992] [emphasis in original].) If ESDC concludes, in the face of the Development Agreement and the renegotiated MTA agreement, that a 10 year build-out continues to be reasonable, and that it need not examine environmental impacts of construction over a 25 year period on neighborhood character, air quality, noise, and traffic, among other issues, then it must expressly make such findings and provide a detailed, reasoned

basis for the findings.

In sum, the court holds that ESDC did not provide a "reasoned elaboration" for its determination not to require an SEIS, based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project. The matter should accordingly be remanded to ESDC for additional findings on this issue. (fn 11)

It is accordingly hereby ORDERED that the motions of petitioners DDDB and PHND are granted to the following extent: Leave to reargue and renew is granted, and the proceedings are remanded 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.

Dated: New York, New York
November 9, 2010

MARCY S. FRIEDMAN, J.S.C.

Footnotes

Footnotes

fn 1 While the copy of the Development Agreement that is annexed to the petitions is undated, ESDC's counsel confirmed at the oral argument of the petitions that it was executed on December 23, 2009. (Jan. 19, 2010 Tr. Of Oral Argument Of Petitions [Jan. 19, 2010 Tr.] at 46.)

fn 2 ESDC also argued that the MTA agreement set outside deadlines for FCRC to acquire the air rights needed to construct 6 of the Phase II buildings, but that FCRC had the option to purchase the air rights on a parcel-by-parcel basis. ESDC further argued that it expected that FCRC would exercise the option because it would be obligated to use commercially reasonable efforts to complete the Project within the 10 year deadline. (Jan. 19, 2010 Tr. at 51.)

fn 3 AR refers to the record before ESDC in connection with its approval of the 2009 MGPP.

fn 4 The enumerated improvements are improvements of 4,470,000 gross square feet, exclusive of the Arena; no less than 2,250 units of affordable housing, subject to the availability of subsidies; a completed Arena for basketball and other events; at least 8 acres of open space; a completed Urban Room; a completed upgraded railyard; a completed subway entrance; and a completed Carlton Avenue Bridge.

fn 5 Thus, for example, ESDC represented: "With respect to schedule, the MGPP describes the anticipated timetable (AR 4687), and establishes mandatory commencement dates for construction of the first few buildings on the Arena Block (AR 4692); it then dictates that 'the Project documentation to be negotiated between ESDC and the Project Sponsor is to require the Project Sponsors to use commercially reasonable efforts to . . . complete the entire Project by 2019.' (Id.)" (ESDC Memo. In Opp. To DDDB Pet. at 17.) AR 4687 is also a citation to a portion of the MGPP stating that the "[t]he build-out of the Project is likely to occur in two phases," with Phase I anticipated to completed by 2014 and Phase II by 2019. AR 4692 refers to a portion of the MGPP which states that the Arena is expected to open in 2011-2012, sets forth dates for commencement of construction on three other Phase I non-Arena buildings, and contains the much-referenced statement: "The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019."

Another statement typical of ESDC's representations as to the terms of the Development Agreement is as follows: "Petitioners' errors in describing the purpose and effect of the MTA term sheet are compounded by the fact that they look only to the transaction with MTA to discern FCRC's obligations. What they apparently fail to apprehend . . . is that there will be an entirely separate set of agreements between FCRC and ESDC, and that under those agreements FCRC will be contractually committed to implementing the 2009 MGPP. (Fact Statement ¶ 39.) Among other things, FCRC will be required to use 'commercially reasonable efforts' to complete the Arena and certain Phase I buildings in accordance with a specified schedule, and to bring the

Project to completion by 2019, with sanctions imposed for any failure to do so. (Fact Statement ¶ 39; AR 4692, 7070.)" (ESDC Memo. In Opp. To DDDB Pet. at 22.) The Fact Statement is contained in ESDC's Answer to the Petition. Paragraph 39 refers to the commercially reasonable efforts provision of the MGPP (AR 4692); to AR 7067-7069 which is a description of the Project Leases; and to AR 7070 which is the summary of the Development Agreement referred to in the text above.

Other substantially similar representations as to the terms of the Development Agreement are made in ESDC's Memorandum In Opposition To DDDB Petition at 40, and in ESDC's Memorandum In Opposition To PHND's Petition at 34 and 57.

fn 6 At the oral argument of the reargument motions, ESDC stated that the 25 year terms of the Project leases "match[ed] up with what was actually in the development agreement, which is that there was the outside date [of] 25 years from project effective date. . . . So what we have in the development agreement is really from a contractual standpoint, that which was anticipated. There is a schedule. There is a commercially reasonable efforts provision. And then there is the outside dates that is kind of a drop-dead date, no matter what you have to complete by that date." (Rearg. Tr. at 35-36.)

As discussed in the text (infra at 12-13), this argument is contrary to the position taken by ESDC at the time the petitions were first heard.

fn 7 It is undisputed that the Project Effective Date, based on which the Development Agreement imposes deadlines, is May 12, 2010. (ESDC Letter to Court, dated July 2, 2010.)

fn 8 Unavoidable Delays, as defined in the Development Agreement (Appendix A) include typical force majeure conditions and litigation which delays construction, but not inability to obtain financing.

fn 9 ESDC argued that the liquidated damages provision set forth in § 17.2(a)(x) would apply to failure to complete the Phase II construction work by the 25 year outside date, but only if FCRC was not using commercially reasonable efforts to complete the Project within 10 years. As stated at the oral argument:

"If the reason why phase two was not progressing was that Forest City had walked away from the project or failed to use adequate efforts to complete the project, then that would be a breach of the covenant to use commercially reasonable efforts to complete the entire project within a ten-year period. And that would implicate the penalties set forth in x. [§17.2[a][x]]. However, if Forest City was using commercially reasonable efforts to proceed with the project on a ten-year schedule and notwithstanding its use of commercially reasonable efforts it was falling behind the ten-year schedule, then that would not be subject to the penalties set forth in x because there would be no breach of the commercial reasonable efforts covenant." (Reargument Tr. at 31.)

fn 10 The court notes that petitioners, not ESDC, brought the Development Agreement to this court's attention after submission but before decision of the Article 78 petitions. The court

rejected the proffer based on its misapprehension that petitioners were raising a new argument, not before ESDC at the time of its approval of the MGPP, that the Development Agreement that was subsequently negotiated did not provide adequate guarantees that the Project would be built within the 10 year period. (See Prior Decision at 13, n 2.) As held above, the Development Agreement is not received on that issue but in order to correct the incomplete record furnished to this court as to the terms regarding deadlines that would be included in the Development Agreement and, hence, the reasonableness of ESDC's use of a 10 year build-out in approving the MGPP.

fn 11 This decision should not be construed as staying construction of the Project. Petitioners' prior challenges to the original Plan and in condemnation proceedings have not been successful. Thus, as of the date of the prior decision, substantial public and private expenditures had already been made and the Project was already well underway. (Prior Decision at 17.) While petitioners seek a stay in the event of a favorable decision on the reargument motions, they have not moved for reargument or renewal of their prior motion for a stay. The record is not factually developed on the current state of the construction. Nor have the parties addressed the legal issues regarding the propriety of a stay at this stage of the construction. Any decision on a stay would therefore not be proper on this record. The court notes, moreover, that while the DDDB petitioners oppose continued work on the arena (DDDB Reply Aff., ¶ 23), the PHND petitioners represent that their greatest concern is over the disruptions that would occur during extended construction of Phase II, and appear to acknowledge that the Arena could be permitted to proceed. As they also note, the Phase II work is not scheduled to begin for years. (PHND Reply Aff., ¶ 15.)

Exhibit B

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

PRESENT: FRIEDMAN PART 57

MARCY S. FRIEDMAN, J.S.C.

Prospect Heights Neighborhood Development Council, Inc. et al.

v.

Empire State Development Corp. et al.

INDEX NO. 116623/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Reargument/Leave to appeal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are settled pursuant to the parties stipulation dated and filed under index no. 114631/2009 motion seq. #004

FILED

DEC 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/22/10

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

Develop Don't Destroy (Brooklyn), Inc, et al.
v.
Empire State Development Corporation
Index 114631/09

Prospect Heights Neighborhood Dev. Council, Inc.
v.
Empire State Development Corporation
Index 116323/09

FILED
DEC 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

The parties stipulate as follows:

1) If petitioners decide to challenge the ESDC Directors' findings of December 16, 2010, they shall file a supplemental petition pursuant to CPLR 3025(b) on or before January 18, 2011.

2) Petitioners consent to respondents' cross-motions for leave to appeal the Court's November 9, 2010 order (entered November 10, 2010).

3) Respondents agree not to perfect their appeals until the earlier of June 22, 2011 or this Court's ruling on petitioners' supplemental petitions, without prior leave of this Court.

4) Petitioners agree to withdraw their current motions for a stay of construction without prejudice.

5) The Prospect Heights Neighborhood Development Council petitioners (Index 116323/09) withdraw their pending motions for costs and sanctions pursuant to 22 NYCRR § 130-1.1.

For Develop Don't Destroy Petitioners
Jeffrey L. Baker (Navy Somerset LLC)
Petitioner

For Prospect Heights Neighborhood Dev. Council
Sean T. Basinski, ~~Esq.~~ Law Office

Respondent
For Empire State Development ~~Corp.~~ Corporation
Philip L. Kramer, Bryan Cave LLP

Respondent
For Forest City Ratner Companies, LLC
Adam C. Rome, Kramer Levin Naftalis & Frankel LLP
~~Kramer Levin Naftalis & Frankel LLP~~, Thacher Proffitt & Wood LLP

FILED
DEC 23 2010
COUNTY CLERK'S OFFICE

So Ordered:
Marcy Friedman 12-22-10
MARCY S. FRIEDMAN

Exhibit C

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

In the Matter 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 COALTION, 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, FOREST CITY RATNER COMPANIES, LLC, Respondents-Appellants.	**CIVIL APPEAL PREARGUMENT STATEMENT**

Respondent-appellant Forest City Ratner Companies, LLC ("FCRC") submits this civil appeal preargument statement pursuant to 22 NYCRR § 600.17:

1. Title of action.

The full title of this action at this time is set forth in the above caption, to which the Court is respectfully referred.

2. Full names of original parties and changes in the parties.

All of the named parties appear in the above caption, and there has been no change in the parties to this proceeding.

3. Counsel for appellants.

Counsel for respondent-appellant FCRC are Kramer Levin Naftalis & Frankel, LLP, 1177 Avenue of the Americas, New York, NY 10036 (tel. 212.715.9100), and Fried, Frank, Harris, Shriver & Jacobson, LLP, One New York Plaza, New York, NY 10004 (tel. 212.859.8000). Counsel for respondent-appellant Empire State Development Corporation ("ESDC") is Bryan Cave LLP, 1290 Avenue of the Americas, New York, NY 10104 (tel. 212.541.2000).

4. Counsel for respondents.

Counsel for petitioners-respondents is Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, Executive Woods, Five Palisades Drive, Albany, NY 12205 (tel. 518.438.9907).

5. Court and county from which the appeal is taken.

This appeal is from a non-final decision and order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on November 10, 2010, a copy of which is annexed hereto as Exhibit A. Leave to appeal from the decision and order was granted by an

order of the same court and Justice entered on December 23, 2010, a copy of which is annexed hereto as Exhibit B.

6. Nature and object of the proceeding.

This proceeding was commenced on October 16, 2009 to challenge ESDC's approval on September 17, 2009 of minor modifications to the General Project Plan for the Atlantic Yards Land Use Improvement and Civic Project (the "Project"). The Project is a public-private undertaking by ESDC and FCRC to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn. ESDC's approval of the original General Project Plan for the Project was upheld by this Court on a prior appeal (*Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *lv. to app. denied*, 13 N.Y.2d 713 (2009)).

The petition's principal claim is that ESDC allegedly violated the State Environmental Quality Review Act ("SEQRA") by not preparing a supplemental environmental impact statement ("SEIS").

7. Result reached in the Supreme Court.

By decision, order and judgment dated March 10, 2010, and entered on March 11, 2010, the Supreme Court denied the petition in its entirety, denied the petition in a related proceeding (*Prospect Heights Neighborhood Council, Inc., et al. v. Empire State Development Corporation, et ano.*, Index No. 116323/09), and denied a motion by both groups of petitioners for a preliminary injunction against further construction of the Project.

On April 7, 2010, petitioners in this proceeding and the *Prospect Heights* case moved for leave to reargue and renew on the ground that the terms of a Development

Agreement between FCRC and ESDC that was executed after the petition was submitted, and the renegotiated agreement between FCRC and the MTA, necessitated the preparation of a SEIS to consider the potential environmental impacts of the Project's being built over 25 rather than 10 years. On November 9, 2010, the Supreme Court granted the motions and remanded the matter to ESDC to make further findings as to the relevance of the Development Agreement and the MTA agreement on the use of an assumed 10-year build-out of the Project as the basis for ESDC's environmental analysis, and as to whether an SEIS should be prepared.

8. Grounds for seeking reversal.

Under SEQRA and controlling precedent, it is within the discretion of an agency to determine whether to prepare an SEIS. It also is well settled that a reviewing court is bound by the facts and record before the agency. The Supreme Court erroneously disregarded these principles.

Here, ESDC determined in September 2009 that it was reasonable to use an assumed 10-year build-out as the basis for its environmental analysis. This position was rational in all respects, and adequately supported by the record. Neither the terms of the Development Agreement nor the MTA agreement compelled a contrary view. Under both the 2009 Modified General Project Plan and the Development Agreement, FCRC was obligated to use commercially reasonable efforts to complete the Project by 2019. The Development Agreement thus explicitly provides that FCRC "agrees to use commercially reasonable efforts to cause the substantial completion of the Project to occur by December 31, 2019," and provides for liquidated damages and other remedies at equity and law. The Development Agreement further provides that none of the other provisions in the Development Agreement trumps FCRC's obligation to use commercially reasonable efforts to complete the Project

within that time frame. The Supreme Court erroneously found that these provisions did not evidence such a commitment by FCRC.

There is no requirement under SEQRA to guarantee a build year or construction period. An SEIS may be required if an approval that changes a project has significant adverse environmental impacts that were not adequately addressed in the final environmental impact statement. Here, there were no significant changes to the Project. An SEIS is not necessary merely because a project falls behind the schedule that was contemplated in the prior environmental impact analysis for the project.

9. Related proceeding.

The November 9, 2010 decision and order also was entered in a related Article 78 proceeding, *Prospect Heights Neighborhood Development Council, Inc.., et al. v. Empire State Development Corp., et ano.* (Supreme Court, New York County, Index No. 116323/09). FCRC and ESDC also have appealed the decision and order in this proceeding. Copies of the order granting leave to appeal and the preargument statement are annexed hereto as Exhibit C. FCRC is unaware of any other related actions or proceedings pending in any court of this or any other jurisdiction.

Dated: New York, New York
February 18, 2011

KRAMER LEVIN NAFTALIS &
FRANKEL LLP

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Attorneys for Respondent-Appellant Empire State Development Corp.

Exhibit A

SCANNED ON 11/10/2010

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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

Index Number : 114631/2009
DEVELOP DON'T DESTROY
VS.
EMPIRE STATE DEVELOPMENT CORP
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 114631/09
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for reargue/renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 10
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memo of Law M1, M2

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

FILED
NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11-9-10

MARCY S. FRIEDMAN

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners,

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.

Index No.: 114631/09

DECISION/ORDER

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al.,

Petitioners,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC,

Respondents.

Index No.: 116323/09

DECISION/ORDER

In these Article 78 proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc. (DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenged the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of a modified general project plan (2009 MGPP) for the Atlantic Yards Project in Brooklyn, to be constructed by respondent Forest City Ratner Companies (FCRC). By decision dated March 10, 2010 (prior decision), this court denied the petitions. Petitioners now move for leave to reargue and renew the petitions.

On these motions, petitioners argue that the court erred in rejecting petitioners' claim that ESDC violated the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 et seq.) by approving the 2009 MGPP without preparing a Supplemental Environmental Impact Statement (SEIS) as a result of changes to the Project. Petitioners also argue that the court erred in rejecting petitioners' claim that ESDC violated the Urban Development Corporation Act (UDCA) by finding that the Project is a plan within the meaning of § 6260(c). Petitioners' motions are based on the terms of a master Development Agreement, entered into between ESDC and FCRC on December 23, 2009 (fn 1) which, according to petitioners, shows that the Project will be built-out over a 25 year period, not the 10 year period that ESDC assumed in reviewing the 2009 MGPP.

The Prior Decision

The court refers to the prior decision for a detailed discussion of the parties' claims in these proceedings. In brief, petitioners' challenge rested primarily on the renegotiation in June 2009 by the Metropolitan Transit Authority (MTA) of its agreement with FCRC to sell FCRC air

rights necessary for development of 6 of the 11 residential buildings to be constructed in Phase II of the Project. In particular, petitioners cited MTA's agreement to permit FCRC to acquire the air rights over a 15 year period extending until 2030, rather than to require FCRC to purchase all of the air rights at the inception of the Project, as had been the case when the original Project Plan was approved in 2006. Petitioners argued that ESDC ignored the impact of the renegotiated MTA agreement on the time frame for construction, and improperly continued to use the 10 year build-out for the Project that had been used in the Final Environmental Impact Statement (FEIS) prepared in connection with the original Plan.

The prior decision set forth the court's reasons for rejecting petitioners' UDCA claim. The court is not persuaded that it misapprehended applicable facts or law governing this claim. The remainder of this opinion will accordingly address petitioners' SEQRA claim.

In the prior decision, the court found that ESDC based its use of a 10 year build-out on three main factors: the opinion of its consultant that the market can absorb the planned units over a 10 year period; ESDC's intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC's financial incentive to do so. (Prior Decision at 11.) The decision reasoned that, under the limited standard for SEQRA review, the court was "constrained to hold that ESDC's elaboration of its reasons for using the 10 year build-out and for not requiring an SEIS was not irrational as a matter of law. ESDC's continuing use of the 10 year build-out was supported – albeit, . . . only minimally – by the factors articulated by ESDC." (Id.)

Evidence of the Terms of the Development Agreement in the Prior Papers and in the Reargument Motions

At the time the petitions and ESDC's opposition papers were filed, ESDC had not yet entered into a formal agreement with FCRC for development of the Project. However, in arguing that the renegotiated MTA agreement did not extend the build-out until 2030, ESDC emphasized that the MTA agreement would be subject to a set of development agreements, to be entered into between ESDC and FCRC, in which FCRC would be contractually committed to implementing the 2009 MGPP, and would be required to use commercially reasonable efforts to complete the Project within 10 years, by 2019. (See e.g. ESDC Memo. In Opp. To DDDB Pet. at 22.) (fn 2) ESDC supported this claim with a citation to the MGPP as well as to a summary of the Development Agreement. (Id., citing AR 4692, 7070.) (fn 3) The MGPP provision that ESDC cited stated in full: "The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019. The failure to commence construction of each building would result in, inter alia, monetary penalties being imposed upon the Project Sponsors." (MGPP [AR 4692-4693].) The summary of the Development Agreement that ESDC cited was a one-page document that described the "Development Obligation" as: "To construct the project described in the Modified General Project Plan," including enumerated improvements. (AR 7070.) (fn 4)

It is undisputed that at the time ESDC approved the 2009 MGPP, the above MGPP provision and summary were the sole documents in the record before ESDC that summarized the terms of the Development Agreement. (June 29, 2010 Transcript of Oral Argument of Reargument Motions [Reargument Tr.] at 34.) As of the time ESDC filed its opposition papers to the petitions, the Development Agreement was in the process of being negotiated. (ESDC

Answer to DDDB Pet., Fact Statement ¶ 39.) However, ESDC cited no evidence of any terms of the Development Agreement other than the above MGPP provision and summary. Rather, in discussing the terms of the Development Agreement in its papers in opposition to the petitions, ESDC repeatedly cited only the MGPP provision and summary. (fn 5) By the time the oral argument of the petitions was held on January 19, 2010, the Development Agreement had been executed. However, ESDC continued to represent that the terms of the Development Agreement were those contained in the MGPP provision and summary. (See e.g. Jan. 19, 2010 Tr. at 44-46, 51, 81.)

On the reargument motions, ESDC for the first time acknowledged the existence in the Development Agreement of a 25 year outside date for substantial completion of Phase II of the Project. The reargument motions also mark the first time ESDC admitted that, at the time of its review of the 2009 MGPP, ESDC knew of the 25 year outside date and "anticipated" its inclusion in the Development Agreement. (Reargument Tr. at 35-36.) (fn 6)

Prior to these reargument motions, the above MGPP provision and summary were also the sole documents containing the terms of the Development Agreement that were furnished to this court. In seeking leave to renew, petitioners offer the full master Development Agreement. This Agreement distinguishes between construction of the Arena and Phase I buildings on the Arena block, and construction of Phase II buildings which constitute 11 of the 16 residential hi-rise buildings to be constructed on the Project site. The former are required to be substantially completed within or reasonably soon after the 10 year build date, and are the subject of heavy penalties in the event of delays. The latter are required to be substantially completed in 25 years or by 2035, and are apparently the subject of less stringent penalties in the event of failure to

meet that deadline.

Development Agreement

As the issue before this court is the impact of the Development Agreement on ESDC's determination to use the 10 year build-out and to approve the 2009 MGPP without requiring an SEIS, the detailed provisions of the Development Agreement regarding scheduling of the construction must be reviewed: The Agreement provides for commencement and construction of the Arena well within the 10 year period. (§ 8.4; Appendix A [requiring the Arena to be the first or second building for which construction is commenced, and requiring the substantial completion of the Arena by the Outside Arena Substantial Completion Date, defined as the sixth anniversary of the Project Effective Date or by 2016].) (fn 7) It also provides for commencement of the Phase I buildings on the Arena Block well within the 10 year period (§ 8.6[d] [providing, subject to certain exceptions, for commencement of Phase I buildings within 3 to 10 years of the Project Effective Date or from 2013 to 2020]), and for substantial completion of the Phase I buildings within a 12 year period. (§8.6 [providing for substantial completion of the Phase I construction within 12 years of the Project Effective Date or by 2022, subject to Unavoidable Delays].) (fn 8) The Agreement defines as Events of Default failure to commence or substantially complete the Arena within the preceding deadlines (§ 17.1[b], [d]) and failure to commence or substantially complete the Phase I construction within such deadlines. (§ 17.1[i], [l].) Upon the occurrence of these Events of Default, FCRC is required to pay substantial liquidated damages (Schedule 3 liquidated damages). For the Arena, these damages are set at $75 million for failure to timely commence construction. (Schedule 3 at 1.) They may amount to as much as $341 million for failure to meet the outside substantial completion deadline,

depending on the length of the default. (Id. at 2-3.) For Phase I, the damages for failure to timely commence construction may reach $5 million per building per year. (Id. at 4-5.) The damages for failure to meet the outside substantial completion date are based on a formula that takes into account the length of the default and the Phase I square footage that has been completed. The Phase I damages shown in the example range from $586,000 per year to $5.5 million. (See § 17.2[a][ii]; Schedule 3 at 8-10.)

In contrast, the Development Agreement does not provide for dates for commencement of Phase II construction other than for commencement of the platform which is needed to support the construction of certain Phase II buildings. The commencement of the platform is not required until the 15th anniversary of the Project Effective Date or 2025 (§ 8.5.) While failure to commence construction of the platform is defined as an Event of Default (§17.1[g]), the significant Schedule 3 liquidated damages are not a remedy for such default. (§ 17.2[a][ii].) The Development Agreement requires Phase II Construction to be substantially complete, subject to Unavoidable Delays, by the Outside Phase II Substantial Completion Date, which is defined as 25 years following the Project Effective Date or 2035. (§ 8.7.) Failure to substantially complete the Phase II construction is defined as an Event of Default (§ 17.1[m]), but is not a basis for the payment of Schedule 3 liquidated damages. (§ 17.2[a][ii].) Rather, the remedy for such default is ESDC's option to terminate the applicable Project Lease for any portion of the Project site on which construction of improvements has not commenced. (§ 17.2[a][vi].)

The Development Agreement contains the following provision requiring FCRC to use commercially reasonable efforts to complete the project by December 31, 2019: "[The FCRC developer entities] agree to use commercially reasonable effort to cause the Substantial

Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date [defined in § 8.7 as 25 years following the Project Effective Date], in each case as extended on a day-for-day basis for any Unavoidable Delays." (§ 2.2.) The Development Agreement provides that the Article VIII deadlines for the performance of Phase I and II work shall not "modify, limit or otherwise impair" FCRC's obligations under the preceding provision. (§ 8.1[d].) However, 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.

The Development Agreement provides that in the event of FCRC's failure to use commercially reasonable efforts, ESDC may resort to remedies available through litigation – i.e., "any and all remedies available to ESDC at law or in equity under or in connection with this Agreement," including specific performance and damages. (§ 17.2[d].) If ESDC were to claim a breach of the commercially reasonable efforts provision, a mixed issue of fact and law would be presented. While courts are adept at interpreting legal standards, determination of this issue would be complicated by the absence of settled authority. There is a substantial body of case law, under UCC 9-627, interpreting the term commercially reasonable manner in connection with dispositions of collateral. (See e.g. Bankers Trust Co. v J.V. Dowler & Co., 47 NY2d 128 [1979].) However, this authority is not factually relevant to the construction context. The parties have not cited, and the court's research has not located, case law articulating standards for awarding damages or equitable relief for failure to use commercially reasonable efforts to meet construction deadlines. (Cf. 330 Hudson Owner, LLC v The Rector, Church-Wardens &

Vestrymen of Trinity Church, 2009 NY Slip Op 51018[U], 23 Misc 3d 1131[A] [Sup Ct, New York County].)

The Development Agreement also does not define the failure to use commercially reasonable efforts as an Event of Default for which Schedule 3 liquidated damages are available. (§ 17.2[a][ii].) It does appear that such failure would qualify as an Event of Default for which a notice to cure is required under a catch-all provision for not otherwise specified defaults. (§ 17.1 [r].) For these unspecified defaults, the Development Agreement provides for liquidated damages in the amount of $10,000 per day until the defaults are cured, or the reduced amount of $1,000 per day if, in ESDC's "reasonable determination," the default would not have a material adverse effect on the value or use of the Project site, or result in a condition hazardous to human health, or put the Project site in danger of being forfeited, or subject ESDC to criminal or civil liability or penalties. (§ 17.2[a][x].) (fn 9) These damages are significantly lower than the Schedule 3 damages available for other specified Events of Default. In addition, imposition of these damages would require a predicate finding, subject to the legal uncertainties discussed above, that the commercially reasonable efforts provision had been breached.

Discussion

As close reading of the Development Agreement shows, the Agreement plainly contemplates an outside build date of 25 years for completion of the 11 Phase II buildings which constitute the substantial majority of the residential buildings at the Project. It provides detailed timetables, firm commencement dates for the Arena and Phase I work, no commencement dates (other than for the platform) for the Phase II residential construction, and apparently far stricter penalties for failure to meet the deadlines for the Arena and Phase I work than for failure to meet

the 2035 outside deadline for substantial completion of the Phase II buildings or for failure to use commercially reasonable efforts to complete the Project by 2019.

In its papers in opposition to the Article 78 petitions, ESDC repeatedly cited, as the basis for its continuing use of the 10 year build-out, the MGPP provision stating ESDC's intent to require FCRC to use commercially reasonable efforts to complete the Project by 2019, and the summary of the Development Agreement (AR 7070). Neither of these documents gave any indication that the Development Agreement would include a 25 year substantial completion date for the Phase II construction. While ESDC's papers acknowledged that there were mandatory commencement dates for construction of the first few buildings on the Arena Block, the papers did not discuss the absence of any deadlines for commencement of the Phase II buildings, were completely silent as to the 2035 outside date, and contained no discussion of the disparate penalties provided for failure to meet the deadlines for Phase I and II construction. ESDC's papers left the inaccurate impression that the commercially reasonable efforts provision was the focus of the Development Agreement, whereas the Agreement in fact contained numerous far more detailed construction deadlines for the Project which cannot be ignored in addressing the rationality of the build-date.

In opposing the petitions, ESDC argued that the master closing documents could not have been included in the record because they did not exist at the time of ESDC's approval of the 20009 MGPP. (Jan. 19, 2010 Tr. at 67.) Significantly, although the Development Agreement had been executed as of the date the petitions were heard, ESDC did not then claim that it was unaware, at the time of the approval, that the Development Agreement would provide the 2035 outside completion date for Phase II rather than a 2019 completion date for the entire Project.

Rather, at the oral argument, ESDC continued to represent that the terms of the Development Agreement were described in the summary (AR 7070) that was in the record before ESDC at the time of the approval. (Jan. 19, 2010 Tr. at 45.) ESDC went so far as to state that this document "summarizes many of the salient elements of the general project plan." (Id.) This summary, of course, said nothing about the 2035 outside substantial completion date for the Phase II construction, and merely stated that FCRC was obligated to construct the Project in accord with the MGPP which, in turn, contained the provision that FCRC would be required to use commercially reasonable efforts to complete the Project by 2019.

As noted above, on the reargument motions, ESDC acknowledged for the first time that it was aware, when it reviewed the 2009 MGPP, that a provision for a 2035 substantial completion date for the Phase II construction would be included in the Development Agreement that was to be negotiated. (Reargument Tr. at 35-36.) However, ESDC never discussed this provision in its review of the MGPP, and ESDC never disclosed the provision to this court in these Article 78 proceedings for review of ESDC's determination.

ESDC had an obligation to furnish the court in these Article 78 proceedings with a complete and accurate record of the proceedings before ESDC. (See generally 7804[e]; Bellman v McGuire, 140 AD2d 262, 265 [1st Dept 1988] [holding that "CPLR 7804[e] requires the respondent in an Article 78 proceeding to submit a complete record of all evidentiary facts." [emphasis in original].) It is axiomatic that ESDC also had an obligation to accurately summarize the bases for its determination in the proceedings before this court. Thus, once the Development Agreement was executed, ESDC had an obligation to bring it to the attention of this court in order to correct the totally incomplete representations, made in the summary of the

Development Agreement and in ESDC's papers in opposition to the Article 78 petitions, as to the terms that were included in Development Agreement regarding the imposition and enforcement of deadlines for completion of the Project. Given ESDC's failure to do so, leave to reargue and renew is warranted. (See Bellman, 140 AD2d at 265.)

In granting reargument and renewal, the court rejects ESDC's contention that consideration of the Development Agreement would violate the well-settled tenet of Article 78 review that the court is bound by the facts and record before the agency. (See generally Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000].) Nor would consideration of the Development Agreement violate the precept that updating of the information to be considered by the agency is "rarely warrant[ed]," given the interest in the finality of administrative proceedings. (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 425 [1986].) The Development Agreement is not accepted to show changed circumstances since ESDC's determination or to supplement the record that was before ESDC. Rather, although the Development Agreement was executed after ESDC's determination, ESDC repeatedly stated that it relied on its terms in approving the MGPP. In fact, at the oral argument of the petitions, ESDC represented that the Development Agreement was the "main thing" ESDC was relying on to get the Project built in conformance with the plan. (Jan. 19, 2010 Tr. at 45-47.) The Development Agreement is therefore accepted to correct ESDC's incomplete representations concerning the Agreement's terms regarding construction deadlines and their enforcement. Put another way, 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 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. (fn 10)

The court also rejects ESDC's contention that reargument and renewal is unnecessary because the 25 year outside date for completion of the Project is "nothing new," and that the documents that were in the record before ESDC – in particular, the summary of Project leases showing 25 year terms (see AR 7068-70) – gave notice of the 25 year outside date. (ESDC Memo. In Opp. To Reargument Motions at 21.) ESDC took a completely contrary position in opposing the petitions. It dismissed petitioners' reliance on the 25 year term leases to show that the Project would take 25 years to build, stating: "[A] sunset provision establishing the date on which the relationship between the developer and ESDC would come to an end with respect to a specific development parcel, whether or not a Project building has been successfully constructed on that parcel, sheds no light on the schedule for construction anticipated by the parties. [¶] Outer 'drop dead' dates do not supersede FCRC's contractual obligation to use commercially reasonable efforts to develop the Project by 2019." (ESDC Memo. In Opp. To PHND Pet. at 35 [internal citations omitted].)

To the extent that ESDC argues that reargument and renewal is unnecessary because ESDC has already taken a hard look at the impacts of delays in the construction of the Project, this contention is also unavailing. For this argument, ESDC relies on the Technical Memorandum (AR 4744 et seq.), prepared at the time of ESDC's review of the 2009 MGPP, in which ESDC concluded that an extended schedule would not result in significant impacts not identified in the FEIS; and that preparation of an SEIS was not needed. (ESDC Memo. In Opp. To PHND Pet. at 39.) While the Technical Memorandum reached this conclusion (AR 4808), it treated the change in the Project schedule as a change from 2016 to 2019. It assumed a 10 year

build-out, stating: "The anticipated year of completion for Phase I of the project has been extended from 2010 to 2014 due to delays in the commencement of construction on the arena block. The anticipated date of the full build-out of the project – Phase II – has been extended from 2016 to 2019 for the same reason." (AR 4752, 4755.) While the Technical Memorandum also undertook an analysis of the potential for delayed build-out, it did so on the basis of the potential for "prolonged adverse economic conditions" (id. at 4808), and not on the basis of a change in the Project schedule to provide for construction beyond 2019, much less over a 25 year period, as to which the Technical Memorandum was silent. Moreover, in considering delays due to economic conditions, the Technical Memorandum analyzed environmental impacts on traffic and parking, as well as transit and pedestrian conditions, over a five year period beyond 2019 or until 2024, not an additional 16 year period to 2035. (Id. at 4812-4815.) It did not provide a specific number of years for its analysis of other environmental impacts, including delays in the development of open space, extensions of time during which above ground parking lots would remain in existence, impacts on neighborhood character, and effects of prolonged construction. With respect to all impacts, the Technical Memorandum concluded that a delay in the build-out due to prolonged adverse economic conditions "would not result in any significant adverse environmental impacts that were not addressed in the FEIS." (Id. at 4816.)

ESDC now suggests that the construction impacts of a 10 year build-out would be the same or even more severe than the construction impacts of a 25 year build-out because, if construction were delayed, "the intensity of the construction would be greatly reduced." (ESDC Memo. In Opp. To Reargument Motions at 14-15. See also FCRC Memo. In Opp. To Reargument Motions at 11.) However, the Technical Memorandum did not compare the

environmental impacts of intense construction over a 10 year period with the impacts of ongoing construction over a 25 year period. It did not address, and the record thus lacks any expert opinion or analysis of, the impact of a potential 25 year delay in completion of the Project.

Conclusion

ESDC argues, and the court agrees, that SEQRA does not require guarantees that a Project will be completed by the build date or exactitude in the agency's selection of a build date. However, ESDC itself acknowledges that "ESDC had the responsibility to determine whether the proposed schedule was reasonable for purposes of conducting the requisite assessment of environmental impacts." (ESDC Memo. In Opp. To Reargument Motions at 5.) As the Appellate Division held in a prior litigation involving the Atlantic Yards Project, a mere inaccuracy in the build date will not invalidate the basic data used in the agency's environmental assessment. (See Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312, 318 [1st Dept 2009] [DDDB I], lv denied 13 NY3d 713, rearg denied 14 NY3d 748 [2010]. See also Committee to Preserve Brighton Beach v Council of City of New York, 214 AD2d 335 [1st Dept 1995], lv denied 87 NY2d 802.) As the Court also held, ESDC's choice of the build year is not immune to judicial review. Rather, it is subject to review under the arbitrary and capricious or rational basis standard that is applicable to judicial scrutiny of any agency action in an Article 78 proceeding. (DDDB I at 318.)

Under this standard, as applied to a SEQRA determination in particular, the court's review "is limited to 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, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231-232 [2007] [citing

Matter of Jackson, 67 NY2d at 417.) "[T]he courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].) However, judicial review must be "meaningful." (Id. at 232.) It is the court's responsibility to "ensure that, in light of the circumstances of a particular case, the agency has given due consideration to the pertinent environmental factors." (Akpan v Koch, 75 NY2d 561, 571 [1990].)

In the prior decision, this court criticized ESDC's lack of transparency and its failure even to mention the MTA agreement by name, but found, based on its review of the record, that ESDC was aware that the MTA agreement had made a "major change" in the Project, and had articulated reasons for its continued use of the 10 year build-out that were marginally sufficient to survive scrutiny under the limited standard for judicial review of a SEQRA determination. (Prior Decision at 15-16.) Now, in what appears to be yet another failure of transparency on ESDC's part in reviewing the 2009 MGPP, ESDC never directly acknowledged or addressed the impact of the Development Agreement on the build-out; and, in these Article 78 proceedings, ESDC never brought to the court's attention the extended construction schedule that the Development Agreement contemplates.

The Development Agreement has cast a completely different light on the Project build date. Its 25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement giving FCRC until 2030 to complete acquisition of the air rights necessary to construct 6 of the 11 Phase II buildings, raise a substantial question as to whether ESDC's

continuing use of the 10 year build-out has a rational basis.

In the prior decision, this court accepted ESDC's claim that because the MTA agreement permitted FCRC to acquire the air rights on a parcel-by-parcel basis, it was not inconsistent with the development scenario posited by ESDC, in which the Project would proceed incrementally within the 10 year build date rather than stall until the 2030 outside date for acquisition of the air rights. (Prior Decision at 12.) This rationale for continuing use of the 10 year build date was, in turn, dependent on ESDC's assertion that it would require a contractual commitment from FCRC to use commercially reasonable efforts to complete the Project by 2019. (See fn 2, supra.) As such, it is also called into question by the Development Agreement that was actually negotiated.

The court makes no finding, at this juncture, as to the rationality of the 10 year build-out. Its reading of the Development Agreement was undertaken not for the purpose of making a final determination as to the proper construction of the Agreement but for the purpose of determining whether the provisions of the Agreement have relevance to the rationality of ESDC's decision to continue to use the 10 year build date. The court has concluded that these provisions unquestionably must be addressed. Under the limited standard for SEQRA review, it is for ESDC to do so in the first instance. Where, as here, an agency action involves a specific project, "environmental effects that can reasonably be anticipated must be considered." (Matter of Neville v Koch, 79 NY2d 416, 427 [1992] [emphasis in original].) If ESDC concludes, in the face of the Development Agreement and the renegotiated MTA agreement, that a 10 year build-out continues to be reasonable, and that it need not examine environmental impacts of construction over a 25 year period on neighborhood character, air quality, noise, and traffic, among other issues, then it must expressly make such findings and provide a detailed, reasoned

basis for the findings.

In sum, the court holds that ESDC did not provide a "reasoned elaboration" for its determination not to require an SEIS, based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project. The matter should accordingly be remanded to ESDC for additional findings on this issue. (fn 11)

It is accordingly hereby ORDERED that the motions of petitioners DDDB and PHND are granted to the following extent: Leave to reargue and renew is granted, and the proceedings are remanded 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.

Dated: New York, New York
November 9, 2010

MARCY S. FRIEDMAN, J.S.C.

Footnotes

Footnotes

fn 1 While the copy of the Development Agreement that is annexed to the petitions is undated, ESDC's counsel confirmed at the oral argument of the petitions that it was executed on December 23, 2009. (Jan. 19, 2010 Tr. Of Oral Argument Of Petitions [Jan. 19, 2010 Tr.] at 46.)

fn 2 ESDC also argued that the MTA agreement set outside deadlines for FCRC to acquire the air rights needed to construct 6 of the Phase II buildings, but that FCRC had the option to purchase the air rights on a parcel-by-parcel basis. ESDC further argued that it expected that FCRC would exercise the option because it would be obligated to use commercially reasonable efforts to complete the Project within the 10 year deadline. (Jan. 19, 2010 Tr. at 51.)

fn 3 AR refers to the record before ESDC in connection with its approval of the 2009 MGPP.

fn 4 The enumerated improvements are improvements of 4,470,000 gross square feet, exclusive of the Arena; no less than 2,250 units of affordable housing, subject to the availability of subsidies; a completed Arena for basketball and other events; at least 8 acres of open space; a completed Urban Room; a completed upgraded railyard; a completed subway entrance; and a completed Carlton Avenue Bridge.

fn 5 Thus, for example, ESDC represented: "With respect to schedule, the MGPP describes the anticipated timetable (AR 4687), and establishes mandatory commencement dates for construction of the first few buildings on the Arena Block (AR 4692); it then dictates that 'the Project documentation to be negotiated between ESDC and the Project Sponsor is to require the Project Sponsors to use commercially reasonable efforts to . . . complete the entire Project by 2019.' (Id.)" (ESDC Memo. In Opp. To DDDB Pet. at 17.) AR 4687 is also a citation to a portion of the MGPP stating that the "[t]he build-out of the Project is likely to occur in two phases," with Phase I anticipated to completed by 2014 and Phase II by 2019. AR 4692 refers to a portion of the MGPP which states that the Arena is expected to open in 2011-2012, sets forth dates for commencement of construction on three other Phase I non-Arena buildings, and contains the much-referenced statement: "The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019."

Another statement typical of ESDC's representations as to the terms of the Development Agreement is as follows: "Petitioners' errors in describing the purpose and effect of the MTA term sheet are compounded by the fact that they look only to the transaction with MTA to discern FCRC's obligations. What they apparently fail to apprehend . . . is that there will be an entirely separate set of agreements between FCRC and ESDC, and that under those agreements FCRC will be contractually committed to implementing the 2009 MGPP. (Fact Statement ¶ 39.) Among other things, FCRC will be required to use 'commercially reasonable efforts' to complete the Arena and certain Phase I buildings in accordance with a specified schedule, and to bring the

Project to completion by 2019, with sanctions imposed for any failure to do so. (Fact Statement ¶ 39; AR 4692, 7070.)" (ESDC Memo. In Opp. To DDDB Pet. at 22.) The Fact Statement is contained in ESDC's Answer to the Petition. Paragraph 39 refers to the commercially reasonable efforts provision of the MGPP (AR 4692); to AR 7067-7069 which is a description of the Project Leases; and to AR 7070 which is the summary of the Development Agreement referred to in the text above.

Other substantially similar representations as to the terms of the Development Agreement are made in ESDC's Memorandum In Opposition To DDDB Petition at 40, and in ESDC's Memorandum In Opposition To PHND's Petition at 34 and 57.

fn 6 At the oral argument of the reargument motions, ESDC stated that the 25 year terms of the Project leases "match[ed] up with what was actually in the development agreement, which is that there was the outside date [of] 25 years from project effective date. . . . So what we have in the development agreement is really from a contractual standpoint, that which was anticipated. There is a schedule. There is a commercially reasonable efforts provision. And then there is the outside dates that is kind of a drop-dead date, no matter what you have to complete by that date." (Rearg. Tr. at 35-36.)

As discussed in the text (infra at 12-13), this argument is contrary to the position taken by ESDC at the time the petitions were first heard.

fn 7 It is undisputed that the Project Effective Date, based on which the Development Agreement imposes deadlines, is May 12, 2010. (ESDC Letter to Court, dated July 2, 2010.)

fn 8 Unavoidable Delays, as defined in the Development Agreement (Appendix A) include typical force majeure conditions and litigation which delays construction, but not inability to obtain financing.

fn 9 ESDC argued that the liquidated damages provision set forth in § 17.2(a)(x) would apply to failure to complete the Phase II construction work by the 25 year outside date, but only if FCRC was not using commercially reasonable efforts to complete the Project within 10 years. As stated at the oral argument:

"If the reason why phase two was not progressing was that Forest City had walked away from the project or failed to use adequate efforts to complete the project, then that would be a breach of the covenant to use commercially reasonable efforts to complete the entire project within a ten-year period. And that would implicate the penalties set forth in x. [§17.2[a][x]]. However, if Forest City was using commercially reasonable efforts to proceed with the project on a ten-year schedule and notwithstanding its use of commercially reasonable efforts it was falling behind the ten-year schedule, then that would not be subject to the penalties set forth in x because there would be no breach of the commercial reasonable efforts covenant." (Reargument Tr. at 31.)

fn 10 The court notes that petitioners, not ESDC, brought the Development Agreement to this court's attention after submission but before decision of the Article 78 petitions. The court

rejected the proffer based on its misapprehension that petitioners were raising a new argument, not before ESDC at the time of its approval of the MGPP, that the Development Agreement that was subsequently negotiated did not provide adequate guarantees that the Project would be built within the 10 year period. (See Prior Decision at 13, n 2.) As held above, the Development Agreement is not received on that issue but in order to correct the incomplete record furnished to this court as to the terms regarding deadlines that would be included in the Development Agreement and, hence, the reasonableness of ESDC's use of a 10 year build-out in approving the MGPP.

fn 11 This decision should not be construed as staying construction of the Project. Petitioners' prior challenges to the original Plan and in condemnation proceedings have not been successful. Thus, as of the date of the prior decision, substantial public and private expenditures had already been made and the Project was already well underway. (Prior Decision at 17.) While petitioners seek a stay in the event of a favorable decision on the reargument motions, they have not moved for reargument or renewal of their prior motion for a stay. The record is not factually developed on the current state of the construction. Nor have the parties addressed the legal issues regarding the propriety of a stay at this stage of the construction. Any decision on a stay would therefore not be proper on this record. The court notes, moreover, that while the DDDB petitioners oppose continued work on the arena (DDDB Reply Aff., ¶ 23), the PHND petitioners represent that their greatest concern is over the disruptions that would occur during extended construction of Phase II, and appear to acknowledge that the Arena could be permitted to proceed. As they also note, the Phase II work is not scheduled to begin for years. (PHND Reply Aff., ¶ 15.)

Exhibit B

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

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57
Justice

Develop Don't Destroy (Brooklyn) INDEX NO. 114631/09

MOTION DATE

- v - MOTION SEQ. NO. 004

Empire State Develop. Corp. et al MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for stay / leave to appeal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and 2 cross-motions are settled pursuant to the parties' stipulations & the same date.

FILED

DEC 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/22/10

MARCY S. FRIEDMAN, J.S.C. J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

v.

Empire State Development Corporation

Index 114631/09

Prospect Heights Neighborhood Dev. Council, Inc.

v.

Empire State Development Corporation

Index 116323/09

FILED
DEC 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

The parties stipulate as follows:

1) If petitioners decide to challenge the ESDC Directors' findings of December 16, 2010, they shall file a supplemental petition pursuant to CPLR 3025(b) on or before January 18, 2011.

2) Petitioners consent to respondents' cross-motions for leave to appeal the Court's November 9, 2010 order (entered November 10, 2010).

3) Respondents agree not to perfect their appeals until the earlier of June 22, 2011 or this Court's ruling on petitioners' supplemental petitions, without prior leave of this Court.

4) Petitioners agree to withdraw their current motions for a stay of construction without prejudice.

5) The Prospect Heights Neighborhood Development Council petitioners (Index 116323/09) withdraw their pending motions for costs and sanctions pursuant to 22 NYCRR § 130-1.1.

FOR Develop Don't Destroy Petitioners

[signature] (Young Sommer LLC)

Petitioner

For Prospect Heights Neighborhood Dev. Council

[signature], [illegible] Law Office

For Respondent Empire State Development ~~Council~~ Corporation

Philip E. Karmel, Bryan Cave LLP

For Respondent Forest City Ratner Companies, LLC

FILED

DEC 23 2010

[signature] Kramer Levin Naftalis & Frankel LLP

~~[illegible]~~ Fried, Frank, Harris, Shriver & Jacobson LLP

NEW YORK COUNTY CLERK'S OFFICE

So Ordered:

MARCY S. FRIEDMAN

Marcy Friedman 12-22-10

New York County Index No. 116323/09

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

In the Matter of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., ET AL.,

Petitioners,

For a Judgment Pursuant to Article 78 and Rule 3001 of the New York Civil Practice Law and Rules,

- against -

EMPIRE STATE DEVELOPMENT CORPORATION, et ano.,

Respondents.

CIVIL APPEAL PREARGUMENT STATMENT

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Respondent Forest City Ratner Companies, LLC
1177 Avenue of the Americas, New York, New York 10036
(212) 715-9100

All communications should be referred to:
Jeffrey L. Braun, Esq.

Index No. 116323/09

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

In the Matter of the Application of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et.,

Petitioners,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC

Respondents.

NOTICE OF APPEAL AND CIVIL APPEAL PREARGUMENT STATEMENT

KRAMER LEVIN NAFTALIS & FRANKEL LLP
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All communications should be referred to:
Jeffrey L. Braun, Esq.