COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of

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

Petitioners-Respondents,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION, et al.,

Respondents-Appellants.

In the Matter of the Application of

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

Petitioners-Respondents,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION, et al.,

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MOTION FOR PERMISSION TO APPEAL OF RESPONDENT-APPELLANT FOREST CITY RATNER COMPANIES LLC

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MOTION FOR PERMISSION TO APPEAL OF RESPONDENT-APPELLANT FOREST CITY RATNER COMPANIES LLC

Notice of Motion

Respondent-appellant Forest City Ratner Companies LLC ("FCRC") hereby moves, pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR § 500.22, for permission to appeal to this Court from the order of the Appellate Division, First Department, entered on April 12, 2012. The other respondent-appellant in this case, Empire State Development Corporation ("ESDC"), also is moving for permission to appeal. This motion is made upon the exhibits annexed hereto and upon the appendix and briefs in the Appellate Division, which are being submitted by ESDC in support of its separate motion.

This motion is returnable at the Court of Appeals Hall in Albany, New York, on May 21, 2012.

The Appellate Division's order (Exhibit A hereto) unanimously affirmed a judgment of the Supreme Court, New York County, which directed ESDC to prepare a Supplemental Environmental Impact Statement ("Supplemental EIS" or "SEIS") and make further findings with respect to Phase II of the two-phase large-scale Atlantic Yards project in Brooklyn. FCRC is building the project for ESDC. The Appellate Division's decision is wholly erroneous, and fundamentally inconsistent with prior decisions of this Court interpreting the State Environmental Quality Review Act ("SEQRA") (Envtl. Conserv. Law § 8-0101, *et*

seq.), including the Court's seminal decision in *Jackson v. N.Y.S. Urban Development Corp.*, 67 N.Y.2d 400 (1986).

This appeal would raise issues that are both novel and of substantial public importance, particularly the basic issue of whether courts may compel an agency to reopen a previously approved Final Environmental Impact Statement, which was sustained by the courts after extensive litigation, where the only basis for requiring a Supplemental EIS is delay in the project's implementation resulting from a deterioration in the general economic climate. Because there concededly were no environmentally significant changes to the project's physical components, these cases and the decisions below constitute impermissible collateral attacks on the prior EIS and the prior court decisions sustaining that EIS's adequacy. If allowed to stand, the decisions below would fundamentally transform the administration of SEQRA in its application to previously approved projects that, like most large-scale projects, encounter delay.

Procedural History

These cases are CPLR Article 78 proceedings that were not formally consolidated but were jointly administered. Both cases challenge ESDC's approval on September 17, 2009, of a Modified General Project Plan (the "2009 MGPP") for the Atlantic Yards project. The 2009 MGPP was approved on the basis of an environmental review that determined that a Supplemental EIS for the

2009 MGPP was unnecessary. The *Develop Don't Destroy* case was commenced against ESDC and FCRC in the Supreme Court, New York County, on October 19, 2009. The *Prospect Heights* case was commenced in the same court against the same respondents on November 19, 2009. The cases were assigned to the same Justice, the Honorable Marcy S. Friedman.

In a decision dated March 10, 2010 (Exhibit B hereto), Supreme Court denied both petitions. However, in a decision dated November 9, 2010 (Exhibit C hereto), Supreme Court granted reargument and renewal, reversed its prior decision and remanded the matter to ESDC for further findings.

On remand, ESDC commissioned and reviewed a comprehensive further environmental analysis and, on December 16, 2010, adopted further findings adhering to its prior determination that the preparation of a Supplemental EIS was unnecessary. On January 18, 2011, petitioners served supplemental petitions asking Supreme Court to annul ESDC's adoption of the 2009 MGPP, require ESDC to prepare a Supplemental EIS, and enjoin all work on the project.

In a final decision and order (one paper) dated July 13, 2011 (Exhibit D hereto), Supreme Court granted the supplemental petitions to the extent of directing ESDC to prepare a Supplemental EIS "assessing the environmental impacts of delay in Phase II construction of the Project, ... including a public

hearing if required," and to make "further findings on whether to approve the MGPP for Phase II of the Project" (Exhibit D hereto, at 21).

FCRC and ESDC served timely notices of appeal on September 9, 2011. No cross appeals were taken by petitioners. In its decision and order of April 12, 2012 (Exhibit A hereto), the Appellate Division affirmed Supreme Court's order.

Notice of entry of the Appellate Division's order was served by overnight delivery on April 12, 2012 (Exhibit E hereto). No motion for leave to appeal to this Court has been made in the Appellate Division. The present motion is timely, because, under CPLR 5513(b) and (d) and CPLR 2103(b)(6), the last day on which a motion for permission to appeal to this Court may be served is 31 days after April 12, 2012, which is Sunday, May 13, 2012. Therefore, by operation of General Construction Law § 25-a(1), the deadline for serving this motion is extended automatically to the following day, Monday, May 14, 2012. This motion is being served on or before that date.

Jurisdiction

This Court has jurisdiction to entertain the present motion, and the proposed appeal, pursuant to CPLR 5602(a)(1)(i).

These proceedings originated in the Supreme Court, which granted the supplemental petitions to the extent of directing ESDC to prepare a Supplemental

EIS and make further findings as to Phase II of the project. The Appellate Division decision and order from which FCRC now seeks permission to appeal affirmed Supreme Court's decision and order, and is a final determination of the proceedings. Remittal to an agency for preparation of an EIS is a final order for purposes of this Court's jurisdiction, and the adequacy of the resulting EIS may "be reviewed by the courts only through a new article 78 proceeding." *Inland Vale Farm Co. v. Stergianopoulos*, 65 N.Y.2d 718, 719 n. * (1985).

Questions Presented for Review

The basic question presented for review here is whether courts can compel an agency to prepare a Supplemental EIS to re-assesses major components of a previously approved large-scale project where there are delays in the project's implementation but, concededly, no environmentally significant physical changes to the project's components. These cases thus raise the issue of whether the decisions directing ESDC to prepare a Supplemental EIS because of delays in the project's implementation amount to an improper collateral attack on judicially upheld prior project approvals.

Because of their unprecedented nature, the decisions below also raise other serious issues about the practice of environmental review under SEQRA, including:

1. In holding that ESDC's environmental analysis on remand of a 25-year project build-out "failed to consider an alternative scenario" with a different pace of construction over 25 years, did the Appellate Division improperly substitute its judgment for that of ESDC as to the reasonable worst-case scenario, from an environmental perspective, that could be expected from delayed construction at the project site?

2. Did the Appellate Division err in holding that ESDC's environmental analysis on remand was inadequate due to a failure to include "technical studies of environmental impacts of protracted construction," where no additional "technical studies" exist that could have been used to further examine environmental impacts of construction delays?

3. Given the basic principle that SEQRA compliance should be conducted "at the earliest opportunity" in a project's planning stages (*Neville v. Koch*, 79 N.Y.2d 416, 426 (1992)), is it proper to use transactional documents for project implementation, which were finalized after the project had been analyzed and approved, to impeach the "build year" – *i.e.*, the assumed future completion date that had been used as a base line for analyzing the project's environmental impacts?

4. Was it proper to expand the scope of SEQRA to include economic issues by requiring the developer to prove that it has the financial

wherewithal to implement the project by the "build year" that was used for the project's environmental analysis?

Statement of Why These Cases Merit Review by This Court

The core issue in these cases – *i.e.*, whether courts can compel an agency to re-examine a previously approved project, or substantial components of the project, because of delay in the project's implementation – is novel and of substantial public importance beyond the Atlantic Yards project. Development projects almost invariably entail delays, and large-scale projects necessarily entail large delays. In New York City alone, large-scale projects such as the rehabilitation of Times Square, the development of Battery Park City and the construction of the Riverside South buildings along the Hudson River on Manhattan's Upper West Side all took substantially longer than envisioned when these projects were approved.

The scope and public importance of the Atlantic Yards project further justify review by this Court of the decisions below. The project is a major public-private undertaking that is intended to revitalize a now cleared but formerly blighted 22-acre site in Brooklyn. In previously upholding the project, this Court described it as follows:

> ... [T]he project is to involve, in its first phase, construction of a sports arena to house the NBA Nets franchise, as well as various infrastructure improvements – most notably reconfiguration and modernization of the Vanderbilt Yards rail

> facilities and access upgrades to the subway transportation hub already present at the site. The project will also involve construction of a platform spanning the rail yards and connecting portions of the neighborhood now separated by the rail cut. Atop this platform are to be situated, in a second phase of construction, numerous high rise buildings and some eight acres of open, publicly accessible landscaped space. The 16 towers planned for the project will serve both commercial and residential purposes. They are slated to contain between 5,325 and 6,430 dwelling units, more than a third of which are to be affordable either for low and/or middle income families.

Goldstein v. N.Y.S. Urban Dev. Corp., 13 N.Y.3d 511, 517 (2009), *rearg. denied*, 14 N.Y.3d 756 (2010). This Court also pointed out that it was undisputed that "blight findings [were] appropriate with respect to more than half of the project footprint" of 22 acres. *Id.* at 517. *See also Goldstein v. Pataki*, 516 F.3d 50, 52 (2d Cir.), *cert. denied*, 554 U.S. 930 (2008). The project is expected to create thousands of construction and permanent jobs, and generate billions of dollars in tax revenues for the City and the State.

ESDC gave its final approvals to the project in 2006, consisting of the adoption of (1) a Modified General Project Plan (the "2006 MGPP") under the Urban Development Corporation Act (the "UDC Act") (Unconsol. Laws § 6251, *et seq.*), (2) a Final Environmental Impact Statement (the "Final EIS") and environmental findings under SEQRA, and (3) a Determination and Findings under the Eminent Domain Procedure Law (the "EDPL") to allow ESDC to use eminent domain in furtherance of the project. Necessary approvals by the Metropolitan

Transportation Authority (the "MTA") and the Public Authorities Control Board also were forthcoming in 2006.

These approvals were challenged by project opponents in multiple lawsuits, and were sustained by the courts, including this Court, without exception.

Nevertheless, as FCRC, ESDC and the MTA proceeded with the preparation of the numerous contractual documents necessary to implement the project, delay resulting from litigation and the worldwide economic collapse and credit crisis of 2008 led FCRC to seek business terms for its agreements with ESDC and the MTA that allowed FCRC (which already had acquired much of the project site through agreements with former property owners) to acquire the remainder of the project site incrementally over time rather than, as had been envisioned in the 2006 MGPP, all at once. Therefore, the 2009 MGPP approved a few modest changes to the project's physical components, and also authorized ESDC to condemn properties for the project in multiple stages instead of all at once, at the outset, as authorized by the 2006 MGPP.

The environmental review that accompanied ESDC's approval of the 2009 MGPP (as well as the subsequent further review conducted by ESDC on remand) were rejected by the courts below as inadequate in their consideration of potential impacts of a prolonged delay in completion of Phase II of the project, necessitating, in the view of those courts, preparation of a Supplemental EIS and

the making of "further findings on whether to approve the MGPP for Phase II of the Project" (Exhibit D hereto, at 21).

Unless overturned, the lower courts' decisions will transform the scope of SEQRA to an unprecedented degree. To allow delay, without more, to subject a project to a mandatory new environmental review would mean that there never would be finality in the process, because projects' environmental analyses would have to be updated repeatedly.

Here, moreover, petitioners unmistakably seek to use the delay caused by adverse economic conditions to reopen the 2006 project approvals that previously were sustained by the courts. By definition, a Supplemental EIS is a targeted document of limited scope that is directed at specific new impacts that were not examined in a prior EIS – not a broad reconsideration of an entire project. *See, e.g., Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219, 231-32 (2007). Despite a Supplemental EIS's narrow scope, the press release about the Appellate Division's decision issued by petitioner Develop Don't Destroy (Brooklyn), Inc. ("DDDB") (Exhibit F hereto) quoted DDDB's "legal director" as stating that "the project should never have been approved at all – it is entirely illegitimate." The same press release quoted one of DDDB's founders as characterizing the Appellate Division's decision as creating "the opportunity and impetus to reconsider and change the course of the project."

To allow this result would contravene this Court's seminal decision in *Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400 (1986), as well as subsequent decisions, all of which caution against making environmental review under SEQRA perpetual. A more detailed discussion follows.

A. Statement of Facts

1. The 2006 Approvals

On December 8, 2006, following a lengthy review process that included public hearings, ESDC approved the 2006 MGPP, the Final EIS and the EDPL Determination and Findings. On December 13, 2006, the MTA's Board of Directors approved the sale to FCRC of real property and development rights over the LIRR rail yard for the project.

For analytical purposes, the 2006 MGPP and the Final EIS divided the project into two phases.[1] Phase I consists of (a) consolidation of three city blocks into a single "Arena Block," (b) construction of the Barclays Center arena, four other buildings and a major new subway entrance on the Arena Block and a fifth building across Flatbush Avenue from the Arena Block, (c) construction of a new rail yard for the LIRR, and (d) construction of permanent underground parking facilities at several locations and two temporary surface parking lots, one of which

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[1] Multiple maps of the project appear in the record (*see, e.g.*, A 89-90, 3890, 3892). Citations in this motion to "A" refer to the appendix that was filed in the Appellate Division in these cases.

would occupy most of Block 1129. Phase II consists of eleven other buildings and eight acres of publicly accessible open space. Six of the Phase II buildings are to be built on a platform to be constructed by FCRC over the new rail yard after the new yard's completion, in air space acquired from the MTA.

The Final EIS's analysis of the project's environmental impacts assumed a 10-year build-out. The Final EIS disclosed that, upon completion, the project would have significant adverse impacts (*see, e.g.*, A 1239). It provided for mitigation of these impacts to the extent practicable, but disclosed that, once completed, the project still would have several unmitigated or partially unmitigated impacts. The Final EIS also disclosed significant temporary impacts during construction of both Phase I and Phase II, *i.e.*, construction-related traffic and noise, and impacts on neighborhood character (A 2286, 2288-89, 2290-91, 2317-18), some of which would be mitigated, but some of which could not be mitigated.

2. Litigations Challenging the 2006 Approvals

The 2006 MGPP and the other project approvals were challenged in a barrage of lawsuits, all of which were unsuccessful. The courts determined that ESDC's use of eminent domain for the project does not violate the federal constitution (*Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 554 U.S. 930 (2008)), that ESDC's use of eminent domain and its financial contribution to the project's infrastructure costs do not violate the state constitution (*Goldstein v.*

N.Y.S. Urban Dev. Corp., 13 N.Y.3d 511 (2009), *rearg. denied*, 14 N.Y.3d 756 (2010)), and that the 2006 MGPP made appropriate arrangements for the relocation of the site's residential occupants (*Anderson v. N.Y.S. Urban Dev. Corp.*, 45 A.D.3d 583 (2d Dep't 2007), *app. denied*, 10 N.Y.3d 710 (2008)).

The adequacy of the Final EIS also was challenged – and was sustained by the courts. *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't), *app. denied*, 13 N.Y.3d 713 (2009), *rearg. denied*, 14 N.Y.3d 748 (2010) ("*DDDB II*").[2] This decision specifically upheld ESDC's use in the Final EIS of a 10-year construction schedule as the basis for its analysis of the project's impacts. 59 A.D.3d at 318.

During the pendency of these litigations, FCRC began construction activities at the project site, including extensive infrastructure improvements (*i.e.*, construction and relocation of conduits and electricity, gas, telephone and cable lines, and water mains and sewers) and demolition of vacant buildings that FCRC had acquired (A 995-96).

3. The 2009 Modifications

The global economic collapse of 2008 made it significantly more difficult for FCRC to obtain financing for the project, and led FCRC to seek

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[2] A prior lawsuit ("*DDDB I*") had challenged the emergency demolition of several dangerous buildings on the project site, and also had sought to disqualify ESDC's environmental counsel. *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *app. denied*, 8 N.Y.3d 802 (2007).

modifications to the business terms that it was negotiating with ESDC and the MTA (A 920-21). The principal modifications agreed to by ESDC and the MTA allowed acquisition of properties for the project in phases rather than all at once at the outset. Contrary to the Appellate Division's erroneous understanding, however (*see* Exh. A, at 6-7), these modifications only changed business terms that had been under discussion; they did not modify any existing contracts. Prior to a December 2009 "master closing" discussed below, FCRC was under no contractual or other legal duty to build the project, because neither the 2006 MGPP nor any contracts obligated FCRC to build the project by any deadline – or ever at all.

On June 24, 2009, the MTA's Board of Directors approved revised business terms for the MTA's proposed agreements with FCRC (A 3905-10), allowing for FCRC's acquisition of the right to build a platform over the new LIRR rail yard and then build improvements on the platform in six separate stages. While the outside date specified for FCRC's last purchase of these rights was in 2030, FCRC also could elect to purchase these rights on an accelerated schedule.

In connection with its consideration of the 2009 MGPP (A 3843-88), ESDC and its environmental consultants prepared an 85-page Technical Memorandum (the "2009 Technical Memorandum") (A 87-170). This document examined whether changes effectuated by the 2009 MGPP would be likely to have significant adverse environmental impacts different from those previously

examined in the Final EIS, which would warrant the preparation of a Supplemental EIS. In conducting this analysis, the 2009 Technical Memorandum, like the Final EIS, assumed that the project would be completed in 10 years. However, it also analyzed a delayed scenario pursuant to which, due to weak economic conditions, the project would not be completed for 15 years. Based on these analyses, ESDC concluded that adoption of the 2009 MGPP did not warrant preparation of a Supplemental EIS (A 172).

On September 17, 2009, ESDC's Board of Directors completed its consideration of the 2009 MGPP and formally affirmed it (A 4022-23). The 2009 MGPP effectuated some minor modifications to physical components of the project, but as Supreme Court recognized (Exh. D, at 19), these changes had no significant environmental effects, and petitioners never have claimed otherwise. The 2009 MGPP also authorized condemnation of properties on the project site in multiple stages rather than all at once at the outset (A 3865), thereby allowing FCRC to lease the properties from ESDC and reimburse ESDC's condemnation costs, including compensation awards (A 920-21), over time rather than all at once.

4. The "Master Closing" and Work on the Project

On December 21-23, 2009, a "master closing" for the project occurred among ESDC, FCRC, the MTA, the City of New York, various affiliates and subsidiaries of these entities, a bond trustee and an escrow agent (A 923). Several

hundred documents were executed at the master closing, including a final Development Agreement (the "Development Agreement') among ESDC, FCRC and various affiliates to establish FCRC's obligations to ESDC for development of the project (A 4024-211). FCRC also delivered letters of credit totaling more than $150 million to secure its obligations and those of its affiliates to ESDC and the MTA, and the sale of more than $500 million in tax-exempt bonds to finance construction of the arena was closed (A 996).

These financial commitments by FCRC enabled ESDC to commence proceedings to acquire title to the properties to be condemned for the project's first stage. ESDC acquired this title on March 1, 2010, and vacant possession was delivered to an FCRC affiliate later in the spring (A 4620-26). At the same time, FCRC's acquisition of the MTA property on the Arena Block was completed. These achievements allowed construction of the arena to begin (A 1156).

Construction of the arena and related public improvements on the Arena Block – including the new subway entrance, a temporary rail yard for the LIRR, remediation of environmental contamination at the former rail yard and substantial preparatory work for a permanent new rail yard (A 1166) – is now far along, in anticipation of the arena's opening for its first event this summer (A 1144). All but one of the buildings on the Arena Block and Block 1129 have been demolished.

5. Litigations Challenging the 2009 Project Approvals

ESDC's adoption of the 2009 MGPP and the MTA board's approval of modified business terms led to a second wave of litigation by project opponents, consisting of five separate proceedings. Three were quickly disposed of.[3]

The two cases at bar are the exceptions that remain pending. In both cases, the contention that a Supplemental EIS should have been prepared essentially was based on the argument that the environmental analysis in the 2009 Technical Memorandum was inadequate because the assumed 10-year build-out that had been used in the analysis was unrealistic in view of the modified business terms approved by the MTA's board, which allowed FCRC until 2030 to complete its acquisition of development rights from the MTA.

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[3] In an Article 78 proceeding joined in by petitioner DDDB, Justice Michael D. Stallman refused to annul the MTA board's approval of modified business terms, holding that the new terms reflected "essentially the same plan" that the MTA had approved in 2006. *Montgomery v. Metropolitan Transp. Authority*, 25 Misc.3d 1241(A), 2009 WL 4843782, at *1 (Sup. Ct. N.Y. Co. Dec. 15, 2009). In the proceeding brought by ESDC to condemn properties for the project, Justice Abraham G. Gerges dismissed counterclaims interposed by condemnees on the basis of ESDC's adoption of the 2009 MGPP. *Matter of N.Y.S. Urban Dev. Corp.*, 26 Misc.3d 1228(A), 2010 WL 702319, at *8 (Sup. Ct. Kings Co. March 1, 2010). Justice Gerges also dismissed a separate Article 78 proceeding that asserted that the 2009 MGPP, the Development Agreement and the MTA board's approval of modified business terms so significantly changed the project that a new determination and findings under the EDPL were required. *Peter Williams Enterprises, Inc. v. N.Y.S. Urban Dev. Corp.*, 28 Misc.3d 1239(A), 2010 WL 3703257 (Sup. Ct. Kings Co. Sept. 20, 2010), *aff'd*, 90 A.D.3d 1007 (2d Dep't 2011). Appeals from these decisions never were perfected.

On January 6, 2010, after the master closing, the *DDDB* petitioners moved for a preliminary injunction halting further work on the project.

6. The March and November 2010 Decisions

By decision and order dated March 10, 2010 (Exhibit B hereto), Supreme Court denied both petitions and the motion for an injunction. The court concluded that, "[u]nder the limited standard for SEQRA review," it "was constrained to hold that ESDC's elaboration of its reasons for using a 10-year build-out and for not requiring an SEIS was not irrational as a matter of law" (at 11). The court reasoned that ESDC "was aware of" the revised MTA-FCRC business terms when it approved the 2009 MGPP but "determined ... to continue to use the 10 year build-out, based on its intent to require FCRC to commit to use commercially reasonable efforts to build-out the Project within 10 years, and based on its real estate consultant's opinion that, notwithstanding the economic downturn, the market could reasonably be expected to absorb the units over the 10 year period" (at 12).

On April 7, 2010, petitioners in both cases filed motions to reargue and renew (A 771-82, 784-804), claiming that the Development Agreement, which had been executed after ESDC's final approval of the 2009 MGPP, supported their claim that ESDC had acted irrationally in not requiring a Supplemental EIS. By decision and order dated November 9, 2010 (Exhibit C hereto), Supreme Court

granted the motions, reversed its prior denial of the petitions and remanded the cases to ESDC "for findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project, and on whether a Supplemental [EIS] is required or warranted" (at 18).

7. ESDC's Compliance With the Remand Order

On remand, ESDC prepared a 37-page analysis of the Development Agreement and FCRC's final agreements with the MTA (A 265-301). This document examined the salient provisions of these agreements, and analyzed their relevance to the project's build-out schedule.

ESDC also directed its environmental consultants to perform an analysis of any significant adverse environmental impacts, not previously addressed in the Final EIS, that reasonably could be expected to result from a delay in the project's completion for up to 25 years. This analysis of an "Extended Build-Out Scenario" was set forth in a 91-page single-spaced document entitled "Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project" (the "2010 Technical Analysis") (A 174-264).

To determine whether new adverse impacts would result from this extended delay, the 2010 Technical Analysis considered each technical area that had been studied in the Final EIS. Detailed technical studies were conducted of the potential impacts on traffic and parking, and transit and pedestrians. Based on

these studies, the 2010 Technical Analysis concluded that, with a delay in the project's completion to 2035, the completed project would have no significant adverse impacts beyond those previously identified in the Final EIS.

The 2010 Technical Analysis also assessed the potential temporary impacts of the Extended Build-Out Scenario. A hypothetical construction schedule consistent with the Extended Build-Out Scenario was created (A 220-22, 253-59), and the 2010 Technical Analysis considered site conditions at seven different hypothetical stages of construction to examine how the project would affect surrounding areas at progressive stages of construction. This examination included detailed analyses of potential construction-related impacts on open space, land use and urban design, traffic and transportation, air quality, noise and neighborhood character to determine whether the Final EIS's conclusions regarding these potential impacts remained valid under the Extended Build-Out Scenario (A 222-44). Specific consideration was given to the prolonged use of Block 1129 for a surface parking lot and construction staging (A 225), and the potential impacts on neighborhood character (A 242-44).

Based on these analyses, the 2010 Technical Analysis concluded that the Extended Build-Out Scenario with an outside project completion date of 2035 would not have significant adverse impacts substantially different from those

previously addressed in the Final EIS, in consequence of which preparation of a Supplemental EIS was unnecessary.

8. The Supplemental Petitions

On January 18, 2011, the petitioners in both cases served virtually identical supplemental petitions (A 837-50, 856-69). These petitions asserted, *inter alia*, that ESDC had failed to take a "hard look" at the long-term impact of construction on the health and viability of the neighborhood.

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

9. Supreme Court's Final Decision

On July 13, 2011, Supreme Court issued a written decision and order (Exhibit D hereto) in which it directed ESDC to conduct a "further environmental review," including "preparation of a Supplemental [EIS] assessing the environmental impacts of delay in Phase II construction of the Project" (at 21). The court also directed ESDC to conduct "further environmental review proceedings pursuant to SEQRA in connection with the SEIS, including a public hearing if required by SEQRA," and to make "further findings on whether to approve the MGPP for Phase II of the Project." *Id.*

The court concluded that the 2010 Technical Analysis contained "an inadequate analysis of the effects of the change in schedule on neighborhood

character" (at 18). To support this conclusion, the court ignored this Court's admonition in *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 308 (2009), that an agency's compliance with SEQRA should be governed by "common sense." Instead, the court rejected ESDC's reliance on the 2010 Technical Analysis as primarily premised on "common sense" rather than "technical studies" (at 11) – although neither petitioners nor the court ever identified any additional "technical studies" that could have been performed.

The court declined to invalidate ESDC's approval of the 2009 MGPP or enjoin the ongoing work on Phase I of the project "[g]iven the extent to which construction of Phase I has already occurred, under a plan which has been subjected to and withstood challenge" (at 20). The court also declined to issue a stay of Phase II construction because "it is undisputed that Phase II work will not commence for many years." *Id.*

10. <u>The Appellate Division's Decision</u>

On April 12, 2012, the Appellate Division unanimously affirmed Supreme Court's decision (Exhibit A hereto). The Appellate Division's eight-page opinion essentially parrots many of Supreme Court's conclusions without citation to legal authority. The bulk of the decision criticizes ESDC's reliance on an assumed 10-year build-out in its 2009 Technical Memorandum, ignoring the fact

that, on remand, ESDC had performed a comprehensive analysis of the impacts of a 25-year build-out, which supplemented the 2009 Technical Memorandum.

Almost as an after-thought at the end of its opinion, the Appellate Division added a cursory two-paragraph explanation of why it viewed ESDC's consideration of a 25-year build-out in the 91-page 2010 Technical Analysis as inadequate. The court disparaged the 2010 Technical Analysis as "not based on any technical studies of the environmental impacts of protracted construction" (at 10), but, like Supreme Court, it did not identify any additional "technical studies" that supposedly could have been performed. The court also substituted its judgment for that of ESDC on ESDC's "choice of worst-case scenarios ... considered reasonable" for a 25-year build-out (*Neville v. Koch*, 79 N.Y.2d 416, 428 (1992)), criticizing the 2010 Technical Analysis as based on the assumption that construction would proceed on a rolling parcel-by-parcel basis rather than "an alternative scenario in which years go by before any Phase II construction is commenced," during which time, supposedly, "area residents must tolerate vacant lots, above-ground arena parking, and Phase II construction staging for decades" (at 10-11).

B. Legal Argument: These Cases Merit Review by This Court

1. Requiring a New Environmental Review Solely Because of Delay in Project Implementation Is Unprecedented

Requiring that a project undergo further environmental review solely because its implementation has been delayed is an unprecedented ruling with far-reaching implications. The Atlantic Yards project was the subject of an exhaustive Final EIS, 3,500 pages in length, completed in 2006 and sustained by the courts as fulfilling ESDC's obligations under SEQRA. *DDDB II*, 59 A.D.3d at 316-19. Therefore, the decisions below conflict with this Court's seminal SEQRA decision, *Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400 (1986). *Jackson* involved the Times Square redevelopment project, which, like the Atlantic Yards project, was a large-scale redevelopment plan intended to eliminate blight and revitalize the relevant area. Like Atlantic Yards, it also was litigated extensively. In that context, this Court observed that "[t]he EIS process necessarily ages data," but "[a] requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives." *Id.* at 425.

Since *Jackson*, this Court has consistently protected the finality of determinations made in compliance with SEQRA. The Court has rendered

numerous decisions halting post-approval environmental studies sought by project opponents to perpetuate or re-institute the review process.

For example, in *Neville v. Koch*, 79 N.Y.2d 416 (1992), the Court considered the environmental review of a rezoning. The Court decided that further environmental review would not be warranted in the future even if the project eventually proposed for the rezoned site differed from the hypothetical worst-case scenarios that had been examined in the EIS for the rezoning. The Court held that "continuing review is not only unauthorized under SEQRA but also invites perpetual litigation and consigns the Site ... to limbo." *Id.* at 427.

Similarly, in *Sutton Area Community v. Board of Estimate of the City of New York*, 78 N.Y.2d 945 (1991), the Court reversed a decision requiring further environmental review, where the Appellate Division had held that a factual error in a final EIS had not been caught in time to allow sufficient consideration of correct information. And in *EFS Ventures Corp. v. Foster*, 71 N.Y.2d 359 (1988), this Court made clear that the environmental review of a project's second stage may not reopen issues that could have been "addressed earlier in the environmental review process." *Id.* at 373.

Here, the project as approved in 2006 and as modified in 2009 are identical except for minor physical changes that no one ever has claimed have environmental significance (Exh. D, at 19). The only other change concerns

implementation of the project, *i.e.*, the condemnation of properties in stages rather than all at once. The project's environmental impacts already were exhaustively examined in the Final EIS, and the physical components of the project examined in that EIS remain the elements of the project under the 2009 MGPP. While the 2009 MGPP changed implementation of the project by allowing properties to be condemned by ESDC in multiple stages, this change reflected – and resulted from – the post-approval deterioration in over-all economic conditions. Under both the 2006 MGPP and the 2009 MGPP, the project was to be built incrementally over a period of several years, with the pace of actual construction governed primarily by market conditions and the availability of financing. The change in property acquisition reflected in the 2009 MGPP was, thus, a response to changed economic conditions – not a change to the project or the cause of any change in the project's construction schedule.

Delay is a phenomenon of most construction projects, including in particular large-scale projects containing multiple buildings intended for construction over a period of years. The lower court decisions requiring a Supplemental EIS on the basis of delay are unprecedented in SEQRA practice. Indeed, these decisions cannot be reconciled with the earlier Appellate Division decision in *Wilder v. N.Y.S. Urban Dev. Corp.*, 154 A.D.2d 261 (1st Dep't 1989),

app. denied, 75 N.Y.2d 709 (1990), which involved the Times Square redevelopment project and followed this Court's decision in *Jackson*.

The change in property acquisition reflected in the 2009 MGPP is essentially identical to a change in the Times Square project at issue in *Wilder*. There, similar to here, project opponents claimed that a change in the project's implementation that replaced "simultaneous acquisition and construction" with "phased acquisition and construction" necessitated another EIS. The Appellate Division disagreed, holding that further environmental review was not warranted. The court explained:

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

154 A.D.2d at 262-63. The court then made clear that the intervening "events" that rendered the "simultaneous construction contemplated in the original plan ... impractical" were a change in economic conditions resulting from "an unprecedented building boom" that had occurred while the original project approvals were in litigation. *Id.* at 262-63. The court concluded as follows:

> ... [I]t would be most inappropriate to permit an unsuccessful challenge to a public benefit project to nevertheless thwart its

> completion by requiring the condemning authority to review the project *de novo* because of circumstances resulting from delay attendant on the litigation. Such a result renders a baseless challenge as effective as a meritorious one in defeating public development projects and cannot be tolerated.

Id. at 263 (emphasis added). These principles are consistent with controlling Court of Appeals precedent and apply with equal force here. Tellingly, however, although the decision in *Wilder* was prominently brought to the Appellate Division's attention in the present cases, the Appellate Division's opinion avoids any mention of *Wilder*.

2. The Lower Courts' Decisions Would Fundamentally Change SEQRA Compliance Due to the Courts' Unprecedented Justifications for Their Impermissible Substitution of Their Own Judgment for That of ESDC

In directing ESDC to prepare a Supplemental EIS, the lower courts usurped the discretion vested in ESDC to make that decision, and improperly substituted their judgment for that of ESDC. In *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219 (2007), this Court made clear that "[a] lead agency's determination whether to require a SEIS ... is discretionary." 9 N.Y.3d at 231 (emphasis added). The Court differentiated this discretion whether to prepare a Supplemental EIS from the standard governing an agency's decision whether to prepare an initial EIS, which "the lead agency must" prepare if a project can reasonably be expected to have any significant adverse impact. *Id.* (emphasis added). Unlike a Supplemental EIS, "the requirement to produce an [EIS] is

triggered by a relatively low threshold ...." *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 397 (1995).

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

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

6 NYCRR § 617.9(a)(7)(i) (emphasis added). While this regulation could perhaps be read to allow an agency to prepare a Supplemental EIS due to a change in economic circumstances, nothing in the regulation can be interpreted to compel an agency to prepare a Supplemental EIS merely on the basis of a change in economic circumstances. Yet that is what the lower courts did in these cases.

Allowing the decisions below to stand would fundamentally change how agencies comply with SEQRA. It is axiomatic that "[a]n agency's responsibility under SEQRA must be viewed in light of a 'rule of reason,'" that "not every conceivable environmental impact ... need be addressed in order to

meet the agency's responsibility," and that "only environmental effects that can reasonably be anticipated must be considered." *Neville*, 79 N.Y.2d at 427 (emphasis in original). Therefore, to examine the potential adverse impacts of a project, the agency must make a "choice of worst-case scenarios" that are "reasonable" to anticipate. *Id.* at 428.

Here, in analyzing the temporary adverse impacts of the construction process, ESDC originally determined in 2006 that a 10-year build-out represented the reasonable worst-case scenario because of the intense level of construction activities that would proceed simultaneously at multiple locations within the project footprint. Therefore, the Final EIS examined potential construction impacts on that basis. This use of a hypothetical 10-year build-out was challenged in litigation and specifically upheld by the courts. *DDDB II*, 59 A.D.3d at 318. ESDC subsequently structured the 2009 Technical Memorandum on the same basis. Then, after the matter had been remanded to ESDC by Supreme Court with a direction to examine the impacts of a 25-year build-out, ESDC and its consultants developed an analytical framework based on a gradual parcel-by-parcel build-out that assumed that the project would be built incrementally as market conditions allowed FCRC to obtain the financing needed for each project component.

The Appellate Division criticized this approach, complaining that ESDC "failed to consider an alternative scenario in which years go by before any Phase II construction is commenced – a scenario in which area residents must tolerate vacant lots, above-ground arena parking, and Phase II construction staging for decades" (Exh. A, at 10-11). However, this criticism overlooks the fact that the site of these vacant lots, parking lots and staging areas were included in the project footprint precisely because – as this Court recognized in *Goldstein v. N.Y.S. Urban Dev. Corp.* – these blocks and the buildings that formerly stood there already were blighted. 13 N.Y.3d at 517. Furthermore, the alternative scenario favored by the Appellate Division, in which many years pass before construction begins, amounts to pure speculation by the courts as to the pace of construction. There is no requirement under SEQRA that an agency examine potential environmental impacts that are "speculative" in nature. *Industrial Liaison Committee of Village of Niagara Falls Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 143 (1988). The lower courts' disapproval of the 2010 Technical Analysis thus amounts to blatant substitution by these courts of their judgment for that of ESDC as to what constitutes a reasonable worst-case scenario for the project.

Furthermore, not only did the lower courts substitute their judgment for that of ESDC as to the worst-case scenarios that reasonably can be expected

from the project, but their justifications for doing so fundamentally transform the scope of SEQRA compliance.

1. Lack of "technical studies". The Appellate Division disparaged the 2010 Technical Analysis on the ground that its conclusions are not supported "with any technical studies on the effects of significantly prolonged construction on various areas of environmental concern" (Exh. A, at 10), a conclusion that echoed Supreme Court's disparagement of the 2010 Technical Analysis as reliant on "common sense" instead of "technical studies" (Exh. D, at 11). However, neither the lower courts nor petitioners ever identified any "technical studies" that could be performed as part of an additional analysis of the impacts of prolonged construction on a neighborhood. The reason for this omission is that there are none.

The evaluation of potential construction impacts on neighborhood character is essentially an examination of qualitative considerations, not quantitative variables. Under SEQRA, while some environmental issues are amenable to quantitative analysis, other issues – such as the impact on neighborhood character – are qualitative in nature and not subject to quantitative

evaluation. *See, e.g., CEQR Technical Manual* (chapter 7).[4] The *CEQR Technical Manual* thus states that, "[b]ecause a neighborhood's character is perceived and contextual, this judgment may be more subjective than in other technical areas." *Id.* at 21-6.

This Court has extolled the application of "common sense" to the subject of compliance with an agency's substantive obligations under SEQRA. *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 308 (2009). A "common sense" approach to the analysis of the potential impacts of construction delay on neighborhood character – an inherently qualitative and subjective issue – was entirely reasonable and proper.

2. Reliance on post-approval contracts. Both lower courts relied on selected provisions of the Development Agreement to support their conclusion that ESDC's use of an assumed 10-year build-out as the basis for the 2009 Technical Memorandum was arbitrary and capricious (*see* Exh. A, at 6-7). So far as we are aware, however, this use of the terms of subsequent contracts for project implementation to impeach the assumed "build year" that previously was used in the project's environmental review is without precedent under SEQRA.

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[4] New York City's *CEQR Technical Manual* has been published by the City to set forth best-practice methodologies to be employed in environmental studies for urban projects. It is available at http://www.nyc.gov/html/oec/html/ceqr/technical_manual_2012.shtml.

The performance of an environmental review for a project generally requires the reviewing agency to choose a "build year," which is "a nonstatutory baseline used ... as a device to provide assumptions" on which the environmental studies can be based. *Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Council of City of New York*, 214 A.D.2d 335, 337 (1st Dep't), *app. denied*, 87 N.Y.2d 802 (1995). *See also DDDB II*, 59 A.D.3d at 318.

The use of subsequently negotiated business terms to impeach the build year previously used in an environmental analysis is inconsistent with a fundamental goal of SEQRA, which is "to incorporate environmental considerations into the decisionmaking process at the earliest opportunity ...." *Neville*, 79 N.Y.2d at 426. SEQRA review of a project necessarily occurs before the project can be finalized and approved. Therefore, contractual documents that govern the financial and other considerations for implementation of the project cannot be finalized until after the SEQRA process has been completed.

Allowing the decisions below to stand would improperly inject post-approval business activity into the judicial review of project approvals. This result is contrary to basic principles of judicial review. *See, e.g., Featherstone v. Franco*, 95 N.Y.2d 550 (2000). It also is fundamentally unfair to project sponsors in view of the need to establish a project's parameters through the approval process before contractual arrangements for financing and building the project can be finalized.

3. Consideration of financial issues. In explaining why it had concluded that the 2009 Technical Memorandum was deficient, the Appellate Division also stated that "respondents failed to show that FCRC had the financial ability to complete the Project in 10 years" (Exh. A, at 8) (emphasis added). Supreme Court likewise stated that "ESDC's further assertion that ... FCRC has the financial incentive to pursue the Project to a 'speedy conclusion' is unsupported by any financial analysis," and that, "while FCRC asserts its intent to comply with its commitment to use commercially reasonable effort to complete the Project in 10 years, its papers in these proceedings are devoid of any detail showing its ability to do so" (Exh. D, at 8) (emphasis added).

The lower courts' requirement of proof of the developer's financial capabilities to support an assumed build year also is unprecedented. SEQRA is an environmental statute intended to provide decision makers with information about the environmental impacts of a project. It is not intended to assess the financial feasibility of a project. Although this Court has not previously addressed this issue, Appellate Division authority prior to these cases had uniformly held that consideration of a project's financial feasibility or the economics of a project is outside the scope of SEQRA and not required, at least in the absence of a showing that the project is a "sham." *See, e.g., Coalition Against Lincoln West, Inc. v. City of New York*, 208 A.D.2d 472, 473 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 123 (1995);

Tudor City Assoc., Inc. v. City of New York, 225 A.D.2d 367, 368 (1st Dep't 1996); *Nixbot Realty Associates v. N.Y.S. Urban Dev. Corp.*, 193 A.D.2d 381, 381 (1st Dep't 1993). Here, there is no claim that the project is a sham, nor can there be in view of the hundreds of millions of dollars already spent on site acquisition and clearance and on actual construction of infrastructure, mass transit improvements and the arena.[5]

Conclusion

These cases are of substantial public importance and raise novel questions of law. Permission to appeal to this Court should be granted.

Dated: New York, NY
May 11, 2012

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[5] We are aware of at least two currently ongoing matters in which project opponents are attempting to bring financial considerations within the purview of SEQRA. In a pending appeal from Supreme Court's decision in *Williamsburg Community Preservation Coalition v. Council of the City of New York*, N.Y County Index No. 10/115437 (May 6, 2011), the petitioners have cited the Appellate Division's decision in these cases to support their contention that the developer of a residential conversion of the former Domino Sugar Factory in the Williamsburg section of Brooklyn should provide evidence that it has the financial resources to build the project. Similarly, in a challenge to New York University's plans to expand its Greenwich Village campus, project opponents have claimed in an April 19, 2012 letter to the City Planning Commission that "in light of the enormous cost of the proposed project," NYU "lacks the financial wherewithal" to implement the project.

Respectfully submitted,

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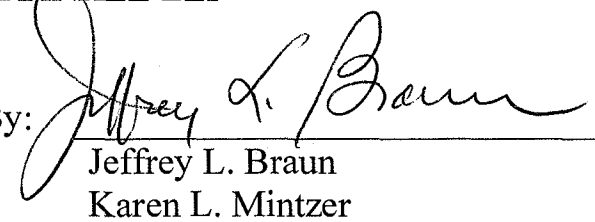
By: 
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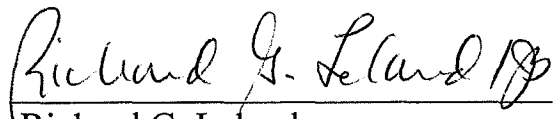
By: 
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Disclosure Statement

Pursuant to 22 NYCRR § 500.1(f), FCRC hereby represents that it is wholly owned, indirectly through other entities, by Forest City Enterprises, Inc., a publicly owned corporation. Forest City Enterprises, Inc. owns directly or indirectly all or major interests in numerous other entities. The primary ones are FC Basketball, Inc., Forest City Sports, LLC, FCR Sports, LLC, Nets Sports and Entertainment, LLC, Brooklyn Arena, LLC, Atlantic Yards Development Company, LLC, Forest City Land Group, Inc., FC/M Gladden II, L.L.C., Forest City Rental Properties Corporation, F.C. Member, Inc., FCR Land, LLC, Forest City Commercial Group, Inc., Forest City Commercial Holdings, Inc., Forest City Residential Group, Inc., FC Mesa Inc., FC Stapleton II, LLC, T.C. Avenue, Inc., Tower City Properties Ltd., Tower City Member, LLC, Tower City Avenue, LLC and Sunrise Development Co.

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