SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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In the Matter of the Application of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC. ATLANTIC AVENUE LOCAL DEVELOPMENT CORP., BOERUM HILL ASSOCIATION, INC., BROOKLYN HEIGHTS ASSOCIATION, INC., FIFTH AVENUE COMMITTEE, INC., PARK SLOPE CIVIC COUNCIL, INC, PRATT AREA COMMUNITY COUNCIL, INC., STATE SENATOR VELMANETTE MONTGOMERY, 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,

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.

- x

Assigned to Justice

Index No. /2009

PETITIONERS' MEMORANDUM OF LAW

Preliminary Statement

This Memorandum of Law is submitted on behalf of the Prospect Heights Neighborhood Development Council (“PHNDC”) and the other petitioners in support of their position that the Empire State Development Corporation (“ESDC”) did not comply

with the State Environmental Quality Review Act [*Environmental Conservation Law, Article 8*] when it failed to prepare and consider a supplemental environmental impact statement ("SEIS") in connection with ESDC's approval of a modified general project plan ("MGPP") for the 22-acre Atlantic Yards development in Brooklyn (the "Project"). In rejecting the need for an SEIS, ESDC concluded that the changes effected by the MGPP to the original general project plan ("GPP") would have no significant impacts on the environment beyond those identified in the original EIS. This conclusion was reached despite the fact that (1) the Project build out was likely to extend 17 years beyond the 2016 date that had been specified in the GPP; (2) this elongated project schedule would keep in place, in whole or in part, the urban wasteland that currently characterizes the Project site, for an additional 17 years, to the great detriment of adjacent homeowners and businesses; (3) the changed schedule will expose the residents of adjacent brownstones neighborhoods to the adverse impacts of Project construction for an additional 17 years; (4) other revisions in the MGPP would allow the Arena that is the centerpiece of the Project and the hectic activities that its operations would generate to stand unbuffered from nearby neighborhoods contrary to the directives of the GPP; (5) new and expanded surface parking lots would occupy much of the Project site for an indeterminate period of time, whereas the under the GPP, parking was to be moved underground; and there is a very real likelihood that the Project will never be completed as planned, thus exposing the neighboring areas to a future of undefined negative impacts.

Petitioners contend that the refusal of ESDC to prepare an SEIS for the

changes in this massive Project authorized by the MGPP was the outcome of Alice-in-Wonderland-like wishing thinking on the part of ESDC and, like the proverbial ostrich, represents the product of decision makers who buried their heads in the sand rather than seriously address the negative impacts of the changes in the Project. At the same time, Petitioners submit that in approving the MGPP, which left much of the shape of the Project, as well as the timing of the build out, to FCRC to determine, ESCD abdicated its proper role under the Urban Development Corporation Act [*NY Unconsolidated Laws, Chapter 252*](the "UDC Act") and illegally delegated to the developer of the Project, Forest City Ratner Companies ("FCRC"), governmental authority that ESDC was obligated to exercise itself.

Petitioners accordingly ask this Court to annul ESDC's determination not to prepare an SEIS and to annul the MGPP, which was approved without compliance with SEQRA and illegally delegated ESDC's governmental responsibilities to FCRC.

Factual Background

The petitioners are seven organizations, three elected officials and 14 individuals who have been deeply concerned about the impacts of the Atlantic Yards Project on their communities since the development plan was first announced. The magnitude of the Project, in and of itself, was a cause for concern, and this was exacerbated by its central element, a basketball arena that would seat more than 18,000 and draw heavy vehicular and pedestrian traffic through these communities to the 214 events projected to be held there annually. Still, petitioners' focus was less on the Arena than on the implications of the new city that was proposed to be built in

close proximity to their neighborhoods – a city that would include 16 towers and constitute the densest residential development in North America. [Petition, ¶ 2]

Petitioners' goal was to have some voice in the shaping of the massive project so that it would be as compatible as possible with the character and fabric of the adjoining communities. As it turned out, petitioners were never allowed to participate in any meaningful way in the planning process, and the development that has taken shape and now morphed into something even more ill-defined and chaotic, reflects how completely they were cut out and how indifferent ESDC and FCRC have been to their concerns. See the Affidavit of Gib Veconi submitted in support of the Petition.

The project that is formally known as the Atlantic Yards Arena and Redevelopment Project was first announced by FCRC in 2003. The centerpiece of the proposal was a Frank Gehry-designed Arena that was to have a green roof providing open space and other amenities. This was to be the new home to the New Jersey Nets basketball team (presumably to be renamed the New York Nets or the Brooklyn Nets), which had recently been purchased by Bruce Ratner, the principal of FCRC. [Petition, ¶ ¶ 2, 50]

The Arena, however, was only the beginning. The Project also included 16 new commercial and residential high rise towers containing some seven million square feet of space and more than 6,000 apartments. Another element was the reconstruction of the LIRR Vanderbilt Rail Yards, which was to be platformed over to provide a base for the Arena and a number of the towers. In addition, many public amenities, including eight acres of publicly-accessible open space and an "urban

room" to consolidate subway entrances, were promised. All of this was to take place on a 22-acre site that lies adjacent to a number of Brooklyn's brownstone residential neighborhoods. This raised great concern among the residents of these areas, as well as many businesses. [Petition, ¶ ¶ 2, 50]

In the spring of 2005, the plans for the Project were "governmentalized," when ESDC and the City of New York entered into several memoranda of understanding with FCRC formalizing those plans. Under this arrangement, ESDC become the titular sponsor of the Project, which allowed it to override local zoning and avoid the City's much more public land use review process. The plan, however, remained basically the same as the one FCRC had announced a year earlier, with the Arena for the Nets as its centerpiece. [Petition, ¶ 50]

At about the same time, the MTA issued an RFP for the sale of certain rights in and above the Vanderbilt Rail Yards, which were a critical part of the Project plans, since they included the spot where the Arena was to be located. FCRC was not the high bidder, but in another example of the control it has exercised over the Project from the beginning, the higher bid was rejected and in September 2005, FCRC was granted the purchase rights; for these it agreed to pay $100 million upfront in cash. Also in September, ESDC, as the "sponsor" of the Project, declared itself to be the "lead agency" for purposes of SEQRA and initiated the environmental review process through a scoping hearing. [Petition, ¶ 51]

In July 2006, ESDC adopted a preliminary GPP for the Project and issued a draft EIS evaluating the environmental impacts. Public hearings were held in August

and September, at which speakers commenting on the draft EIS were allowed three minutes each to address the thousands of pages of environmental studies. Witnesses testifying in support of the Project, whether or not they addressed the environmental impacts, were permitted as much as 15 times longer to present their views. Among many others, PHNDC and several other petitioners submitted detailed comments on the GPP and the draft EIS, expressing their concerns. Many organizations, including the local community board (Community Board 6) and the Municipal Art Society of New York, opposed the Project in its current configuration. Despite the significant opposition, in November 2006, the ESDC board voted to approve the GPP and accept the findings of the final EIS, thereby authorizing the largest single-source real estate project in New York City history. Subsequent legal challenges brought by groups other than the petitioners have been unsuccessful, although one case challenging the use of eminent domain for the Project is pending before the New York Court of Appeals. [Petition, ¶ 52]

Throughout the review process, the public, including the petitioners over their protests, was provided with only the most limited opportunity to participate in the review of the Project, even though the massive development, with its high-rise towers, would significantly change the character of the area and impose on adjacent neighborhoods very significant environmental impacts. This was due significantly to the use of ESDC as the titular sponsor of the Project; under its legislative mandate, all that was required in terms of public involvement was a legislative public hearing on the GPP and the DEIS. And neither ESDC nor FCRC extended themselves beyond

the explicit mandate. Indeed, in voting to disapprove the Project, Community Board 6 based its decision on, among other things, "a failure to involve the community board and the community in a meaningful way; misleading and overstating the involvement of the public in the process." [Petition, ¶ 53; and see Affidavit of Gib Veconi]

Following ESDC's 2006 approval of the Project, concerned civic groups and community organizations stepped up calling for more community involvement, increased transparency of decision-making and reform of project governance. In August 2006, a group of Brooklyn and citywide civic associations and affordable housing groups, including the petitioners, sponsored an initiative known as Brooklyn-Speaks, which in 2007 released a proposal for a revised governance structure that would allow for more transparency and accountability and more meaningful community participation in decisions regarding the shaping of the Project. This proposal was subsequently endorsed by the state and city elected officials from the area and in the spring of 2008, ESDC offered to form a community advisory council. However, it refused to identify any role for the council in future decision-making, and the offer came to naught, as did other efforts by petitioners to open up the ESDC process. [Petition, ¶ 54; Veconi Affidavit]

By the spring of 2008, it had also become clear that economics would not support the build-out of the Project as originally proposed; and the circumstances only grew worse as capital lending dried up. It was suggested that the four towers surrounding the Arena, which had been a key design feature mitigating the placement of the sports facility in a residential neighborhood, would be delayed. Responding to

this development, New York Times architectural critic Nicolai Ouroussoff, an early supporter of the Project, wrote: "Postpone the towers and expose the stadium, and it becomes a piece of urban blight – a black hole at a crucial crossroads of the city's physical history. If this is what we are ultimately left with, it will only confirm our darkest suspicions about the cynical calculations underlying New York real estate deals." (NY Times, March 31, 2008). In June 2009, FCRC announced that the original design of the Arena was being abandoned and presented a revised design that critics likened to an airport hanger. The Times critic wrote again of the consequences: "If it is ever built, it will create a black hole in the heart of a vital neighborhood." (NY Times, June 8, 2009). [Petition, ¶ 55]

In June 2009, the MTA and FCRC "renegotiated" their agreement pursuant to which FCRC was to acquire certain parts of the Vanderbilt Rail Yards and the air rights above it. Among other things, the $100 million upfront cash payment that had been part of the initial deal was reduced to $20 million; the property that FCRC was required to acquire immediately was sharply cut back; the time FCRC was given to pay for, and acquire, additional parts of the property was extended by 14 years to 2030; and the obligation of FCRC to buy the additional parts of the property was, for all intents and purposes, transformed into an option exercisable or not in FCRC's discretion. Thus, control over the Project's development and how it progressed was effectively delegated to FCRC. In the same vein, because it only benefited FCRC, the new agreement, which was approved by the MTA on June 24, 2009, also reduced the size of the replacement rail yard that FCRC was required to provide from nine

tracks with a 76 car capacity to seven tracks with a 56 car capacity. (The MTA Staff summary describing the terms of the new Agreement is attached as Exhibit A to the affirmation of Albert K. Butzel in support of the Petition, hereinafter referred to as the "Butzel Affirmation".) [Petition, ¶ 56]

On June 23, 2009, ESDC adopted an MGPP for the Project, even though no site plan or design renderings were included. The MGPP paralleled the renegotiated MTA agreement in granting FCRC major concessions as compared to the original GPP, including the extension of time for the build out of the Project and granting much greater flexibility to FCRC, as, for example, the timing of when it was required to construct the buildings that, under the original GPP, were the key elements in buffering the Arena from the adjacent residential neighborhoods. In addition, the MGPP accepted the airport hanger configuration for the Arena in place of the Frank Geary design that had been identified by FCRC as a central element of the Project and had been lauded by ESDC at the time it approved the original GPP, and it allowed FCRC to substitute surface parking lots for the Arena for the underground facilities the GPP had required. (The MGPP is attached as Exhibit C to the Butzel Affirmation.) [Petition, ¶ 57]

Crucially, while the MGPP projected that the entire Project would be completed by 2019, this completely ignored the reality of the revised MTA Agreement, which gave FCRC until 2030 to acquire portions of the Project site and begin construction on those lots. This was irrefutable evidence that the build-out would extend far beyond the 2019 date and that if FCRC decided to complete the

Project, it could well be 2033 before that happened – 17 years after the finish date in the original GPP and 14 years after the date identified in the MGPP. Moreover, the MTA Agreement allowed FCRC *not* to purchase the entire property – a clear indication that the Project as presented in MGPP might never be completed; and even it if were, because of the elongated construction schedule, much of the site would lie vacant as an urban wasteland. [Petition, ¶ 58]

The deferral of FCRC's purchase obligations under the MTA Agreement, as well as the 80 percent reduction in the upfront cash payment called for under that Agreement, was a reflection of the extraordinary power that FCRC was exercising in connection with the Project. It was dictating what government was going to receive, rather than vice versa, and this same pattern was evidenced in the MGPP. The extension of the build-out period identified in the GPP was at the behest, and for the benefit, of FCRC, rather than the public. The flexibility allowed under the MGPP in terms of the components of the project – *whether, for example, there would be 336,000 square feet of commercial development or 1.6 million square feet* – was at the behest and for the benefit of FCRC, and FCRC, rather than government, was effectively empowered to make that kind of choice based on *its* preferences. To a significant extent, it was also given control over the pace of development and much else, formalizing what had in fact been the situation since the Project was first proposed 2003. FCRC invented the Project, and it has called tune since then, with government as its vehicle. The willingness of the MTA to give up what it had and cut back sharply on what it would get also reflected that reality. The MGPP not only

confirmed the situation, it turned over what should have been governmental responsibility in determining, among other things, the pace and the components of the Project, as well as the timing of the promised public open space and other project amenities. [Petition, ¶ 59]

Despite the changes that the MGPP made and allowed, as described above, the SEQRA Technical Memorandum provided to the ESDC board by its staff prior to the June 23 approval of the MGPP concluded that none of them would have any significant environmental impacts.[1] The Technical Memorandum based this "conclusion" in significant part on the assertion that the entire Project would be completed by 2019, even though the MTA Agreement evidenced a completion date of 2034. (A copy of the Technical Memorandum is attached as Exhibit B to the Butzel Affirmation.) [Petition, ¶ 60]

ESDC held public hearings on the MGPP on July 29 and 30, 2009, at which speakers were given a few minutes each to present their concerns, and it accepted written comments until August 31, 2009. At the hearings and subsequently, ESDC received numerous comments critical of the MGPP that included demands that ESDC prepare an SEIS because of substantial changes to the project and the new information relating to its likely completion date. PHNDC and other petitioners submitted detailed comments on the MGPP and the Technical Memorandum

[1] Technical memoranda are the vehicles used under SEQRA – at least in New York City – to evaluate the environmental impacts of changes in a particular proposal. Prepared by staff, these are used regularly when a project changes after the final EIS has been issued but before final action is taken. They are also the mechanisms used for evaluating whether changes in a project subsequent to its original approval are such as to require the preparation of a supplemental environmental impact statement.

spelling out the reasons why an SEIS was required and otherwise detailing the deficiencies of the MGPP. (A copy of the written comments submitted by PHNDC is attached as Exhibit D to the Butzel Affirmation). In short order, however, it became apparent that these comments fell on deaf ears. [Petition, ¶ 61]

On September 17, 2009, the ESDC Board met to give final approval to the MGPP. At that time, the ESDC directors were provided with a document prepared by ESDC staff that purported to summarize and respond to the public comments. Without taking the time to study that document in any depth, and relying on the Technical Memorandum to find at that meeting that no SEIS was required, the directors approved the MGPP without any significant changes. [Petition, ¶ 62]

In approving the MGPP, the ESDC board did not take into account, or identify as a matter of environmental concern, the impact of a build-out extending to 2030 or beyond, although this was the most likely development scenario; it did not take into account, or apparently know about, the MTA Agreement that made that time frame for the Project a near certainty; it did not identify or consider the impacts on adjacent residential communities of large portions of the Project site becoming or remaining desolate for 20 years or longer (including those parts of the site where FCRC had razed existing structures and thus added to the expanse of vacant lots); it did not take a hard look at the consequences of adding large new surface parking lots to service the Arena, when the original GPP had provided that Arena parking would be underground; it did not focus on implications of the deferral in the construction of the buildings that under the GPP were critical in providing a buffer between the Arena

and the nearby residential neighborhoods; it did not take into account the traffic growth which, under the City's SEQRA regulations, was required to be, but was not included, in the evaluation of impacts contained in the Technical Memorandum; it did not address the change in design of the Arena itself, because this was not even mentioned in the MGPP or the Technical Memorandum; it did not take a hard look at the impacts of an elongated construction period, with all its noise and other indignities, on the residents of adjoining neighborhoods; and it did not address in any serious way the many other identified impacts that PHNDC and other petitioners presented in their written comments. [Petition, ¶ 63]

What the ESDC board did do in approving the MGPP was to delegate down to FCRC governmental duties that it was responsible for exercising itself. To this end, the MGPP is rife with "anticipations" about how the Project may develop, as distinct from imposing specific obligations of FCRC as developer; and the MGPP effectively leaves it to FCRC to define its obligations in terms of the project components as well as the timetable for the build out. This reflects the reality that has existed with respect to the Project from the outset; FCRC has defined the Project and has changed it over time to suit its convenience, with government simply going along. But with the approval of the MGPP, the delegation of governmental responsibilities went too far. [Petition, ¶ 64]

ARGUMENT

Point One

ESDC Violated SEQRA by Failing to Prepare a Supplemental Environmental Impact Statement

A. The Principal Violations of SEQRA

The State Environmental Review Act was adopted in 1975, with the goal of protecting the environment to the fullest extent possible consistent with other key areas of policy. To that end, it requires that

> Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process. ECL, § 8-0109(1)

As the Court of Appeals described the import of the statute in City Council of Watervliet v. Town Board of Colonie, 3 N.Y.3d 508 (2004):

> "SEQRA's primary purpose 'is to inject environmental considerations directly into governmental decision making' Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 . . . [1988]. The Legislature's intent is reflected in the statute, which requires that '[s]ocial, economic and environmental factors be considered together in reaching decisions on proposed activities. (ECL 8-0103[7]). The procedures necessary to fulfill SEQRA review are carefully detailed in the statute (see ECL 8-0101 – 8-0117; 6 NYCRR Part 617; see also Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337. . . [2003]), and we have recognized the need for strict compliance with SEQRA requirements (Matter of Merson v. McNally, 90 N.Y.2d 742. . . [1997].

The principal mechanism for ensuring that environmental factors or seriously considered in the decision making process the environmental impact statement (or EIS), which SEQRA requires government agencies proposing to undertake an action or give discretionary approvals for actions by others to prepare:

> All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following [among other things]:
>
> (a) a description of the proposed action and its environmental setting;
>
> (b) the environmental impact of the proposed action including short-term and long-term effects;
>
> (c) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (d) alternatives to the proposed action;
>
> (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; [and]
>
> (f) mitigation measures proposed to minimize the environmental impact.

ECL, § 8-0109(2)

SEQRA further requires that the draft EIS be circulated to other involved agencies and the public for their critique and that any comments received, plus answers to them, be included in the final EIS. ECL, §§ 8-0109(2), 8-0109(4) This last requirement is intended to ensure that the public is fully informed about, and has a chance to offer its critique of, the proposed action and also to make sure that the

agency proposing the action does not sweep difficult problems under the rug. *See, e.g.,* Matter of Shawangunk Mountain Environmental Ass'n v. Planning Board of the Town of Gardiner, 157 A.D.2d 273, 276 (3d Dept 1990); Matter of Merson v. McNally, 90 N.Y.2d 742, 755 (1997).

Because a series of discretionary approvals by ESDC were required in connection with the Project, including approval of the GPP, and because it was clear the Project would have a significant impact on the environment, ESDC prepared an EIS before it approved the GPP in 2006. Subsequently, however, FCRC asked to change the Project in significant ways – something that again required a discretionary approval by ESDC for the MGPP. As such, it again required the ESDC comply with SEQRA. But that did not, in and of itself, require ESDC to prepare a new EIS – or, as is more commonly the case, an SEIS. There was a legal duty to prepare an SEIS only if the changes to the Project, as presented in the MGPP, would have a significant impact on the environment not adequately considered in the original EIS.

While the statute itself provides the basis for requiring an SEIS – a new action that may have significant impacts on the environment – the New York State Department of Environmental Conservation, pursuant to the authority granted to it under SEQRA, had issued regulations that fill out the statute. These include, in 6 NYCRR §617.9[a][7]), a regulation on when an SEIS may be required. This provides:

> (i) 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; or

> [b] newly discovered information
>
> [c] a change in circumstances related to the project.
>
> [ii] The decision to require preparation of a supplemental EIS in the case of newly discovered information must be based upon the following criteria:
>
> [a] the importance and relevance of the information; and
>
> [b] the present state of the information in the EIS.
> [iii] If a supplement is required, it will be subject to the full procedures of this Part.

Courts have understandably been wary of requiring agencies to prepare supplemental environmental impact statements due to the passage of time or changes in projects that are not central to the proposed action. Where, however, the change is fundamental and involves *new* impacts having a significant effect on the environment, and those impacts have not been addressed in the original EIS, *the language of the statute requires the preparation of an SEIS.*

The standard of duty for a lead agency under SEQRA, and the standard of review for the courts, is well established. In complying with SEQRA in connection with an action, the agency must have focused on the significant environmental impacts, and the courts review its determination to see 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.* Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process. (emphasis added)

Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986)

The courts may not substitute their own judgment regarding the merits of an agency decision under SEQRA. But where the agency has (1) failed to identify the relevant areas of environmental concern, or (2) having identified the relevant areas, failed to take a "hard look" at them, or (3) having identified the relevant areas and taken a "hard look," failed to provide a reasoned elaboration for its decision, the courts must set aside the decision and direct the agency to rectify the failure before proceeding further.

The willingness of the courts to do so is reflected in many Court of Appeals and lower court opinions, including Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337 (2003)[decision annulled for failure to prepare an EIS where agency failed to take a hard look at the impacts of hazardous materials]; Matter of Kahn v. Pasnik, 90 N.Y.2d 599 (1997)[decision annulled where, in deciding not to prepare an EIS, agency failed to take a hard look at traffic and other impacts]; Chinese Staff and Workers Association v. City of New York, 68 N.Y.2d 359 (1986) [decision annulled for failure to prepare an EIS when agency failed to identify or take a hard look at possible secondary impacts of new luxury housing in Chinatown]; Matter of Kogel v. Zoning Board of Appeals of Town of Huntington, 58 A.D.3d 630 (2d Dept, 2009)[determination set aside when agency, in deciding not to prepare an EIS, failed to take a hard look at, or provide a "reasoned elaboration" regarding, potential impacts raised in an environmental assessment form]; Matter of Kittredge v. Planning Board of Liberty, 57 A.D.3d 1336 (3d Dept 2008) [determination set aside when agency's decision not to prepare an EIS was

based on its failure to take a hard look at potential impacts of project on wildlife]; Matter of Serdarevic v. Town of Goshen, 39 A.D.3d 552 (2d Dept 2007)[negative declaration annulled and preparation of full EIS directed for failure to take a hard look at, and provide a reasoned elaboration regarding, potential impacts of project on Town reservoir]; Matter of Shawangunk Mountain Environmental Ass'n v. Planning Board of Gardiner, 157 A.D.2d 273, 276 (3d Dept 1990)[decision annulled for failure to prepare an EIS when the project was in a sensitive environmental area and there was the potential for erosion, sedimentation and stream pollution].

The preceding cases all involved situations where an agency failed to prepare an EIS in the first instance, rather than instances, such as that involved here, where ESDC determined not to prepare a supplemental EIS. But the statute sets out the same standard – whether the action (here, changes in the actions) will have a significant effect on the environment; and the same standards of judicial review set out in Jackson v. New York State Urban Dev. Corp., *supra,* 67 N.Y.2d at 417, apply – whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and provided a reasoned elaboration for its decision. Matter of Riverkeeper, Inc. v Planning Bd Of the Town of Southeast, 9 N.Y. 3d 219, 231 (2007).

In this case, it is clear that the changes in environmental impacts were significant beyond anything identified in the original EIS, and it is equally clear that in the case of the most important changes, ESDC did not identify them at all or, when it did, it did not take a "hard look" at them.

Certainly, the most significant of these changes was the schedule for the

build out, which is now likely to extend an additional 17 years beyond the completion date identified in the original EIS. ESDC, through the Technical Memorandum, addressed the question of longer build out but limited its vision to a three year extension. Based on the realities of the current economic environment and even normal schedules for the construction of up to 6,000 units of housing, this was bogus on its face. But that was not the critical shortcoming.

What was critical was ESDC's *complete failure to identify or acknowledge,* much less take into account, the fact that FCRC had abandoned its 2005 agreement with the MTA for the purchase of the rights to the Vanderbilt Rail Yards and entered into a new agreement in June 2009. This reduced FCRC's commitment from an immediate cash purchase of all of the real property interests for $100 million to an initial payment of just $20 million for the land necessary for the Arena, and 20 years of installment payments, largely at FCRC's option, to acquire such of the remaining rights as it elected to buy. The new Agreement stretched out the schedule for acquisition to 2030 – more than 20 years longer than would have been the case with the upfront purchase. More importantly, it was clear evidence the Project would not be completed until at least 2033, since it would take at least three years to construct a new tower after the land was acquired. This was 17 years longer than the analysis of impacts in the original EIS has assumed.[2]

[2] ESDC's own decision document implicitly recognizes that the Project will take decades to complete. The Project Leases Abstract includes the basic terms for the leases of parcels associated with the 16 towers. The basic structure is that ESDC will lease each parcel to an FCRC affiliate until the building is completed at which point it will be purchased by the entity owning the building. However, the Abstract states that *if the improvements are not completed, the leases will terminate "no later than the 25th anniversary of the vacant*

And these 17 years were not, and if ESDC had taken a hard look, it could not possibly have viewed them as, benign or even neutral in their impacts. First of all, even assuming that the Project would be completed, it would take 17 more years of construction to complete it, so that the adverse impacts of that construction on adjacent neighborhoods – the noise, the congestion, the dust, the blocked streets and single lanes – all of these would stretch out 17 years more.[3] Second, because of the elongated build-out would leave portions of the site vacant for 17 additional years, the impacts of the desolate landscape on adjoining neighborhoods – the sense of the 1970's South Bronx in Brooklyn -- would last far longer, with a much greater potential to spread the contagion to those neighborhood. Finally, the uncertainties that the elongated build out would have their own depressing impact on the neighboring communities.

ESDC took no account of this extraordinary elongation of the schedule of the

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possession of the Arena Block and any other properties acquired in the first taking." (emphasis added) Therefore, by ESDC's own terms, FCRC would have until at least 2035 to complete the buildings in Phase II. Yet ESDC never addressed this scenario under SEQRA.

[3] The Technical Memorandum considered rather summarily an extended build out to 2024, *but this failed to identify the critical areas of environmental concern*. Among other failings, it treated the elongation of construction impacts as being no different from construction impacts for any other period of time – two years or five years, it is all the same, they are "temporary" impacts. But SEQRA does not provide any such exception. Moreover, when a construction period may extend 25 years, as is the case here, the negative impacts, which cannot be denied, can hardly be explained away as "temporary." This is recognized in the City Environmental Quality Review Manual, which states that for actions with lengthy construction periods, it may be appropriate to examine additional areas of environmental concern in addition to those examined for most projects (traffic related impacts, air quality and noise). These additional areas include: land use and neighborhood character; socio-economic conditions; community facilities; open space; historic resources; and infrastructure. Manual at S3-1

build out or of the consequent adverse environmental impacts. Indeed, in deciding that an SEIS was not required, neither the ESDC Board, nor the Technical Memorandum on which the Board relied, identified the terms of the MTA Agreement, much less its implications. In thus ignoring the fundamental changes reflected in and brought about by the Agreement and other clear evidence that completion of the Project would extend decades, ESDC failed to identify a critical area of environmental concern; and in doing so it violated SEQRA.

In addition, the extraordinary flexibility that ESDC allowed to FCRC to determine the components and timetable of the Project raises serious questions under SEQRA about the long-term impacts of an ill-defined project subject to continual change and reconfiguration. In effect, ESDC has granted FCRC an open-ended option permitting the developer to bank the much of the land on the Project site for future development when, in the developer's sole judgment, the time would be right and then in a configuration that could be far removed from what was analyzed in the original EIS. Not only that, there are so few absolute obligations in the MGPP and the MTA Agreement that FCRC could, if it so chose, walk away from the Project, leaving it only partially finished, with acres of land left vacant. In light of the uncertain economy and the immense costs that FCRC would face in seeing the Project through, this "failure" scenario is no longer speculative.

Indeed, the reality of such a failure scenario is demonstrated by recent developments in New London, Connecticut, where the City of New London, in the name of economic development, condemned and cleared a tract of several acres,

including many private homes, to provide a site for a major new Pfizer Pharmaceuticals office and laboratory center. This plan led to a landmark lawsuit challenging the use of eminent domain to take private property for another private use, a power that was upheld in a 5-to-4 decision of the United State Supreme Court. Kelo v. New London, 545 U.S 469 (2005). The ultimate outcome, however, reported on the front page of The New York Times on November 13, 2009, is that after building one part of the project, Pfizer has abandoned the rest, leaving a swathe of desolate landscape behind it. Given the current economic climate and the far freer hand FCRC has to delay the Project or abandon it in midstream, the MGPP significantly increased the potential that a “failure” scenario could happen at Atlantic Yards. However, despite written requests by PHNDC and other groups that it prepare an SEIS to examine the implications of such a scenario, ESDC failed to do so and neither identified nor took a hard look at the environmental impacts that would accompany a failure of the Project. In this, too, ESDC violated SEQRA.

"The purpose of an SEIS is to account for new information bearing on matters of environmental concern not available at the time of the original environmental review." Coalition Against Lincoln West, Inc. v Weinshall, 21 AD3d 215, 223 [1st Dept. 2005], lv to appeal denied 5 N.Y.3d 715. In that case, the court found that information contained in updated studies related to a ramp closure did not identify any significant impacts not identified or considered in the original FEIS and thus the decision to not require an SEIS was upheld. In this instance, by contrast, the realities of a 17-year elongation of the Project build out, and the

obvious added impacts that would follow from this elongation, were never addressed in the original EIS because there was no reason to believe that the construction schedule and the wasteland of vacant lots would extend beyond 2016. The realities of the real estate market and the new MTA Agreement have made it clear beyond any doubt that this impacts will continue an additional 17 years, yet neither the Technical Memorandum nor anything else that ESDC relied on identified or took a hard look at the resultant impacts. It is always possible – though in our view it would be arbitrary and capricious – that if a proper analysis were made of these impacts, ESDC would still conclude that no SEIS is required. However that may be, it is the role of this Court to ensure that agencies follow the mandates of SEQRA in making such decisions. Up to now, ESDC has failed to do so.

B. Other SEQRA Failings

While ESDC's failure to address the implications and the impacts of the greatly elongated build-out of the Project was certainly the most serious of the errors it made in concluding that no SEIS was required, there were additional failures of consideration that underscore the fact that such a supplemental impact statement should have been prepared in this case. Included among these are the following:

1. Expanded Surface Parking. In the original EIS, the analysis of the impacts of the parking spaces needed to service the new Arena was predicated on the assumption that such parking would be located underground beneath several building sites. However, due to the extended build out of the Project, more than

1,000 of these spaces will now be located in surface parking lots. Indeed, it appears that surface parking will increase by 62% over what was projected in the original EIS. While the increase in surface parking was identified in the Technical Memorandum, no adverse impacts from this change were identified. It was as if the adjoining neighborhoods did not exist or that the thousand parked automobiles would not be unsightly or that empty surface lots when no event was taking place worked no blight on nearby communities. The blithe way this change in the Project was treated in no way qualified as the "hard look" SEQRA requires.

2. Runoff Implications of Expanded Surface Parking. The expansion of surface parking as a part of the modified Project would expand impermeable surfaces as compared to the amount projected in the original EIS, which contemplated a "green" roof to the Arena as well as 7 acres of highly landscaped "public open space" within the residential enclave and below which would be massive tanks for storage and re-use of storm water. This increase in impermeable surfaces, in turn, would increase the burdens on the area's storm water sewers, which also serve as sanitary sewers. The increased runoff will exacerbate sewage overflows at combined sewer outflows just downhill from the Project site and may also increase flooding in the surrounding communities. The Technical Memorandum failed to take a hard look at these impacts.

3. Increased Visibility of the New Arena. The original EIS concluded that the new Arena, although adjoining residential neighborhoods, would not adversely impact them because it would be accompanied and hidden by four large new

residential towers, which would provide a visual buffer between the Arena and those neighborhoods and would also activate the Project site when the Arena was closed. Under the MGPP, however, there is no specified date for the completion of these towers, and no commitment to build beyond the first two. As a result, the mitigating impacts of the towers in terms of the visibility of the Arena and the activation of the area will be deferred and could be lost altogether, with vacant lots and surface parking substituted in place of the towers. As Nicolai Ouroussoff, architectural critic for The New York Times, wrote: "Postpone the towers and expose the stadium, and it becomes a piece of urban blight – a black hole at a crucial crossroads of the city's physical history." Yet, the Technical Memorandum passed this change off as unimportant and in doing so, failed to take the "hard look" that SEQRA requires.

4. Traffic Congestion. While the Technical Memorandum recognized that there would be some delay in the build out of the Project – from 2016 to 2019 – it concluded that this would result in no change in traffic congestion. It did this by assuming that there would be no increase in traffic from other sources (so called "background traffic") in the three year period of the delay. However, in arriving at this conclusion, the Technical Memorandum ignored the directive in the City's SEQRA Technical Manual that background traffic be increased by 0.5% per year. If this directive had been followed, it would have resulted in a 1.5% increase in background traffic for 2019, which, given current levels of congestion in the area, would have had a significant negative impact. Moreover, by the theoretical completion year of 2024, the calculated increase would have reached 4%, and by

2033, the realistic completion date, it would have exceeded 8%. The failure of the Technical Memorandum to follow the directive in the City Technical Manual and to evaluate traffic congestion on this basis was far less than the "hard look" SEQRA requires.

5. Implications of the Redesigned Arena. The original Project was touted on the basis of its architectural provenance – the design of the eminent architect, Frank Gehry. This included the Arena, in particular, whose innovative design, including a green roof that would provide open space as well as runoff mitigation, was lauded as the centerpiece of the Project. All this has dropped away with the MGPP. Mr. Gehry has been let go, and the Arena has been redesigned into something that looks like far different and has no green roof. Given the prominence the original architect and his design were accorded in the GPP, the implications of the new design should have been addressed in the Technical Memorandum and by the ESDC Board. But they were not even identified.

6. The Failure Scenario. As discussed above, the probability that the Project will never be completed or will be only partially completed is very real. In either of these cases, the blighted conditions that allegedly exist, some of which were created by FCRC's demolition of homes and other buildings it has acquired for the Project, will be continued, rather than remedied. This "failure" scenario was and is sufficiently realistic that it should have been addressed and evaluated in the Technical Memorandum and in an SEIS. Here, again, ESDC fell far short of the standards the SEQRA imposes.

Point Two

ESDC Acted Illegally and Beyond its Authority in Delegating Down to FCRC the Discretion to Determine the Schedule for the Project Build Out and the Components That are to be Included in the Project

The UDC Act was enacted by the New York State Legislature in 1968. It created the Urban Development Corporation, which now does business as ESDC, to carry out projects in New York State for what were identified as statewide public purposes. As such, it was given power to override local land use regulations. While ESDC's original focus was on low- and middle-income residential development, its charter was much broader than that, including commercial, civic, industrial and mixed-use projects. In time, at least in the City of New York, ESDC's most visible role became that of sponsoring large-scale projects, such as the 42nd Street Redevelopment project and the failed Jets' stadium on Manhattan's West Side, where the parties in interest, including the City, wished to avoid compliance with the City's own zoning and land use procedures.

The UDC Act provides ESDC with broad powers focused over what are defined as "projects" in Section 3(6) of the Act [NY Unconsolidated Laws, Chapter 252, §3(6)]. These powers are set out generally in Section 5 of the Act and include the authority to acquire and sell land and exercise responsibility for the design and implementation of its projects. The powers are reserved to ESDC. Nowhere in the UDC Act is there authority to delegate to private parties decisions regarding the timing or make up of a project. That, however, is what the petitioners submit, ESDC

had done in this case – and done illegally.

This is clear from the face of the MGPP. Thus, ESDC has not placed specific limits on the components of the Project, but has left much to FCRC to decide. In particular, commercial development, which was a modest component under the GPP, has now been expanded, but by how much is left to the discretion of FCRC. Anywhere between 336,000 square feet and 1,607,000 square feet of commercial development is permitted under the MGPP, with the decision on amount left entirely to FCRC to make. Similarly, a hotel of 140,000 square feet is permitted – *if* the developer decides it wants to build it. Residential units can now range anywhere between 5,000 and 6,000 units, as FCRC determines; and this decision will in turn determine how much affordable housing will be included. Moreover, the timetable for the build out is left entirely to FCRC; with the exception of a "drop dead" date projected as 2035, the MGPP leaves it up to the developer to decide when, and ultimately whether, to proceed with any particular element of the Project.

We have pointed out before, and we reiterate now, that what ESDC has done is to grant FCRC an open-ended option permitting the developer to bank much of the land on the Project site for future development when, *in the developer's sole judgment*, the time is right and then in a configuration that the developer, to a significant extent, chooses. Moreover, with so few absolute obligations under the MGPP, FCRC can walk away from the Project, leaving it only partially finished. An arrangement of this kind is in no way and nowhere authorized under the UDC Act. ESDC is a public authority invested by the

legislature with governmental powers. FCRC, by contrast, is a *private* entity that would make the Project *private*, using ESDC simply as a government enabler. Bruce Ratner, the principal of FCRC, has said as much. In a November 8, 2009 article appearing in Crain's New York.com, Mr. Ratner is identified as

> . . . refus[ing] to discuss what the project will look like, whether or not it will include an office building and even who will design the first residential tower, which he's slated to break ground on early next year.
>
> Initially, the project called for four office towers, but by early this year, only one was on the drawing boards. Asked when it will go up, Mr. Ratner responds with a question: "Can you tell me when we are going to need a new office tower?"
>
> He has no intention of sharing the designs for the complex. "*Why should people get to see plans*?" he demands. "*This isn't a public project*. We will follow the guidelines." (emphasis added)

Nothing could more clearly illustrate the misuse of ESDC's governmental powers than this commentary. The private developer has taken on the government's role. But it has only been able to do so because government has delegated that role – delegated it without legislative authorization and in excess of its power to so. The "arrangement" with the private sector that ESDC has countenanced in this case is, quite simply, *ultra vires.*

The courts of New York have not stood idly by when unauthorized delegations of government power have been attempted. In one leading case, Boreali v. Axelrod, 71 N.Y.2d 1 (1987), the Court of Appeals held that a Public Health Council created by the Legislature had exceeded its authority when it issued a comprehensive code to govern smoking in public areas. The court noted that while the Legislature had

given the Council broad authority to adopt regulations on matters concerning public health, the scope of the Council's authority under its enabling statute was limited by its role as an administrative, rather than a legislative, body. The court concluded that the Council usurped the latter role and thereby exceeded the mandate that the Legislature delegated to it. Similarly, in this case, in delegating its basic power to pursue residential, civic and other limited types of project, ESDC exceeded its legislative mandate and illegally transferred its authority to FCRC.

In Matter of Schumer v. Holtzman, 60 N.Y.2d 46 (1983), the District Attorney of Queens County, concerned that her involvement in an investigation of a political rival might appear to conflicted, delegated down to an independent “master” the authority to conduct the investigation free of her oversight and control. The rival brought an Article 78 challenge to this arrangement. The Court of Appeals held that it was invalid and *ultra vires* as an attempt by the District Attorney to delegate powers that she was obligated to exercise herself.

Another Court of Appeals case, Matter of Fink v. Cole, 302 N.Y. 216 (1951) is equally in point. In that case, the Legislature delegated down to the Jockey Club, a private organization, the power to grant licenses to owners, trainers, jockeys and other working at New York running tracks. The court invalidated the statute, holding that the delegation by the Legislature of licensing power to a private corporation was an unconstitutional relinquishment of legislative power. If the legislature cannot delegate legislative-type rights (which clearly include land use restrictions) to a private entity, then it must follow that an entity created by the Legislature, here

ESDC, cannot delegate to a private organization, here FCRC, powers that the Legislature has given to it, and it alone.

Under the UDC Act, ESDC was granted expansive powers to pursuing housing and other projects in needy areas and to promote economic development. It was not, however, authorized to delegate its powers to private entities. In do so in this case, ESDC violated the law, acted arbitrarily and capriciously and abused its discretion.

Conclusion

For the foregoing reasons, the Petition should be granted, ESDC's approval of the 2009 Modified General Project Plan should be annulled, and ESDC should be directed to prepare a supplemental environmental impact statement in this matter.

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Respectfully submitted,

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