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.

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Assigned to Justice Friedman

Index No. 116323/09

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL PETITION

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Assigned to
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Index No. 10833/2009

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL PETITION

Preliminary Statement

This Memorandum of Law is submitted on behalf of the Prospect Heights Neighborhood Development Council and the other petitioners in support of their Supplemental Petition. By that Petition, the Petitioners contend that the Empire State

Development Corporation ("ESDC") did not comply with the State Environmental Quality Review Act [*Environmental Conservation Law, Article 8*] when, in September 2009, the agency approved the Modified General Project Plan ("MGPP") for the 22-acre Atlantic Yards development in Brooklyn (the "Project"). The Petitioners also contend that ESDC did not comply with this Court's Decision and Order dated November 9, 2010 (the "November 9 Decision), when, only five weeks after the mandate issued, the agency reasserted its position that it had a rational basis for adhering to at 10-year construction schedule when it approved the MGPP and found that the environmental impacts of a 25-year build-out would not be significant or require a supplemental environmental impact statement. The Petitioners ask the Court to annul the MGPP and the more recent findings and enjoin further construction of the Project unless and until there as been compliance with SEQRA.

The background of this proceeding is well known to the Court and summarized in the Affirmation of Albert K. Butzel dated January 17, 2011 (the "Butzel Affirmation") to which the Court is respectfully referred. In summary, ESDC approved the MGPP without preparing a supplemental environmental impact statement ("SEIS"). The Petitioners challenged the approval on the grounds that in failing to prepare an SEIS, ESDC had failed to comply with SEQRA and that its approval of the MGPP was invalid for that reason. In making this claim, the Petitioners relied primarily on the failure of the Technical Memorandum prepared for ESDC to evaluate the impacts of a build-out that could extend far beyond the 10-year schedule assumed in that document. The Petitioners contended that a much longer build-out was not only

inevitable due to the collapse of the real estate market but was also evidenced by an amended agreement between the sponsor of the Project, Forest City Ratner Companies ("FCRC"), and the MTA, which gave FCRC until 2030 to complete the purchase of the properties that would support Phase II of the Project.

By decision dated March 10, 2010, the Court denied and dismissed the Petition, concluding that while the ESDC process lacked transparency, there was enough – albeit barely enough – in the record to support the agency's continued use of a 10-year construction schedule in evaluating construction impacts. But in the meantime, ESDC, FCRC and other parties had entered into a Master Development Agreement ("MDA"), the terms of which allowed FCRC until 2035 to complete the Project, indicating that construction could run on for 25 year or even more. The Petitioners moved to reargue and renew the Petition on the basis that the MDA provided clear evidence that the 10-year construction schedule employed in the Technical Memorandum was unsupportable and had been so at the time of the approval of the MGPP.

By the November 9 Decision, the Court granted the Petitioners' motion and remanded the matter to ESDC, holding that in approving the MGPP, ESDC "did not provide a 'reasoned elaboration' for its determination not to require an SEIS" and remanding the matter to the agency to make further findings. On December 16, 2010, the ESDC Board met and approved new findings, which are included in the Exhibit Binder as Exhibit B (the "December 16 Findings"). These Findings, while acknowledging that the Project could no longer be completed in 10 years, continued

to insist that its use of that schedule as a basis for approving the MGPP was rational at the time. In addition, relying on a "Technical Analysis" prepared by its consultants (a copy of which is included in the Exhibit Binder as Exhibit C), the Board also found that even if the build-out required 25 years, the environmental impacts would not change from described for the 10-year construction period in the 2006 FEIS.

The issues that remain to be decided are (a) whether the December 16 Findings themselves are rationally based and (b) whether ESDC's September 17, 2009 approval of the MGPP was somehow cured by the new Technical Analysis and Findings. The Petitioners' understanding of the Court's remand order was that ESDC was obligated to make *rationally-supported* findings explaining why it continued to use a 10-year schedule in determining whether an SEIS was required. If ESDC could not provide that rational basis and "reasoned elaboration," then its approval of the MGPP would not be sustainable, since the agency did not have before, at the time that approval, the information on environmental impacts that SEQRA required.

For the reasons described below, in the Butzel Affirmation and in the Affidavit of Stuart Pertz, FAIA, submitted in support of the Supplemental Petition (the "Pertz Affidavit"), Petitioners believe that the December 16 Findings and the materials on which they are based do not support the ESDC's use of the 10-year build-out that it continues to try to justify; that its after-the-fact analysis of a longer construction schedule cannot be substituted, *nunc pro tunc,* for the evaluation of impacts it was required to have before it at the time it approved the MGPP; and that the hastily-prepared and belated Technical Analysis is deficient in its evaluation of the long-term

construction impacts, serving as a justification rather than the good faith evaluation that SEQRA and the Court's November 9 Decision called for. Petitioners accordingly ask the Court to annul ESDC's approval of the MGPP and its determination not to prepare an SEIS and enjoin further construction unless and until ESDC has complied with SEQRA.

LEGAL POINTS

A. Standard of Review; Continued Invalidity of the MGPP

The standard of review for SEQRA actions has been well articulated by this Court in its March 10 and November 9 Decisions. It may not substitute its judgment for that of the agency, but rather must limit itself to determining whether the action was arbitrary, capricious or an abuse of discretion – the action must be rationally-based. At the same time, the Court's review must be "meaningful." Specifically with respect to SEQRA, the Court must determine whether the agency (1) identified the relevant areas of environmental concern, (2) took a "hard look" at the potential impacts, and (3) made a "reasoned elaboration" of the basis of its determination. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986); Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337 (2003). The same standard applies to an agency's determination whether or not to prepare an SEIS. Matter of Riverkeeper, Inc. v Planning Bd of the Town of Southeast, 9 N.Y. 3d 219, 231 (2007).

It was the third of the three Jackson factors that this Court found wanting in its November 9 Decision. It reached this conclusion based on the terms of the MDA,

which, taken together with the acquisition schedule included in the MTA Agreement, evidenced the likelihood that at the time the MGPP was approved, ESDC was aware that the Project could not be completed within 10 years and thus the evaluation contained in the Technical Memorandum based on a 10-year schedule was irrational at the time. However, rather than annulling the MGPP then and there, the Court remanded the matter to ESDC to give it a chance to explain how its adherence to the 10-year building out could be deemed rational.

ESDC purported to do so in the first of the December 16 Findings. But as described at length in the Butzel Affirmation, ¶¶7-19, to which we respectfully refer the Court, the explanations provided in support of Finding 1 are clearly an after-the-fact attempt to *justify the* erroneous 10-year construction schedule used in the 2009 Technical Memorandum, rather than a rational explanation for its use. As early as April 2009, Marisa Lago, the CEO of ESDC, had stated publicly that the Project would not be completed for "decades," clearly evidencing the understanding within the agency that a 10-year build-out was not going to happen [Butzel Affirmation, ¶10]. This was a statement based on reality – by the summer of 2009, the housing market in Brooklyn in terms of sales was only one-third of that which it had been in 2006, when the FEIS was finalized [Butzel Affirmation, ¶11]. That ESDC understood the situation clearly when it approved the MGPP is evidenced not only by Ms. Lago's statement, but also by its being aware of the MTA Agreement, which, as ESDC states in its Response to the Court, extended the purchase and payment dates for 2030 so that the Project could go forward in a difficult real estate market [Butzel Affirmation, ¶¶12-

13; ESDC Response to the Court, pp. 4, 20]. It is also clear that at the time it approved the MGPP, ESDC was well advanced in negotiating the MDA, which allowed FCRC 25 years to complete the Project, an allowance that was also reflected in the lease abstract annexed to the MGPP itself [Butzel Affirmation, ¶14-15]. Thus, there can be no reasonable doubt when it approved the MGPP, ESDC knew that the build-out would extend well beyond 10 years.

To the Petitioners, that is the very definition of "irrational" or "arbitrary." The facts before ESDC led to only one possible conclusion – that the construction of the Project *would* extend well beyond 10 years and *could* extend 25 years or longer. However, to have accepted that reality would have required ESDC to undertake a full analysis of the environmental impacts of the extended build-out. To do this would have required several more months at least and, in our view, would have properly led to a decision to prepare an SEIS. There was clearly no patience in ESDC (or FCRC, which was struggling to get the Arena financed) to accept any further delay. That, in Petitioners' view, is what resulted in the arbitrary decision to adhere to the 10-year schedule in the Technical Memorandum and the MGPP.

ESDC's attempts to explain away the decision as of September 2009 are almost embarrassing. The contentions that "outside dates" are meaningless and that in this case, they were simply the outcome of lawyers trying to be extra-careful not only ignore the reality of market conditions in the fall of 2009, but would also reduce the carefully-negotiated contracts to irrelevance [*see* Butzel Affirmation, ¶¶16-17]. These are bootstrap efforts to explain away the basic failing that has come back to

haunt ESDC. That it attempts do so is perhaps understandable – if the agency were to acknowledge that it should have assessed the impacts of a longer build-out before approving the MGPP, that would also acknowledge that the approval was invalid. But the efforts to deny it are, the Petitioners submit, both unworthy and futile. The facts are the facts, as they were, and were recognized to be by ESDC, in the fall of 2009. In the Petitioners' view, the Response to the Court submitted by ESDC to justify Finding 1 is simply one more example of a pattern of concealment that characterized the MGPP process from the start.

There was no rational basis for ESDC's continued use of the 10-year build-out in the 2009 Technical Memorandum and in its approval of the MGPP; and nothing in ESDC's Response to the Court provides a rational explanation for that arbitrary use. There was no "reasoned elaboration" at that time of why ESDC continued to use the 10-year construction schedule, because there was no rational basis for continuing to use it; and nothing in the Response to the Court provides a reasoned elaboration now. Referencing the Jackson tests, ESDC may have identified construction impacts as an area of environmental concern, but by adhering to the 10-year build out, it failed to take a "hard look" at them; indeed, it blinded itself from doing so. And as the Court has already found, the agency did not provide the "reasoned elaboration" required under the third prong of the test. Given these failures, ESDC's approval of the MGPP was illegal; and nothing it has offered in its Response to the Court could have or has cured that illegality.

In most cases where courts have found that an agency approval did not comply

with SEQRA, those approvals have been annulled and treated as void, with the matter remanded to the agency to reconsider the approval after remedying the violation. *See, e.g.,* Chinese Staff and Workers Association v. City of New York, 68 N.Y.2d 359 (1986); Matter of Tri-County Taxpayers Association v. Town Board of Queensbury, 55 N.Y.2d 41 (1982); Vitiello v. City of Yonkers, 255 A.D.2d 506 (2d Dept, 1998*); and see* Matter of Dickinson v. County of Broome, 183 A.D.2d 1013, 1015 (3d Dept 1992). In this case, however, the Court did not annul the MGPP, rather giving ESDC another chance to provide a "reasoned elaboration" for its determination. If, as the Petitioners contend, the Court agrees that ESDC's Finding 1 and its Response to the Court did not provide the requisite "reasoned elaboration" or rational basis for the continued use of the 10-year construction schedule, it should now annual the approval of the MGPP and direct ESDC to reconsider and act anew on that Plan *after* it has fully and fairly identified and disclosed the environmental impacts of a 25-year build-out and has made a rational and sustainable decision on whether or not to prepare an SEIS.

B. Reasonable Worst-Case Analysis

Even if ESDC had had some basis for adhering to the 10-year construction schedule in the Technical Memorandum and its approval of the MGPP, the relevant regulations under SEQRA *required* it to analyze the construction impacts under a "reasonable worst case scenario." This obligation is spelled out in the City's CEQR regulations and very specifically in the CEQR Technical Manual,[1] which ESDC and FCRC have regularly cited and endorsed in opposing the Petitioners' claims in this

[1] The Technical Manual can be found on line at http://www.nyc.gov/html/oec/html/ceqr /technical_manual.shtml.

proceeding.

The "reasonable worst case scenario" requirement is identified and explained in detail in Chapter 2 of the Technical Manual. As explained there, the purpose of using such a scenario is to ensure that the SEQRA analysis takes account of the reasonably-assumed maximum impacts that may result from the proposed action [CEQR Technical Manual, pp. 2-3]. In this case, whatever basis there might have been for ESDC to believe that a 10-year construction schedule *might* still be met, the "reasonable worst case scenario" was clearly reflected in the MTA Agreement and the MDA, which allowed FCRC 25 years to complete the Project. These were not speculative limitations but dates made specific in two of the principal documents governing construction of the Project. Even if 2035 was an "outside" date with uncertain relevance as ESDC argues, it was nonetheless the date made real, in terms of the "reasonable worst case scenario," by those two agreements; and as discussed above, the situation those dates reflected was certainly known to ESDC before it finalized the Technical Memorandum and approved the MGPP. In failing to follow the requirements spelled out in the CEQR Technical Manual, ESDC violated SEQRA.

C. The Deficiencies of the Technical Analysis

Perhaps recognizing the limitations of its position that the use of a 10-year construction schedule was rational at the time ESDC approved the MGPP, shortly after the Court's November 9 Decision, the agency hired its regular consultant to conduct an analysis of environmental impacts assuming the build-out of the Project

extended for 25 years. Not surprisingly given everything else that has characterized ESDC's approach in the case, the conclusion – set forth in Finding 3 of the December 16 Findings and allegedly documented in the Technical Analysis – was that there would be no significant new or different impacts as compared to those described in the 2006 FEIS and thus no SEIS was required or warranted.

What the Petitioners believe to be major deficiencies in the Technical Analysis that reflect a continuing failure by ESDC to identify or take a hard look at very significant and damaging environmental impacts are spelled out in the Butzel Affirmation and the Pertz Affidavit, to which the Court is respectfully referred. If the Court agrees with some or all of the failings identified in those papers, then under the Jackson standard, Finding 3 and the conclusion about an SEIS that follows from it are arbitrary and capricious and should be annulled.

Beyond that, however, even if the evaluation contained in the Technical Analysis were persuasive, the Petitioners submit that it could not cure the failure of the ESDC Board to have had such an evaluation before it at the time it approved the MGPP. This is established law: the first important SEQRA case decided by the Court of Appeals – Matter of Tri-County Taxpayers Association v. Town Board of Queensbury, 55 N.Y.2d 41 (1982) – held that a failure to comply with SEQRA could not be cured retroactively, but that the offending agency was obligated to correct the deficiency and only then take action of the proposal.

Here, ESDC's approval of the MGPP was given on the basis of a 10-year construction schedule, without regard to the *reality at the time* that the build-out

would extend much longer. Perhaps the Board would have approved the same MGPP after considering the impacts of the extended construction schedule. However, it did not do so in September 2009, because it could not do so without an analysis of those impacts; nor could it do so on December 16, 2010, because it had not gone through the review and hearing procedures required of the agency. So instead, it simply adhered to the line that the decision to evaluate impacts on the basis of a 10-year build-out was rational at that time. As discussed above, that was not the case and ESDC knew that it was not the case. As a consequence, the MGPP was not validly approved on September 17, 2009; and because ESDC has not reapproved the MGPP *after* considering the impacts of the 25-year construction schedule and otherwise complying with the requisite procedures, including public hearing procedures under the UDC Act, the Plan remains invalid.

D. ESDC's Doubtful Good Faith[2]

The Petitioners believe that ESDC has acted in doubtful good faith in its actions that led up to and included approval of the MGPP and in its efforts to discount and conceal the reality of the extended construction schedule that was brought on by the market crash. The questionable actions began with the decision to adhere to the 10-year construction schedule when the agency's own CEO had already acknowledged that it would take "decades" to complete the Project. They

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[2] The Petitioners do not suggest or mean that counsel for ESDC or FCRC has proceeded other than in good faith in this proceeding. It is the actions of the agency that the Petitioners believe have been less than forthright in its efforts to explain away its decision to adhere to the 10-year construction schedule and withhold the evidence represented by the MTA Agreement and the MDA.

were continued and made the more egregious by using that schedule for purposes of the Technical Memorandum in the face of the collapse of the Brooklyn housing market beginning more than a year before the MGPP was approved. They were carried forward further by the agency's failure to promptly disclose the terms of the MTA Agreement. They were continued into this court proceeding, when the agency did not immediately bring to the Court's attention the terms of the MDA and, in fact, did its best to keep those terms from the Court until it had already issued its March 10 Decision. Lastly, and most recently, ESDC has responded to the Court's re-mand mandate in a manner that is patently contradicted by the facts and has once again put moving the Project forward promptly ahead of moving it forward legally and responsibly.

ESDC's attitude that it can pretty much do what it wants has not escaped the notice of the courts, including this Court, which has twice take note of the lack of transparency in the agency's proceedings and dealings and also concluded that it was less than forthright in its disclosure of the MDA and its terms.[3] The Petitioners believe that this questionable conduct is pertinent to the issues the Court is called upon to decide in this, the latest round of the case. If, as we believe, ESDC has attempted to control, or even manipulate, the process through its actions, that in its own right bears on the arbitrariness of its actions both in approving the MGPP and

[3] In another case, the First Department, though later reversed by the Court of Appeals on the merits, issued a scathing commentary on ESDC's action in the Columbia eminent domain proceedings. Matter of Kaur v. New York State Urban Development Corp, 72 A.D.3d 1 (1st Dept 2009), *rev'd* 15 N.Y.3d 235 (2010); Develop Don't Destroy (Brooklyn) v. Empire State Development Corp, 59 A.D.3d 312, 326-32 (Catterson, J., concurring).

in its Response to the Court's November 9 Decision. It is one thing for an agency to make a mistaken determination; it is quite another to make a determination that it knows is based on a mistake or error. The latter is what the Petitioners believe happened in this case and what, they respectfully submit, should lead the Court to require ESDC to start over again and do it right next time.

We have not attempted to research cases in which agency action has been rejected by the courts because it was not taken in good faith. Through personal experience, however, we are familiar with the actions of another State agency, the New York State Department of Transportation, in the court proceedings over the Westway megaproject proposed for Manhattan's Lower West Side waterfront. The courts' opinions in these cases and their conclusion that State DOT acted in bad faith are instructive, and we respectfully refer this Court to those opinions, which will be found under the titles and citations that follow: Action for Rational Transit v. U.S. Army Corps of Engineers, 536 F. Supp. 1225, 1252-53 (D.C.N.Y. 1982); Sierra Club v. U.S. Army Corps of Engineers, 541 F. Supp. 1367, 1370, 1372-83 (D.C.N.Y. 1982); Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1031-33, 1044-50 (2d Cir. 1983); Sierra Club v. U.S. Army Corps of Engineers, 590 F. Supp. 1509, 1515-25 (D.C.N.Y. 1984), *aff'd in part, rev'd in part,* 776 F.2d 383, 390-92 (2d Cir. 1985).

E. Remedy

For the reasons we have described under Heading A above, the Petitioners submit that ESDC's approval of the MGPP must now be annulled, since both its

decision not to prepare an SEIS and its approval of the MGPP were based on a fallacious premise and the agency has failed to provide a reasoned elaboration of, or a rational basis for, that premise. The annulment of the decision and approval will render them void and require ESDC to reevaluate the need for an SEIS before deciding whether to approve the MGPP (whether in its current or an updated form).

The remaining critical (and difficult) issue is whether further work on the Project should be stayed until ESDC complies with SEQRA. The Petitioners submit that it should be for the following reasons:

First, if, as we believe, ESDC did not comply with SEQRA when it approved the MGPP, the work that is now underway is proceeding under an illegal and invalid approval. In general, work requiring governmental approvals should not be allowed to proceed on that basis.

Second, in this case, it appears that FCRC has only been able to proceed with construction of the Arena because of ESDC's failure to disclose to the Court in a timely fashion the terms of the MDA, which clearly evidenced the irrationality of the continued use of the 10-year construction schedule. Not knowing this, the Court initially denied the Petition in its March 10 Decision. This, in turn, allowed FCRC to draw down from escrow the proceeds of the bond sale required to finance Arena construction. If, as subsequent events (including the Court's November 9 Decision) have shown, the MGPP was approved in violation of SEQRA and the Court had so held in its March 10 decision, it appears that the terms of the escrow would have prevented the proceeds from being released, in which case financing for the current

work would not have been available.[4] The Petitioners submit that ESDC and FCRC should not be rewarded for having concealed the terms of the MDA until after the bond proceeds had been released.

Third, the Petitioners submit that they have met or will meet the standards for granting injunctive relief. Their case on the merits is set out in the Butzel Affirmation, the Pertz Affidavit and this Memorandum of Law; if the Court agrees, they will have met the first prong on the test by prevailing on the merits. They believe they have also met the two other tests – the danger of irreparable injury in the absence of an injunction and a balancing of the equities in their favor.

With regard to *irreparable injury*, absent an injunction or stay, FCRC will continue with construction of the Project. The construction process itself generates irreparable injury; noise, dust, traffic, and all the other concomitants of a large scale development project are disrupting the lives of neighbors, including the Petitioners and members of the Petitioner organizations. That damage cannot be undone, and money cannot adequately compensate for it. See e.g. *Lattingtown Harbor Property Owners Ass'n, Inc. v. Agostino*, 34 A.D.3 536, 825 N.Y.S. 86 (2d Dep't 2006).

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[4] The key document involved – the so-called Commencement Agreement – has previously been submitted to the Court as exhibit to Jeffrey Braun's Affirmation dated December 10, 2010. Section III of that Agreement provided that the escrow agency could only release the bond proceeds if it had *not* received a Notice of Injunction. "Notice of Injunction," in turn, is defined in Sections II and III.3(h) to mean an "Injunction *or* Unstayed Adverse Decision." The last terms includes any decision that, among other things, "overturns or invalidates any party's authority to (A) enter into" the bond proceeds transaction. ESDC was a party to that transaction, and a holding that it had not complied with SEQRA would have invalidated its authority to enter into the closing. The Petitioners do not know, of course, what remedy the Court would have fashioned if it had ruled against ESDC in its March 10 decision; but the Petitioners would have had the opportunity at least to argue for invalidation.

Equally important, the Petitioners are threatened with *specific* irreparable injury that extends well beyond the current area of work involving construction of the Arena. In particular, the current plans to demolish the remaining structures on Block 1129 and convert it to an immense parking lot for 1100 vehicles threaten to impose on the Petitioners the very burdens and indignities that ESDC has failed to evaluate; and work in this Block will expand the area of disruption, currently limited primarily to the Arena site, to a new area deeper into the Prospect Heights residential neighborhood and immediately adjacent to the Prospect Heights Historic District. Finally, if this open lot is built, it will remain that way far longer than assumed in the original EIS (or in the 2009 Technical Memorandum) because of the extended build-out of the remainder of the Project. This, in turn, would have significantly greater impacts on surrounding residential neighborhoods than has been analyzed up to now.

With regard to *the balancing of equities*, the Petitioners acknowledge that FCRC has already invested a large amount into the Arena portion of the Project and that construction of that structure is in full swing. However, this is not for want of the Petitioners' efforts to stop it; and since the fall of 2009, FCRC has been fully aware of the Petitioners' claims and the risk that a judicial ruling could require it to stop or even reverse the work. See, e.g., *Vitiello v. City of Yonkers,* 255 A.D.2d 506 (2d Dept, 1998); *Matter of Watch Hill Homeowners Assn v. Town Board,* 226 A.D.2d 1031 (3d Dept 1996). Thus, any injury to FCRC by reason of a stay of construction would be self-created. In contrast, the Petitioners, through no fault of their own, are being adversely impacted every day by the ongoing construction.

Furthermore, while FCRC has invested a large amount in the Project in absolute terms (much of it in the form of "soft costs"), the only structure on which work has begun is the Arena, and it is not yet too late to modify the Project, if necessary or appropriate, to mitigate adverse impacts. In contrast, each day that construction is permitted to continue limits the options.

Finally, given the a efforts of ESDC and FCRC to conceal their awareness that completion of the Project is 10 years was not possible (or not realistic), they do not come to the Court with clean hands and thus should not be heard to complain of injuries that they are in part responsible for creating.

There is ample New York authority that a stay or injunction is appropriate when an agency has failed to comply with SEQRA. See, e.g., *Williamsburg Around the Bridge Block Association v, Giuliani*, 223 A.D.2d 64 (1st Dept 1996); *Matter of Powis v. Giuliani*, 216 A.D.2d 107 (1st Dept 1995); *Vitiello v. City of Yonkers,* 255 A.D.2d 506 (2d Dept, 1998); *State of New York v Town of Horicon*, 46 A.D.3d 1287 (3d Dept 2007); and see *Matter of Dickinson v. County of Broome,* 183 A.D.2d 1013, 1015 (3d Dept 1992), where the court concluded that an injunction was unnecessary because "SEQRA mandates that the required environmental review be completed before respondents may act . . . and respondents cannot approve, fund or carry out any construction relating to the proposed complex until they have fully complied with SEQRA [citations omitted]." In this instance and at this point, if the Court agrees that ESDC has not complied with SEQRA, there is no effective

approval for the ongoing work. Accordingly, an injunction against *all* continuing work would be appropriate.

In some cases, however, where construction of a large scale public project is underway, the courts have issued injunctions but stayed their effectiveness for several months to allow compliance with SEQRA. See, e.g., *H.O.M.E.S v. New York State Urban Development Corp.*, 69 A.D.2d 222 (4th Dept 1979)(four month stay where project was nearing completion); *Matter of UPROSE v. Power Authority of the State of New York*, 285 A.D.2d 603 (2d Dept 2001)(Injunction stayed for six months where project was almost complete). The Petitioners do not believe these cases have application to this one, because the Arena itself is only 10 percent complete and the overall Project (including both Phase I and Phase II) is only one percent complete. If, however, in the exercise of its discretion, the Court were to decide that ESDC should be given a limited amount of time to comply with SEQRA, then the injunction should be stayed *only* for continued work on the Arena, but all other work, including any attempt to convert Block 1129 to a parking lot, should be enjoined unless and until there is full compliance with SEQRA and ESDC has reconsidered its approval of the MGPP.

Conclusion

For the foregoing reasons set forth above and in all the other papers in this proceeding, the relief requested in the Supplemental Petitioner should be granted.

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Respectfully submitted,

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