To Be Argued By:
Albert K. Butzel

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

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Index No. 114631/09

In the Matter of the Application of

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

(Additional Caption On the Reverse)

JOINT BRIEF FOR PETITIONERS-RESPONDENTS PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., ET AL. AND DEVELOP DON'T DESTROY (BROOKLYN), INC., ET AL.

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Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, and SOUTH PORTLAND BLOCK ASSOCIATION, INC.,

Petitioners-Respondents,

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

against

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

Respondents-Appellants.

Index No. 116323/09

In the Matter of the Application of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., ATLANTIC AVENUE LOCAL DEVELOPMENT CORP., BOERUM HILL ASSOCIATION, INC., BROOKLYN HEIGHTS ASSOCIATION, INC., FIFTH AVENUE COMMITTEE, INC., PARK SLOPE CIVIC COUNCIL, INC, PRATT AREA COMMUNITY COUNCIL, INC., STATE SENATOR VELMANETTE MONTGOMERY, NEW YORK CITY COUNCIL MEMBER LETITIA JAMES, ALAN ROSNER, EDA MALENKY, PETER KRASHES, JUDY MANN, RHONA HESTRONY, JAMES GREENFIELD, MICHAEL ROGERS, ANURAG HEDA, ROBERT PUCA, SALVATORE RAFFONE, RHONA HETSTONY, ERIC DOERINGER, JILLIAN MAY and DOUG DERRYBERRY,

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PRELIMINARY STATEMENT

This Brief is submitted on behalf of the Prospect Heights Neighborhood Development Council, Development Don't Destroy (Brooklyn) and the other Petitioners-Respondents in opposition to the appeals taken by the Empire State Development Corporation ("ESDC") and the Forest City Ratner Companies ("FCRC") from a final decision and order of the Supreme Court, New York County (Marcy S. Friedman, J) (A. 15-43) entered on July 19, 2011 (the "Final Decision").[1] The Decision granted the supplemental petitions to the extent of directing ESDC to prepare a supplemental environmental impact statement ("SEIS") under the State Environmental Quality Review Act [Environmental Conservation Law, Article 8 ("SEQRA") for the Atlantic Yards Arena and Re-development Project, taking account of a project construction schedule that is likely to extend for 25 years. In addition, the Final Decision required ESDC to revisit its approval of a Modified General Project Plan for the Project (the "2009 MGPP") in light of the impacts disclosed in the SEIS.

The Final Decision followed a circuitous course in the Supreme Court, brought on by the misrepresentations and later cover-up by ESDC. Thus, Justice Friedman initially dismissed the petitions (A. 67-86). However, when it was brought to her attention that *before* it approved the 2009 MGPP, ESDC, in the

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[1] The prefix "A." connotes references to the Appendix in these appeals.

face of the collapse of the real estate market, had reworked its agreements with FCRC to allow the developer 25 years to construct the Project, rather than the 10 years indentified in the MGPP and analyzed in the accompanying SEQRA Technical Memorandum (A. 87-170) – but had suppressed that fundamental change in its representations to the Court – she granted reargument, ordering ESDC to provide a reasoned explanation of why it had continued to use a 10-year build out to assess the environmental impacts of the Project (A. 44-66). When ESDC returned to the Court with a concocted story of why it stuck to the outdated 10-year construction schedule (which, by that time, the agency acknowledged could not be achieved) and, without any study of the impacts, asserted that the 25-year build-out would not exacerbate the turmoil in the surrounding neighborhoods (A. 174-303), the Supreme Court found the explanations wanting and granted the supplemental petitions to the extent noted above.

The preceding realities, unmentioned by the appellants in their brief, are what underlay the decision of the Supreme Court. This was not and is not, as the Appellants would have it, a case where the Court substituted its judgment for that of the agency or exceeded its review authority. This is a case where the agency acted irrationally to cover up what it knew to be an unsupported analysis and decision. The Court below fulfilled the classical role of the judiciary in

calling ESDC to account and requiring it to reevaluate the impacts of the Atlantic Yards Project in good faith and in accordance with the law.

QUESTIONS PRESENTED

The questions presented in this appeal are as follows:

1. Did the Court below correctly hold that ESDC acted arbitrarily and capriciously in continuing to analyze the environmental impacts inflicted by the construction of the Project on the basis of a 10-year build-out, when the market data available to the agency at the time, the terms of the agreements it had executed governing project construction and that statements of its own chief executive officer provided irrefutable evidence that construction would continue for many more years and as many as 25 more years?

2. Did ESDC act arbitrarily and capriciously in failing to disclose to the Court and suppressing the information identified above that bore on the rationality of its adhering to a 10-year construction in evaluating the environmental impacts of the Project, as modified by the 2009 MGPP?

3. In light of the above, did the Court below correctly direct ESDC to prepare an SEIS on the greatly-extended construction impacts of the Project?

The Petitioners submit that all three questions should be answered in the affirmative.

STATEMENT OF THE CASE

As proposed, the Atlantic Yards Project would include an 18,000 seat arena (now well advanced in construction) and 16 high-rise residential buildings with more than 6,400 units of housing.[2] The development would be set down on a 22-acre site at the apex of four low-rise residential neighborhoods in Brooklyn – Prospect Heights, Boerum Hill, Park Slope and Fort Greene (A. 573).

Given the magnitude of the Project, the residents of these neighborhoods were understandably concerned about the potential impacts on them and their neighborhoods. The Prospect Heights petitioners, operating under a coalition called "BrooklynSpeaks," sought changes to the Project after the 2006 FEIS in order to mitigate the impacts of the oversized proposal (A. 619-27). However, the efforts to secure project modifications were rebuffed. The Develop Don't Destroy Brooklyn ("DDDB") petitioners pursued litigation, ultimately unsuccessful, challenging ESDC's 2006 determinations under SEQRA and the UDC Act. *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, 59 A.D.3d 312 (1st Dept. 2009).

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[2] While the Arena is well advanced in construction, the residential portions of the Project, originally scheduled to begin in 2007, have not yet been started.

When ESDC proposed the 2009 MGPP (A. 3844-3901) and it included no reduction in the scale of the Project, but suggested that construction could continue far beyond the period originally considered, with open parking lots and other wastelands burdening the area for as many as 25 years, the petitioners opposed the 2009 MGPP at the public hearing. DDDB and Prospect Heights each filed their own petitions challenging the 2009 MGPP, which are now being considered together in this appeal.

The necessity for a modification of the original 2006 General Project Plan for the Project (the "2006 GPP") was the result of the precipitous decline in the Brooklyn (and, more generally, nationwide) real estate markets that began in 2007 and had become far more extreme by 2009. Under the 2006 GPP, FCRC was obligated to acquire the entire 22-acre Project site at once, most of it from the Metropolitan Transportation Authority ("MTA") under a contract that required it to pay $100 million up front. The market crash, together with the correlative drying-up of bank financing, made it difficult for FCRC to meet these terms. So in rather secretive fashion, it renegotiated its contract with the MTA. Instead of acquiring the entire site at once, FCRC was allowed to buy the land in separate parcels, as needed to allow construction to proceed and when and as feasible financially, with the time for acquisition of the these parcels

extended 18 years to 2030. At the same time, under the renegotiated agreement (the "MTA Agreement"), FCRC's up front obligation was reduced from $100 million to $20 million (A. 3826-34, 3905-10).

Faced with the changes reflected in the MTA Agreement, ESDC was forced to modify the 2006 GPP and to do so in the formal process required by the UDC Act. That modification, in turn, obligated ESDC to comply with SEQRA by taking a hard look to see whether any changes in environmental impacts had occurred, or would occur, as a result of the action it was proposing to take.

The original impacts had been described in an environmental impact statement approved in 2006 (the "2006 FEIS") (A. 1198-3181). At the time, ESDC projected that the Project would be completed over a period of 10 years, and it evaluated the environmental impacts, including construction impacts, on this basis. The 2006 FEIS assumed that construction would proceed parcel-by-parcel in regular order and that land would not lie fallow for any extended period of time. For example, an open parking lot intended to serve the Arena would be in place for only four years; after that, underground parking would be substituted (A. 2296). Similarly, the lots on which the new buildings were erected would be promptly landscaped to provide public open space and ensure

that there would be no "wasteland" effect at any time (A. 1267). Equally critical, the adverse impacts of construction on adjoining neighborhoods – and the 2006 FEIS had acknowledged there would be some (A.1288) – would be over and done with at the end of 10 years.

By mid-2009, when ESDC determined that a modified project plan was required, the idea that construction of the Project would be completed in 10 years was not simply in doubt because of the precipitous market decline – it was totally undercut by the terms of the MTA Agreement extending the time to acquire the required land by 18 years to 2030, before taking account of the additional three years needed to construct buildings on it.[3] Nonetheless, in its SEQRA Technical Memorandum assessing the environmental impacts of the changes wrought by and reflected in the 2009 MGPP, and purporting to rely on a self-serving real estate study that it had commissioned (A. 3971-4018),[4] ESDC adhered to the conceit that the Project would be fully built out 10 years after construction began. As a result, it evaluated the modified development on this basis, ignoring the aggregate and long-term effects that up to 25 years of

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[3] At the time, as it turned out, ESDC was already in negotiations with FCRC that led to ESDC allowing FCRC until 2035 (26 years in the future) to complete the Project.

[4] At the same time, ESDC completely ignored a contrary expert report submitted by the DDDB petitioners on the feasibility of constructing the project in 10 years (A.363-412).

construction would impose on adjoining neighborhoods (A. 142-59). Not surprisingly, insisting that the Project would be completed in 10 years, as the 2006 GPP and FEIS had assumed, ESDC found no change in construction impacts for a similar 10-year schedule used for the 2009 MGPP (A. 151).

But the continued 10-year assumption was a fabrication that served an important purpose. It allowed ESDC to conclude that no SEIS need be prepared in connection with the 2009 MGPP. This, in turn, was critical to FCRC securing tax-exempt financing for the Arena, because under Federal law, the exemption the developer was counting on was scheduled to expire on December 31, 2009 [U.S. Treasury Regulations, 26 CFR §1.141-15(k)(3)(iii), as amended 10/24/08], less than four months after ESDC affirmed the 2009 MGPP. If the extension of the construction schedule and the resulting impacts had been acknowledged in the Technical Memorandum, the almost-certain outcome would have been to require the preparation of an SEIS. This would have taken several months at the least, pushing the date of possible approval of the MGPP beyond the December 31 deadline. It was for this reason, the Petitioners believe, that ignoring all the objective evidence, ESDC continued to assert that the Project would be complete in 10 years, even as it was negotiating an agreement with FCRC that

extended the deadline for completion to 2035 – 25 years beyond the date when Project construction was expected to, and did in fact, begin.

There can be no doubt that well before ESDC issued its SEQRA Technical Memorandum and approved the 2009 MGPP, the agency recognized that the Project would never be completed in the time frame that it was using. Thus, on April 9, 2009 – five months before the MGPP was acted on by the ESDC Board – Marisa Lago, the agency's CEO, responding to a question put to her regarding the build-out of the Project in light of the recession, recognized "that it is project that is scheduled to grow out over multi-years, *decades,* not months." (A. 876-77, 894-95) (emphasis added). This statement alone makes it clear that within ESDC, it was well understood at the time that construction would extend for 20 years, if not longer.[5]

Ms. Lago's observation was not conjecture but based on then-current economic conditions: by April 2009, the real estate markets had imploded. The crash in housing began in 2007 and accelerated quickly (A.877, 899). In the years between 2006, when the 2006 FEIS was completed, and the third quarter

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[5] Ms. Lago's assessment was confirmed in 2011 by FCRC's principal, Bruce Ratner, who, at press conference in September 2010, is reported to have said that the 10-year timeline was always misunderstood. "It was never supposed to be the time we were supposed to build them [the 16 buildings] in." (A. 877, 896-98)

of 2009, when the Technical Memorandum was issued, residential sales in Brooklyn decreased from nearly 4,200 units a quarter to 1,500 units a quarter (A. 877, 899). Thus the housing market into which the Project intended to sell was only about one third the strength of the 2006 market on which the 10-year construction schedule had been based, and no one was predicting a rapid recovery. To the contrary, the commercial real estate market had also broken, with financing for major projects all but dried up by the time the MGPP was prepared (A. 877). It did not take a genius to recognize the situation – all one needed to do was walk the streets and see the many projects brought to a halt in mid-stream or to read any of the many articles appearing in the nationwide press and prominent real estate publications.[6]

FCRC clearly recognized the situation for what it was, which is why it went to the MTA and renegotiated its agreement. Given the sharp downturn in the residential real estate market and the tight lending policies of the banks, $100 million in financing, above what was needed to build the Arena, was not

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[6] Notwithstanding the Brooklyn extreme market decline, ESDC was able to purchase the opinion of a real estate firm that it "was not unreasonable" to assume that that market could absorb 6,400 units of housing over the next 10 years (A. 4013). This "opinion" defied the realities on the ground. Moreover, it took no account of the fact that real estate financing had dried up and there was no way FCRC would be able to finance construction of the 16 buildings needed to complete the Project. Indeed, even today, two and a half year later, FCRC has yet to secure financing for a single building beyond the Arena.

available to it. Equally important, in allowing FCRC to purchase tracts *seriatim* through 2030, the revised MTA Agreement was clearly geared to the length of the build-out that the parties foresaw in the face of a still-declining real estate market. Yet when the Petitioners cited the Agreement as a clear indication of the irrationality of adhering to the fiction of a 10-year build out, ESDC, in its court papers, denied that the Agreement had any relevance to that issue.

The agency did so even though, at the time, it was in the process of negotiating an agreement with FCRC that itself recognized the market realities and, like the MTA Agreement, was intended to allow the developer to move the Project ahead despite the market collapse. As it stated in one of the documents it submitted to the Court below, in 2009, ESDC "negotiated certain changes to the general business plan for the Project to allow construction to proceed *notwithstanding the downturn in the real estate market*" (A. 268), as if that market, and the "changes" made, as reflected in the relevant documents, had no bearing on the projected 10-year build-out.

These negotiations were clearly underway and well advanced at the time ESDC approved the 2009 MGPP on September 17, 2009; indeed, hidden away in the hundreds of pages of documents presented by the staff to the ESDC directors at the September 17, 2009 when the 2009 MGPP was approved was a

brief mention in a document titled "Project Leases and Disposition Abstract" indicating that leases with a 25 year term to build would be employed (A. 3965). But ESDC did not advertise this, much less disclose that (i) FCRC would be given 25 years to complete the Project, (ii) no required "start" dates were provided for 10 of the 11 Phase II high-rise residential buildings, and (iii) that 10 buildings, which were assumed in the Technical Memorandum to be finished in 10 years, would not have to be completed for 25 years (A. 4046, 4050). Instead of presenting this critical information to the Court below, either in the papers it submitted or at oral argument, which took place *after* the agreement had been executed, ESDC suppressed the documentation, persuading Justice Freedman, in a conference call following oral argument, not to consider that agreement and thereby keep it and its implications from the Court (see the Supreme Court's description at A. 49-50).

These implications were that Project construction would continue far longer than the 10 years that ESDC was insisting was reasonable for the analysis of impacts it made in connection with the 2009 MGPP, even at the same time that it was negotiating a development agreement allowing 25 years for the build-out. But it was only after Justice Friedman had reached her initial decision dismissing the petitions – and after the Petitioners had lost the opportunity to stop

construction of the Arena – that they were able to bring before the Court, by way of motions to reargue and renew and even then, over the continuing protests of the Appellants, the detailed Master Development Agreement ("MDA") that documented that the time frame for construction of the Project extended to 2035 (and beyond under certain circumstances)(A.4024-4211). With the specifics finally out in the open and seemingly hoisted with its own petard, ESDC, in its submissions to the Court, took a different tack, insisting that the MDA time frames were not relevant to the decision to adhere to a 10-year build out in evaluating the construction impacts of the modified Project.

This attempt to continue the cover-up that had begun when ESDC chose to risk sticking to an assumed 10-year build out in assessing the environmental impacts of the Project and thus avoid having to prepare an SEIS led Justice Friedman to grant the Petitioners' motions to reargue and renew and remand the matter to ESDC with directions that it provide a reasoned explanation for why it had continued to use the 10-year period in Technical Memorandum (A. 44-66)

It took all of five weeks for the agency to respond *and* to undertake and come forward with a so-called "Technical Analysis" purporting to address the impacts that would result if the construction period extended over 25 years, as allowed and reflected by the terms of the MDA (A. 174-301). Once again,

ESDC attempted to turn reality on its head and sought to obfuscate the import of the documentary evidence allowing FCRC until 2035 to complete the Project. As it did in the Court below (and continues to do now), the agency insisted that while, in its own words, the MDA responded to the "difficult economic climate" in attempting to get the Project started (A. 268, 284), the extended completion dates included in the Agreement had no bearing on the reasonableness of continuing to use a 10-year construction schedule (A. 266). This defied all logic and, more importantly, it defied the market conditions that underlay the extended dates. At the same time, for ESDC to come forward, as it did, with a hastily-prepared Technical Analysis carried out in less than five weeks, which never addressed the crucial question of what happens when projects stall and leave adjacent neighborhoods burdened with parking lots and empty building sites, and which never took account of the cumulative impacts of 25 years of noise, dirt, congestion, wastelands and other forms of pollution , was to compound the deception that had driven the agency from the time it arbitrarily adhered to a 10-year build-out and thereby avoided the obligation to prepare an SEIS.[7] Justice Friedman was correct in concluding that ESDC had acted in an

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[7] The negative impacts of projects where construction stalls or extends over long periods of time were described in some detail in the affidavits of Ronald Shiffman of Pratt Institute and James Goldstein of Tellus Institute submitted in the Court below (A. 1176-80, 1185-97). Among other actual project experiences that they described were the Atlantic

arbitrary and capricious manner in trying to have it both ways, and all of the Appellants' efforts to cover that up not only justified, but necessitated, the decision that she reached.

PROCEEDINGS BELOW

The DDDB Petitioners filed their Article 78 petition on October 16, 2009 (A. 306-413). The Prospect Heights Petitioners initiated their parallel Article 78 proceeding on November 12, 2009 (A. 569-656). The Petitioners' central claim was that ESDC had failed to comply with SEQRA when it approved the 2009 MGPP without preparing an SEIS, notwithstanding the indicia, including the MTA Agreement, that Project construction would extend many years beyond the period the agency had analyzed in the SEQRA Technical Memorandum and result in significant new adverse impacts compared to those that had been evaluated in the 2006 FEIS. ESDC and FCRC served answers and filed the administrative record in November and December 2009 (A. 414-81, 482-540, 657-720, and 721-769). On January 19, 2010 – three weeks after the MDA had been executed but before it was made public – Justice Friedman heard oral argument and made inquiries seeking to understand the contractual obligations

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Terminal Renewal Area in Brooklyn, the West Side and Seward Park Renewal Areas in Manhattan, the Filene's redevelopment in Downtown Boston, Harvard's Alston Development and the Fort Trumbull/Pfizer Development in New London, Connecticut.

between ESDC and FCRC, but the Appellants did not disclose the terms of the Agreement, including the time frames for construction, which extended out 25 years. When, two weeks later, the Petitioners' counsel sought to submit the MDA to the Court to back up their position, the Appellants fought successfully to keep it out (A. 81, fn 2).

The Initial March 10 Decision

On March 10, 2010, the Supreme Court issued a decision, order and judgment dismissing, with some misgivings, both petitions (A. 67-86). In reaching its decision, the Court concluded that "ESDC's continuing use of the 10 year build-out was supported – albeit, in this court's opinion, only minimally – by the factors articulated by ESDC." (A. 79). These factors included ESDC's representation to the court at oral argument that the development agreement would require FCRC to use "commercially reasonable efforts" to complete the Project by 2019. They did not include – because neither ESDC nor FCRC chose to disclose to Justice Friedman – that the same agreement would give FCRC until at least 2035 to finish construction of the Project (A. 4050).

Petitioners' Motions to Reargue and Renew

On April 7 and 8, 2010, the Petitioners served motions to reargue and renew (A. 771-805), finally bringing before the Court the MDA, which they had

succeeded in obtaining after the January 19 oral argument. The MDA (A. 4024-4211) did include, as ESDC had represented, a commitment by FCRC to use "commercially reasonable efforts" to complete the Project by 2019. But its more salient and precise terms recognized the likelihood of a totally different and greatly extended build-out.

Thus, the MDA gave FCRC 25 years – until 2035 – to complete the Project (A. 4050, §8.7). It did not require FCRC to *begin* construction of the platform on which a majority of the Phase II buildings are to be erected for 15 years (A. 4046, §8.5), and with one exception, there was no required start date for *any* of the 11 buildings constituting Phase II; they could be put off for 15 years or 20 years or longer (A. 4050, §§8.7, 8.7(c)). Even for the earlier Phase I of the Project, the MDA gave FCRC 12 years to complete the residential building surrounding the Arena (A. 4046, §8.6). Moreover, all of these deadlines were subject to extension for broadly defined "Unavoidable Delay"), which included the lack of availability of affordable housing subsidies (A. 4046-50, 4101-02, §8.7, Appendix A, p. A-18). The MDA required no security from FCRC to give force to the deadlines, and its only significant penalties related to unexcused delays in construction of the Arena and the other Phase I structures,

leaving the construction of Phase II virtually indeterminate and without penalty (A. 4070, §17.2(x)).

The Petitioners moved to reargue and renew on the basis that the MDA made it abundantly clear that ESDC understood that a 10-year build out was not going to happen and that it had understood this when it developed the SEQRA Technical Memorandum and approved the 2009 MGPP. This was three months before the MDA was signed, but unquestionably at a time its terms were understood. Given these realities, the Petitioners contended that ESDC's continued use of the 10-year construction schedule had been arbitrary and capricious and the agency's resulting failure to take a hard look at the adverse impacts of a far longer build-out violated SEQRA.

ESDC and FCRC served papers opposing the motions on April 27, 2010 (A. 806-11). Oral argument was heard on June 29, 2010.

The November 9, 2010 Decision on Reargument and Renewal

On November 9, 2010, the Supreme Court granted the motions to renew and remanded the matter to ESDC to provide (if it could) a reasoned elaboration of the reasons it had continued to use a 10-year build-out in the Technical Memorandum. The Court also directed ESDC reconsider the need for an SEIS (A. 44-66). In reaching this decision, Justice Freedman noted that throughout

the initial phase of the proceeding, ESDC, in its efforts to justify the continued use of the 10-year construction period, had placed heavy emphasis on the agency's prospective development agreement with FCRC and, in particular, on the clause that would require the developer to use "commercially reasonable efforts" to complete the Project by 2019. This obligation was identified in two brief sentences in the 150-page 2009 MGPP (A. 3276-3433) and appeared nowhere else in the administrative record, yet it was central to the presentation made by ESDC on oral argument in January 2010. By that time, the MDA was fully executed, but as Justice Friedman observed, ESDC did not disclose any of the timeframes or other specific terms of that Agreement, but rather "continued to represent that the terms of the Development Agreement were those contained in the MGPP provision [the two sentences referred to above] and summary." (A. 49-50)[8]

> It was only on reargument in June 2010, the Court continued, that:
>
> ESDC for the first time acknowledged the existence in the Development Agreement of a 25 year outside date for substantial completion of Phase II of the Project. The reargument motions also mark the first time ESDC admitted that at the time of its review of the 2009 MGPP, ESDC knew of the 25 year outside

[8] The record also included a one-page summary of the prospective development agreement but this did not identify the terms in any detail, simply providing the Development Obligation was "to construct the project described in the Modified General Project Plan." (cited by the Court below at A. 49).

> date and 'anticipated' its inclusion in the Development Agreement (Reargument Tr. At 35-36). (A. 50)

The Court then reviewed the terms of the MDA in considerable detail, taking note of the many specific deadlines that it included but had not been disclosed before by ESDC. In assessing the significance of these deadlines and the agency's silence, the Court made the following observations:

> In its papers in opposition to the Article 78 petitions, ESDC repeatedly cited, as the basis for its continuing use of the 10 year build-out, the MGPP provision stating ESDC's intent to require FCRC to use commercially reasonable efforts to complete the Project by 2019, and the summary of the Development Agreement (AR 7070). Neither of these documents gave any indication that the Development Agreement would include a 25-year substantial completion date for the Phase II construction. . . ESDC's papers left the inaccurate impression that the commercially reasonable efforts provision was the focus of the Development Agreement, whereas the Agreement in fact contained numerous far more detailed deadlines for the Project which cannot be ignored in addressing the rationality of the build-date. (A. 55)[9]

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[9] The Court also noted that even though the MDA had been executed by the time of oral argument in January 2010, "ESDC continued to represent that the terms of the Development Agreement were described in the summary (AR 7070) that was in the record before ESDC at the time of the approval [of the 2009 MGPP]. Jan. 19, 2010 Tr. at 45). ESDC went so far as to state that this document 'summarizes many of the salient elements of the general project plan." (Id.) This summary, of course, said nothing about the 2035 outside substantial completion date for the Phase II construction. " (A. 56)

The Supreme Court concluded this part of its decision with the finding that the Petitioners' motion for reargument and renewal should be granted.

> ESDC had an obligation to furnish the court in these Article 78 proceedings with a complete and accurate record of the proceedings before ESDC . . . It is axiomatic that ESDC also had an obligation to summarize the bases for its determination in the proceedings before the court. Thus, once the Development Agreement was executed, ESDC had an obligation to bring it to the attention of this court in order to correct the totally incomplete representations made in the summary of the Development Agreement and in ESDC's papers in opposition to the Article 78 petitioner, as to the terms that were included in the Development Agreement regarding the imposition and enforcement of deadlines for completion of the Project.. Given ESDC's failure to do so, leave to reargue and renew is warranted. (A. 56-57)

The Court below then addressed the merits of the Petitioners' arguments, finding that the completion dates included in the MDA raised serious questions as to whether ESDC had acted rationally in continuing to adhere to the 10-year construction schedule in its analysis of impacts (A. 61-63). The Court also found, as the Petitioners had asserted, that neither the 2009 Technical Memorandum nor any other study had addressed the impacts of construction that lasted as long as 25 years (A. 58-60). Consequently, the Court remanded the matter to ESDC for further findings and a 'reasoned elaboration', if any was possible, for ignoring the impacts of a lengthy build-out.

The Remand and the Supplemental Petitions

The remand can be summarized quite simply. On December 16, 2010 – a little over five weeks after the November 9 Decision – ESDC returned to the Court with its response to the remand order. In the ensuing period, it had developed, and submitted to Justice Freedman, a lengthy written "justification" for its continued use of the 10-year build-out, insisting, despite all the market data to the contrary and the recognition by its CEO that the Project would take "decades" to complete, that it had acted rationally in September 2009 when it adhered to the 10-year fantasy (A. 265-301). In this, it denied that the completion dates set out in the MDA had any relevance to the likely construction schedule. The agency took this position even though, in the same document, it grudgingly acknowledged that the 10-year build-out could no longer be achieved due to the market collapse (A. 266, 302), but it made no attempt to identify what it thought might be a realistic schedule.

Instead, ESDC came forward with the Technical Analysis, which it had compiled in five weeks or less (A. 174-264). In this, the agency purported to analyze the impacts of a 25-year build-out, concluding that they would be no different from, or would be less than those associated with, 10 years of construction. This Analysis was silent on the critical question of the effects of 25

years of overhanging construction on the adjoining neighborhoods, and it took each area of impact in isolation, rather than assessing their cumulative effects. For the most part, the evaluation was qualitative, with no experts identified as having authored the sections on neighborhood character or long-term effects.[10]

On January 18, 2011, in accordance with a stipulation the parties had signed in December, the Petitioners filed supplemental petitions challenging the ESDC findings and asking the Supreme Court to set aside the approval of the 2009 MGPP, direct the preparation of an SEIS and enjoin Project construction (A. 834-907). ESDC and FCRC filed answering papers, and ESDC filed the supplemental administrative record, on or about February 18, 2011. The Court heard oral argument on the supplemental petitions on March 15, 2011.

The Final Decision

The Court below issued its Final Decision on July 13, 2011. The Decision granted the supplemental petitions and remanded the matter to ESDC for

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[10] The Technical Analysis was apparently put together by ESDC's EIS consultants. However, no authors are given for the document as a whole or for specific sections of it. There is no indication in the document that the consultant has staff who are expert in long-term construction impacts or are familiar with the case histories of stalled projects and projects with extended construction schedules, such as those cited by Professor Shiffman and Mr. Goldstein in their affidavits (see discussion at p. 41 below). As far as we know, the sections of the Technical Analysis addressing those issues (to the extent they were addressed at all) were authored by EIS writers having no expertise in the field. Certainly, there is nothing in the record to the contrary.

> . . . further environmental review consistent with this decision, including the preparation of a Supplemental Environmental Impact Statement assessing the environmental impacts of delay in Phase II construction of the Project; the conduct of further environmental review proceedings pursuant to SEQRA in connection with the SEIS, including a public hearing if required by SEQR; and further finding on whether to approve the MGPP for Phase II of the Project. (A. 37)

In its opinion, the Court reviewed the procedural history of the cases, the continued use of the 10-year build-out, the terms of the MTA Agreement and MDA and ESDC's own statements that the changes wrought by the MGPP had been required to "get the Project going in a difficult economic climate" and that it was unlikely the Project could be completed on the 10-year schedule "because of continuing weak general economic and financial conditions." Given these statements and the market realities at the time, Justice Friedman found that:

> [ESDC's] ... suggestion that it was unaware, when it entered into the Development Agreement and approved the 2009 MGPP, that the same economic downturn would prevent a 10 year build-out, strains credulity at best." (A. 24)

On this basis and others set for the Decision, "the court accordingly [found] that ESDC's use of the 10 year build-out lacked a rational basis and was arbitrary and capricious." (A. 25)

The Court then determined that under the circumstances, ESDC was required to prepare an SEIS to address the impacts of the delay in Phase II

construction. In this regard, Justice Friedman found the Technical Analysis which purported to evaluate these impacts wanting in many respects. As an example, the Court noted:

> The Technical Analysis does not undertake any analysis of extensive delays between the completion of the arena, anticipated for 2012, and Phase II construction – the commencement of which, as indicated by the Development Agreement, may be delayed in 2020 for the first Phase II building on Block 1129 and until 2025 for the beginning of Phase II construction that will support 6 of the 11 Phase II buildings; and the completion of which, as indicated by the Development Agreement, may be delayed until 2035. Notably, the Technical Analysis is silent as to the impacts on neighborhood character and socioeconomic conditions of above-ground arena parking, and construction staging which may persist not merely for a decade, but, as petitioners aptly put it, for a generation.
>
> More particularly, as to neighborhood character, the Technical Analysis fails to evaluate the impact of extensive delays in the build-out of Phase II. The Technical Analysis concludes the construction impacts on neighborhood character under the Extended Build-Out Scenario would remain "localized" in the immediate vicinity of construction, but "would be less intense because there would be less simultaneous activity on the site" (SAR at 7704). Again, the Technical Analysis focuses on intensity of construction and does not address the impacts of a construction period that could extend not merely for a decade but for 25 "years. . ." (A. 29)

In further explanation of its order, the Court noted that its directive to ESDC to prepare an SEIS was not based on the fact that the MTA Agreement permitted phased acquisition.

> An SEIS is required here because the phased acquisition authorized by the MTA Agreement, and the extended deadlines contemplated by the Development Agreement made a major change in the construction schedule for Phase II, but ESDC has failed to give adequate consideration to the environmental impacts resulting from this change. (A. 34)

The remainder of the Court's Final Decision addressed – and denied – the Petitioners' motions for a stay of construction. The court found that ESDC's prior environmental review had adequately addressed the impacts of Phase I construction, which, under the terms of the MDA, would extend only 12 years and that a stay of Phase II construction was not necessary because it would be many years before work on Phase II began (A. 34-36).

The Final Decision was entered on July 19, 2011. FCRC and ESDC filed Notices of Appeal on September 9 and September 12, respectively (A. 1-10), but for unexplained reasons, did not perfect the appeals for three months. The Petitioners did not cross-appeal.

ARGUMENT

Point One

ESDC'S APPROVAL OF THE 2009 MGPP WAS ARBITRARY AND CAPRICIOUS AND MADE IN DOUBTFUL GOOD FAITH

This is not an ordinary administrative law case. Rather, it is case filled with doubtful actions, unexplained lapses in disclosure and, at bottom, an agency

decision that so flew in the face of market realities as to all but render it arbitrary and capricious on its face. This is not an instance where an administrative body made a reasoned decision that might or might not be correct – a decision of the sort that courts are not empowered to second-guess. Rather, it is an instance where before it acted, the agency, by the admission of its own CEO, knew that the position it was taking was wrong, endorsed it nonetheless and then, when challenged, sought to cover up that reality and hide it from the court.

In such situations, the judiciary alone stands between lawfulness and lawlessness. Under well established precedent and the fundamental concept of separation of powers, the courts are not empowered to take over the roles of agencies of the executive branch. But they are obligated to ensure that those agencies abide by the law and do not engage in conduct that is a "sham" or otherwise "without foundation." *See, e.g.,* Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 425 (1986). That, however, is precisely what transpired in this case.

The sham began with ESDC's 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. The impetus for this was to avoid preparing an SEIS, which, if undertaken, could have extended the review

process beyond December 31, 2009, when the tax exemption FCRC was relying on to finance the Arena was scheduled to expire.

The sham continued when, faced with the collapsed market that had led to Ms. Lago's statement, the agency purchased a real estate report that effectively denied the market collapse, venturing the opinion that it was "not unreasonable" to assume that the Brooklyn market, down 66 percent since the Project had been approved in 2006, could absorb 6,400 units of new housing in the next 10 years – an opinion that not only disregarded the worsening market conditions but also ignored the drying up of available financing – the very reasons ESDC cited as requiring the modification of the 2006 GPP (A. 268, 284).

The sham was converted to a cover up when ESDC, in as secretive a way as possible, took note of the MTA Agreement, which extended the time in which FCRC could purchase the air rights for the Project from 2009 to 2030, but then denied that the extended dates in the Agreement had any bearing on the build-out schedule. Instead, ESDC represented to the Court below that the pace of construction would be governed by the MDA (Oral Argument Tr. 44-46, cited in the March 9 Decision at A. 49-50). But while the MDA had already been signed

at the time this representation was made, ESDC did not disclose its terms or give the slightest indication that it contained a 2035 completion date for the Project.[11]

Next, when the Petitioners sought to introduce the MDA into the record (A. 81, n. 2), ESDC objected successfully, thus continuing the cover-up and keeping the agreement under wraps until after the Court had denied the petitions. This allowed the proceeds of the tax exempt financing to be released from escrow, paving the way for construction of the Arena to begin.[12]

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[11] In the papers that ESDC filed with the Supreme Court pursuant to the November 10 remand order, it acknowledged that both the MTA Agreement and MDA had been required to allow the Project to go forward "in a difficult economic climate" and "notwithstanding the downturn in the real estate market." (A. 268, 284) In other words, FCRC could not have come up with the $100 million upfront payment required under the original MTA Agreement, because of the banks' unwillingness to lend credit in a real estate market characterized by hundreds of projects stopped in midstream across the City. It is clear from the statements made by ESDC in its submissions to Justice Freedman (as well as the agency CEO's earlier statement that the Project would take "decades" to build) that the agency fully understood the condition of the real estate markets and knew perfectly well the 10-year assumed build-out it was continuing to insist was "rational" was not.

[12] FCRC had been able to close on its tax exempt financing in December 2009, but the proceeds had been placed in escrow and were unavailable to finance construction until the conditions of that escrow were met. One of these conditions, set forth in a document titled "Commencement Agreement," which FCRC submitted to the Supreme but has not included in the Appendix, was that before the proceeds were released, the escrow agent had not received a Notice of an Injunction or Unstayed Adverse Decision (the latter including a decision overturning any party's authority to enter into the transaction). ESDC was a party, and if the Supreme Court had decided that the agency did not comply with SEQRA in its approval of the 2009 MGPP, that would have undercut its authority to participate and, as a result, the release of the proceeds would have been in doubt. If the Court wishes a copy of this document, the Petitioners can provide it.

Finally, when the MDA was at last brought before the Court, ESDC persisted in the denial of its relevance and, in spite of everything, including its acknowledgment that the Project could not be completed in 10 years, continued to assert that the use of that schedule was rational at the time the 2009 MGPP was approved (A. 266, 302). In this, of course, it had little choice; to have admitted anything else would have been to acknowledge that it acted arbitrarily and capriciously in selecting and adhering to that schedule. The agency was hoisted on its own petard and the only way out was to deny the realities or cover them up. It was for this reason, presumably, that ESDC, going beyond the requirements of the remand order, came forward with the hastily-prepared and totally-wanting Technical Analysis in an effort to patch the hole that its sham conduct had left. That, we submit, was not only too little – it was a continuation of the sham.

The fundamental illegality in ESDC's conduct, and that on which the Court below based its decision, was the agency's arbitrary and capricious adherence to the use of a 10-year construction schedule and its consequent refusal and failure to evaluate the environmental impacts of a build-out that would likely extend for 25 years. This is a relatively straightforward issue of administrative law that, as discussed more fully below and as Justice Freedman

found, required ESDC to go back and do it right. *See, e.g.,* Chinese Staff & Workers Association v. City of New York, 68 N.Y.2d 359 (1986); Matter of Kahn v. Pasnik, 90 N.Y.2d 599 (1997); Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337 (2003).

However, something more is involved in this case. As reflected in the administrative process and the proceedings below, ESDC's attitude has been that it can pretty much do what it wants. This attitude did not escape the notice of the Court below, which, in its three decisions, lamented the lack of transparency in ESDC's proceedings and dealings and concluded that the agency had been less than forthright in its disclosure of the MDA and its terms (A. 22-24, 55-58, 83-84).[13]

The Petitioners believe that the questionable conduct described above was pertinent to the issues that the Supreme Court was called upon to decide, and we think it is equally important on this appeal. If, as we believe is evident from its conduct, ESDC has attempted to control or manipulate the process through its actions, that, in and of itself, bears on the arbitrariness of those actions both in

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[13] This Court has also had occasion to comment negatively on the way ESDC conducts business. *See* Matter of Kaur v. New York State Urban Development Corp., 72 A.D.3d 1 (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). The Court of Appeals has also been critical. *See* Matter of West Harlem Bus. Group v. ESDC, 13 N.Y. 3d 882 (2009).

approving the 2009 MGPP and its response to Justice Freedman's November 10 remand order. 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 an error or false information. The latter is what the Petitioners believe happened in this case and what they submit should result in this Court's affirming July 19 Decision.

There is precedent for this in the opinions issued by the United States District Court and the Court of Appeals for the Second Circuit in the lawsuits challenging the Westway megaproject on Manhattan's Lower West Side waterfront. The key issue there was the potential impact on the Hudson River fisheries of the 200 acres of landfill required for the project. Early studies supported by minimal sampling had concluded that the fill area was a "biological wasteland" and did not support any significant fish life, but later trawling financed by the New York State Department of Transportation (the project sponsor) revealed that large numbers of juvenile striped bass – perhaps as many as a third of the entire Hudson River stock – used the area as a winter nursery. However, by the time the new data were uncovered, the project had already been delayed for three years and NYSDOT was unwilling to risk or take the additional time that would have been required to prepare an SEIS. So the new information was disguised and sent out with a report that said nothing in the

results changed the conclusion that the landfill would have no adverse impacts on the fishery.

This was false – or at least potentially false – and NYSDOT knew it. When, despite the new data, the Corps of Engineers issued a dredge and fill permit, several environmental groups brought a lawsuit, and the truth came out. In effect, what NYSDOT (and the Corps to a lesser degree) had done was much the same as ESDC had done in this case. With all the available data suggesting that the landfill could have a significant impact on the striped bass, NYSDOT and the Corps chose to ignore the realities and go with their original conclusion, just as in this case, with all the available data clearly evidencing a collapse in the real estate market, the virtual impossibility of securing construction financing and the consequent lengthy extension of the construction schedule, ESDC chose to ignore that information and go with the10-year construction schedule it had fixed on when the market was extraordinarily strong.

In the Westway cases, the courts annulled the Corps permit and directed it to prepare an SEIS. The courts' opinions leading to this outcome will be found under the following titles and citations: 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), *aff'd in part, rev'd in part,* 701 F.2d 1011, 1031-33, 1044-50 (2d Cir. 1983). *See, also,* 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). Each in its own way stands for the proposition that where an agency relies on information it knows, or should know, to be outdated or wrong, any action taken by the agency on the basis of that information is per se arbitrary and capricious.[14]

As just indicated, this case bears an eerie resemblance to the Westway debacle. When it adopted the 2009 MGPP, ESDC was clearly aware that the market on which it based its original 10-year construction schedule had collapsed, and as its CEO stated, it knew construction would run on for "decades." But the Project had already been delayed and FCRC's ability to use tax-free bonds to finance construction of the Arena was subject to a December

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[14] On remand, the Corps prepared an SEIS, the draft of which stated that the landfill would have a substantial adverse impact on the striped bass but the final of which, without explanation, added the word "not" between "would" and "have," thus turning 180 degrees from its initial finding. The courts again set the landfill permit aside. In doing so, the Second Circuit opinion began with the following three sentences: "A change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief. This case is capsulized in that solitary simile." [Sierra Club v. U.S. Army Corps of Engineers, 772 F.2d 1043, 1046 (2d Cir. 1985)] The same may be said in this case, where a 10-year contractual deadline was extended to 25 years, without any rational explanation.

31, 2009 deadline. In these circumstances, ESDC did not want to wait until an SEIS was prepared, so it ignored the glaring evidence of the market collapse and adhered to the 10-year build out. This was arbitrary and capricious. It and the subsequent cover-up were also actions that should not be tolerated by the courts.

Point Two

ESDC'S APPROVAL OF THE 2009 MGPP WITH-OUT PREPARING AN SEIS VIOLATED SEQRA

A. Standard of Review

SEQRA was adopted in 1975, with the goal of protecting the environment to the fullest extent possible consistent with other key areas of policy [ECL, §8-0109] and with the "primary purpose . . . to inject environmental considerations directly into governmental decision making . . ." [City Council of Watervliet v. Town Board of Colonie, 3 N.Y.3d 508 (2004)]. The primary mechanism for ensuring that agencies take account of environmental impacts in their decision making process is the environmental impact statement (EIS), which is required whenever an agency action may have a significant impact on the environment. Agency decisions whether to prepare an EIS, as well as the adequacy of the procedures followed in making that determination and the rationality of the final project, if any, are subject to judicial review under Article 78.

The standard of review for SEQRA actions is well established. A court may not substitute its judgment for that of the agency, but rather must limit itself to determining whether the action in question 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); Matter of Riverkeeper, Inc. v Planning Bd of the Town of Southeast, 9 N.Y. 3d 219, 231 (2007).

In this case, ESDC prepared a comprehensive EIS in connection with its 2006 approval of the General Project Plan for Atlantic Yards Project, and that EIS was found to be adequate by the courts. However, because of the collapse of the real estate market, the GPP had to be changed, or "modified," to allow FCRC to acquire the properties on which the Project would be built over time, rather than all at once; and this change carried with it the potential (which quickly become reality) that Project construction would not be confined to 10

years, as had been assumed and analyzed in the 2006 FEIS, but would extend much longer, and quite possibly 25 years.

The modification of the GPP constituted an "action" that, as ESDC recognized, required the agency to comply with SEQRA. Under the terms of the statute, the agency was required to prepare an EIS (in this case an SEIS) if the modification *might* have a significant impact on the environment [ECL, §8-0109(2). In this case, ESDC chose not to do so, issuing the equivalent of a Negative Declaration finding the environmental impacts that grew out of the 2009 MGPP would not be significant. As already discussed at length, the conclusion was reached on the basis of a 10-year build-out that the Petitioners believe, and the Court below found, was arbitrary and capricious.

Where significant adverse impacts on the environment are likely, but an agency fails to prepare an EIS or prepares one but fails to take account of all the relevant impacts, the courts have regularly invalidated such actions. *See, e.g.,* Matter of New York City Coalition to End Lead Poisoning v. Vallone, *supra* [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, *supra* [approval 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, *supra* [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].[15]

The preceding cases involved situations where an agency failed to prepare an EIS in the first instance, rather than the situation here, where ESDC failed to prepare a supplemental EIS. But the statute sets out the same standard – whether the action generates new impacts that may have a significant impact on the environment. In this regard, the courts exercise greater restraint – they do not revisit issues that were adequately covered in the original EIS – but the Jackson standards cited above apply when courts review the implications of project modifications. Indeed, those standards were set out in a case where the complaint was the failure to prepare an SEIS; and the same standard was invoked in the more recent case of Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southwest, *supra,* 9 N.Y.3d at 231.

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[15] Instructive appellate division cases include: Matter of Kogel v. Zoning Board of Appeals, 58 A.D.3d 630 (2d Dep't 2009)[determination set aside when agency, in deciding not to prepare an EIS, failed to take a hard look at or provide "reasoned elaboration" regarding potential impacts raised in an environmental assessment form; Matter of Kittriedge v. Planning Board of Liberty, 57 A.D.3d 1336 (3d Dep't 2008)[determination set aside when agency's decision not to prepare an EIS was based on its failure to take a hard look at impacts on wildlife]; Matter of Serdarevic v. Town of Goshen, 39 A.D.3d 552 (2d Dep't 2007) [negative declaration annulled and preparation of full EIS ordered for failure to take a hard look at and provide a reasoned elaboration regarding potential impacts of the project on the Town reservoir].

The Appellants contend that a different standard applies when it comes to negative declarations, such as that involved here, made in connection with the modification of project that has been the subject of an earlier EIS. Indeed, the Appellants read Matter of Riverkeeper and the SEIS regulations issued by the Department of Environmental Conservation [6 NYCRR §617.9(a)(7)]as effectively making the decision whether or not to prepare an SEIS lie entirely within the discretion of the agency. But that reading would eviscerate the statutory mandate of SEQRA that actions that "may have a significant impact on the environment" require the preparation of an EIS. It would also go well beyond anything suggested by the Riverkeeper opinion (which, as noted, invoked the Jackson standard of review) and would make meaningless the DEC regulation, which is intended to provide guidance in situations where there has been a significant project change, not excuse an agency from complying with SEQRA.

The Appellants overstate the Court of Appeals' decision in Matter of Riverkeeper, *supra,* to imply that the Court has established a higher standard of review for a determination of whether an SEIS is required. Contrary to their contention (ESDC brief at 18-19), the Court did not establish a higher or different standard. It simply noted that in reviewing a determination on an SEIS,

the lead agency has the benefit of a full record to compare the changes that are triggering consideration of the need for an SEIS and can fully evaluate whether the changes are significant enough to find that there may be adverse impacts that were not previously considered. And while the authors of Environmental Impact Review in New York, Sec. 3.13[2][d] (Matthew Bender) noted that the standard of review of an SEIS decision was different from the initial determination of significance of whether to prepare an EIS, they did not opine as to any higher standard of review. They simply took note of the more extensive record and referenced the Jackson standard of a "hard look" and "reasoned elaboration."[16]

What is most notable about the difference between Matter of Riverkeeper and the instant case is the different factual situations in the two cases. In River-keeper, while many years had passed since a previous SEIS and the later determination to approve the project without an additional SEIS and there had been numerous changes in relevant laws and permit requirements, the applicant in that case had *modified the project to reduce impacts and included other mitigation measures* to meet the changed circumstances. Thus, the Court of Appeals

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[16] ESDC's citation to Riches v. N.Y.C. Council, 75 A.D.3d 33 (1st Dept. 2010), is completely pointless as that case did not involve SEQRA but a completely different statute that also used the word "may". Riches stands for the proposition that there will be review for abuse of discretion; it does not imply that a review of a decision not to prepare an SEIS is entitled to a heightened standard of deference.

determined that the lead agency had not abused its discretion when it reviewed all of the facts and found that there were no adverse environmental impacts that had not been adequately considered. In contrast, in this case, as more fully discussed below, ESDC went out of its way to deny the full time-frame for completion of the Project and failed to undertake a complete qualitative or quantitative analysis of the new impacts resulting from 25 years of construction (as compared with the 10-year build-out).

Certainly, the scope of judicial review is more limited when the subject is the modification of an action; there is no reason for the courts to revisit impacts that were adequately considered in an earlier EIS. But in the areas where changes in a project impose significant new impacts, the court must be free, and they are duty bound by the law, to address the adequacy of the agency's action under the standards articulated by the Court of Appeals in Jackson. That is what the Supreme Court did in this case.

B. The Significance of the Changes

The Appellants argue that the changes in environmental impacts following from the approval of the 2009 MGPP were not significant and therefore did not require the preparation an SEIS. In this, their first line of defense against the ruling of the Supreme Court is that ESDC acted rationally in adhering to the 10-

year construction schedule. This clearly was not the case, as we have spelled out at length in the preceding section of the Brief.

The Appellants second line of defense is that ESDC appropriately took into account the consequences of a longer construction schedule in the SEQRA Technical Memorandum and, if not there, in the hastily-prepared Technical Analysis. But as the Supreme Court observed and found, no studies were undertaken to analyze the impacts of 25 years of construction. To the contrary, to the extent that ESDC bothered to address these impacts at all, it was on a subjective basis only, with the undocumented conclusion that any construction impacts would simply be "prolonged" and in any case would be "temporary," because at some undetermined future date the Project would be complete and the disturbances associated with the build-out would cease.

This was far from the "hard look" that SEQRA required. In some cases, no doubt, the impacts of construction can be passed off as "temporary," because they are relatively short term and the normal incidents of living in an urban area. But when the subject is the construction of a massive project that is likely to extend over many years, the impacts imposed during the build-out become even more significant that the impacts from the completed project. "Temporary" is no answer in these cases, and especially so here, where construction could well

extend 25 years and beyond. Nor is it sufficient to say, simply, that whatever the impacts, they will be "prolonged" by a longer build-out. Impacts accumulating over time can and often do have far more serious negative consequences than ESDC ever suggested, much less identified, in either the SEQRA Technical Memorandum or the belated Technical Analysis.

That the negative environmental impacts of extended construction can be severe indeed is not merely a matter of conjecture, but was documented by the Petitioners in the record before the Supreme Court. Responding to criticisms of the Appellants that they had presented only generalities about such impacts, the Prospect Heights Petitioners retained two highly-qualified professionals – Professor Ronald Shiffman, co-founder of the Pratt Institute Center for Community and Environmental Development and a recognized expert in planning and environmental issues,[17] and James Goldstein of the Tellus Institute

[17] Professor Shiffman has over 47 years of experience providing program and organizational development assistance to community-based groups in low- and moderate-income neighborhoods. The Pratt Institute Center for Community and Environmental Development, of which he was a co-founder, is the nation's largest public interest architectural, planning and community development office. Mr. Shiffman has been a member of the American Institute of Certified Planners (AICP) since May 1985 and in April 2002 was elected a Fellow of the AICP. He served as a mayoral appointee on the New York City Planning Commission from 1990 to 1996. He is currently a professor at the Pratt Institute School of Architecture, where he chaired the Department of City and Regional Planning from 1991 to 1999. He has served as a consultant to HUD, the USAID and the Ford Foundation on national and global community-based planning, design and development initiatives and has also served on a number of gubernatorial and mayoral task forces (A. 1176).

in Boston[18] -- to provide specific examples of projects where construction had stalled or extended for significant periods of time.

In his affidavit, Professor Shiffman described the extensive negative impacts that the delays in the Atlantic Terminal Renewal Area had inflicted on adjacent areas in Brooklyn, including the Atlantic Yards area, and identified similar adverse effects that had occurred due to project delay in the Upper West Side and Seward Park Renewal Areas in Manhattan (A.1178-80). In a separate affidavit, Mr. Goldstein described the consequences of three projects that had stalled or experienced lengthy build-outs, including, the Filene's redevelopment in Downtown Boston, Harvard's Alston Development and the Fort Trumbull/ Pfizer Development in New London, Connecticut (A. 1185-95). The bottom line in each case was that due to the collapse of the real estate market, the Atlantic Yards project was in much the same situation and the consequent impacts on adjoining neighborhoods could be severe. This, however, is

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[18] Mr. Goldstein is director of the Sustainable Communities program at Tellus Institute. He has almost 30 years of experience at Tellus in the assessment of environmental and economic impacts of major facilities and policies, with a particular emphasis in recent years on socio-economic and job impacts. He has provided independent review and technical consulting services regarding facility impact assessments to a number of municipalities and community organizations. The Tellus Institute has evaluated a number of delayed projects in terms of their community impacts, including the impacts of the delayed Harvard University building program in Alston, Massachusetts (A. 1185-86).

precisely what ESDC failed to take into account by adhering to the 10-year construction schedule and refusing to prepare an SEIS.

Perhaps recognizing that ESDC's defense rests on sand, FCRC has come with a strange theory of its own. It takes the position that the 2009 MGPP did not make *any* changes in the Project; the modifications that it approved were simply the reflection of economic conditions and did not change the Project components. The latter claim is wrong in its own right – for example, creating a huge open parking lot that would be in place for 12 or more years rather than the four years originally promised, or providing publicly accessible open space 10 to 15 years later than had been represented – were certainly changes in the Project components. But more to the point, FCRC's position runs counter to ESDC's, which recognized the 2009 MGPP as effecting a sufficient change as to require the modification of the GPP and undertake a SEQRA review of that action. It also completely ignores the reality that the extension of time for property acquisition approved by the MGPP laid the adjoining communities open to an extension (and probably an expansion) of negative environmental impacts for up to 25 years. So, too, did the extension of the construction schedule inherent in the 2009 MGPP but not disclosed by ESDC. However FCRC may characterize the changes wrought by the MGPP, those changes had the potential of inflicting

severe and negative environmental impacts. As a result, ESDC should have prepared an SEIS to evaluate those impacts, taking into account, among other things, the examples of project delays and long construction schedules elsewhere, including those identified by Professor Shiffman and Mr. Goldstein.[19]

C. The Reasonable Worst Case

The Appellants argue strenuously that the outside completion dates included in the MDA had no relevance to the likely construction schedule – they simply defined the outside limits of when the Project and its various elements were to be finished, and that FCRC's obligation to use "commercially reasonable efforts" to complete work by 2019 was the more compelling provision of the MDA. Thus, projecting into the future, they argue that the Project could be built out before 2035.

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[19] As noted, the Prospect Heights Petitioners submitted the affidavits of Professor Shiffman and Mr. Goldstein in response to the Appellants' criticism that they had not provided any specifics regarding long-term construction impacts. In our view, however, it was not our responsibility to come forward with experts; having the raised the concern in the ESDC SEQRA hearing, it was the agency's obligation to make the appropriate investigations. An instructive case in this regard is a 2010 Ninth Circuit decision under the National Environmental Policy Act, which was, of course, the model for SEQRA. The case is Te-Moak Tribe of Western Shoshone of Nevada v. Department of Interior, 608 F.3d 592, 605 (2010), it makes it clear that the agency has the burden of analyzing potential impacts identified by the public.

The Petitioners agree this is possible – but no more possible or likely than the Project and its elements will be completed after those dates. Just as a "for instance," the three projects ESDC cited in the Court below in different contexts – 42nd Street, Riverside South and Battery Park City – remain unfinished after 26 years, 30 years and 42 years respectively. For none of these was it anticipated that their completion would take so long.

In any case, 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,[20] which ESDC and FCRC have regularly cited and endorsed in opposing the Petitioners' claims in this 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. 1-3, 5, 8-9]. In this case,

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

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 the two 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, as the Court below correctly held.

The Appellants contend, however, that ESDC made a reasoned judgment when it chose to go with a 10-year build out as the reasonable worst case. In fact, however, neither the MGPP nor the SEQRA Technical Memorandum addressed the question of what constituted such a case; nor could they have, given that they denied that there would be a construction schedule possibly extending to 2035. Just as ESDC never addressed the negative impacts of a delayed project build out – impacts that should have been evident from the

historic examples as close to Atlantic Yards as Atlantic Terminal – so it never considered, much less took a hard look at, whether the longer build-out would be the reasonable worst case for the purpose of assessing construction impacts.

Moreover, ESDC disregarded the section of the CEQR Technical Manual that explicitly identifies "Duration" as one of the elements that must be taken into account in evaluating construction impacts [CEQR Technical Manual, Chapter 22, pp. 1, 6, 9, 10]. In the case of the Project, the reasonable worst case in terms of duration, as reflected in the MDA, is 25 years (and it could be longer). Thus, even if ESDC had had a rational basis for believing that the Project would be completed in 10 years – and we do not believe it did – it was obligated to analyze and consider the impacts of the longer construction period before it acted on the MGPP. This it failed to do.[21]

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[21] The Appellants argue that the "intensity" of construction impacts at a particular point in time is a more appropriate measure of worst case impacts than the duration of the impacts. But there is nothing in the record to support this position or the asserted choice, which clearly was made only in response to the Petitioners drawing attention to the CEQR Technical Manual directives. That the potential impacts are of stalled or extended construction are more severe than the moment of most intense activity is reflected in the Shiffman and Goldstein affidavits. As anyone who has lived near a construction project can attest, it is the duration of construction that drives people to madness, not the moment when the loudest bang happens to happen.

D. Build-Year Confusion

Citing 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) and Fisher v. Giuliani, 280 A.D.2d 13 (1st Dep't 2001), the Appellants contend that this court and others have held that the judiciary will not second guess the agency's choice of the "build year" – the specific point in time when a project is expected to be completed and generate the most substantial operational impacts. Even if this were so – and we agree that it is generally true – the courts would have the authority *and* responsibility to review the choice as to rationality; if the year chosen had no basis in reality, its selection would presumably be subject to review under the "arbitrary and capricious" standard of Article 78.

The more pertinent point in this case, however, is that the irrational action involved here was not ESDC's choice of the "build year," but its failure to take into account the impacts of construction over as many as 25 years. ESDC has never disputed that it was obligated to assess the environmental impacts of construction, but it did so on the basis of a 10-year build-out. If, as we have discussed above, construction is likely to last as long as 25 years, then the agency needed to evaluate the impacts of that much extended build-out. This has nothing to do with the selection of a "build year" and the analysis of the

impacts in that specific and somewhat theoretical year. But it has everything to do with the real impacts of the Project, which, in this case, were not considered or assessed due to the agency's decision to adhere to the 10-year analysis it had undertaken in the 2006 EIS.

It is difficult to understand how, in their Briefs, the Appellants could confuse the concept of the "build year" with the issue of long-term construction impacts. Whatever the reason, their reliance on Wilder and Fisher is misplaced.[22]

E. Consideration of the MDA

FCRC (but not ESDC) contends that the Supreme Court erred in considering the terms of the MDA in reaching its decision, claiming that the use of the Agreement "to impeach ESDC's environmental analysis was improper." This position is based on the argument that court can only consider documents and information that was before the agency at the time of its decision.

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[22] In a footnote in its Brief, FCRC chastises the Court below for the manner in which it distinguished Wilder, asserting that that case and this one are factually the same, both resulting from downturns in the real estate market. This, however, is to miss the point. The issue raised in Wilder was the impact the project would have on the environment once it was completed, and a later completion date might have increased those impacts due to traffic growth and the like. The question in this case is the impact will the project will have because construction is now likely to extend over 25 years, not 10. That was not an issue raised or decided in Wilder or Giuliani. The same substantial distinction applies to the cases cited by FCRC at p. 44 of its Brief and by ESDC at pp. 65-66 of its Brief regarding the "build year."

FCRC's position is disingenuous at best and would make a mockery of the role of the courts at worst (which may be why ESDC did not choose to make an issue of the point). To begin with, if strictly applied, FCRC's position would sanction fraud and lack of disclosure. Here, as we have argued above, there was ample information available to ESDC to make it clear that the Project could not and would not be completed in a 10-year time span. Indeed, several months before the 2009 MGPP was approved, the agency's CEO, recognizing the collapse of the real estate market, acknowledged that would be "decades" before the Project was completed. In addition, the available market data showing the Brooklyn residential sales had tumbled by two-thirds and the virtual drying-up of construction loans were clear indications that the projected 10-year build-out was a fantasy well before the 2009 Technical Memorandum was issued and the 2009 MGPP was approved. The terms of the MDA were simply a reflection of those realities which, as discussed below, it is quite likely the agency understood (or should have understood) when the board approved the MGPP. But even if the board was not cognizant of those terms, it was, for all we know, because they were withheld by agency staff. If the position FCRC has taken were the law, the courts would be precluded from inquiring into the actual circumstances, even if they involved intentional withholding. That cannot be, and is not, the law.

Second, it is also disingenuous for FCRC to argue that the terms of the MDA could not be considered, because the crucial one was in fact before ESDC when it approved the 2009 MGPP. That critical term was that construction could extend for 25 years. This was contained in the lease abstract (or summary) that was made part of the MGPP (A. 3964-65).[22] If, as is the case, it was not called out to the directors, it was nonetheless before them. In addition, so was the MTA Agreement, with its 17-year extension of the acquisition schedule (A. 3826-34). Again, the terms were not revealed to the directors in block capitals; in fact, the directors probably had no idea of the extent of the extension. But that in its own right is the point. The relevant information that could have provided the ESDC board with an understanding that Project construction could, and likely would, run on for up to 25 years was so obfuscated as to be all but invisible. It was only when the MDA became public that the specific deadlines were revealed in a way that cut through obscure references in the 2009 MGPP. The Court below acted properly in examining the MDA and using it both to

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[22] On oral argument, ESDC represented to the Court below that in implementing the 2009 MGPP, it was relying on the MDA, "the principal terms of which are outlined in the record." But whatever terms were in the record, they did not include the MDA deadlines, and while ESDC emphasized to the Court that FCRC would be obligated to use "commercially-reasonable efforts" to complete the Project by 2019, it did not mention that there were more specific, and far more distant, deadlines covering every element of the Project.

clarify those references and to pass judgment on ESDC's claim that it had been rational in adhering to the 10-year construction schedule.

Third, as the Supreme Court observed, it strains credibility to accept the Appellants' claim that the terms of the MDA were not known by agency staff by the time the 2009 MGPP was approved (A. 24). They were certainly aware of the terms of the MTA Agreement and the extensions that it provided for property acquisition. And they were sufficiently aware of a 25-year outside date to have included in the abstract of lease made part of the MGPP the 25-year term that lessees would be given to commence construction of their particular buildings (A. 3965). It is hard to believe that the 25-year figure was plucked from thin air, without having reference to specific terms that had already been agreed on or were clearly expected to be agreed on. It is undoubtedly true that the terms of the MDA only became legally binding when the MDA was signed in December 2009. But that is not the issue here. The issue is whether ESDC acted rationally when it adhered to the 10-year build-out. If, as the Petitioners submit is the case, the 25-year deadline was under discussion (and, more likely, agreed to) at the time the MGPP was approved, that clearly bore on the question.

The Appellants cite Featherstone v. Franco, 95 N.Y.2d 550 (2000) in support of their claim that the Supreme Court should never have considered the

MDA, because it was "not before" the ESDC directors when they approved the 2009 MGPP. But the reasons we have identified above clearly distinguish this case from Featherstone. Among other things, the MDA was effectively made part of the administrative record in the sense that the 2009 MGPP and the Technical Memorandum both referenced the fact that separate development agreements were to be drafted and executed by FCRC; and it was these agreements that would supposedly embody terms that would assure completion of the Project by 2019. As it turned out, the MDA included the many further terms, described above, that bore on likely completion dates, but these were suppressed, even though, as we have noted the lease abstract identified (albeit lost in several hundred pages) a 25-year development term. This case is much closer to Matter of Cohen v. Kohler, 181 A.D.2d 285 (1st Dep't 1992), where this court granted a motion to renew and directed reconsideration of the plaintiff's discharge, because the agency involved failed to include as a part of the record pertinent information bearing on the discharge. This is very much what the Supreme Court did in this case, and it did so correctly.

F. The Technical Analysis

The Appellants argue that if ESDC acted arbitrarily and capriciously by adhering to the 10-year construction schedule in the Technical Memorandum,

the agency made up for this with its hastily-prepared Technical Analysis submitted to the Supreme Court in response to its remand order. In point of fact, it was not really in response to the Court's order, which had rather asked for a reasoned elaboration of the reasons that ESDC continued to use the 10-year build- out in evaluating the environmental impacts of the 2009 MGPP. But responsive or not, the Appellants' position does not withstand scrutiny.

To begin with, 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 on the proposal. The Court of Appeals observed that if this remedy was not enforced, there was every reason to believe that an after-the-fact cure would have ended up as a justification for a previously-made decision. This same reasoning applies in this case. If ESDC failed to comply with SEQRA in connection with its approval of the 2009 MGPP, as the Court below held, it should be required to prepare an

SEIS and only then evaluate the MGPP after considering the environmental impacts of a 25-year construction timetable.

In fact, as the Court below found, the Technical Analysis was pretty much what the Court of Appeals had warned about: a hastily assembled after-the-fact justification rather than objective evaluation of the negative impacts of a 25-year construction schedule. Not surprisingly given everything else that characterized ESDC's approach in the case, the agency's conclusion, supposedly documented by the Technical Analysis, was that 25 years of construction would result in no significant or new or different impacts as compared to those described in the 2006 FEIS and thus no SEIS was required or warranted.

It is the Petitioners' view that the Technical Analysis did not represent a good faith effort to measure the negative effects of a 25-year construction schedule, but was rather part of ESDC's continuing effort to disclaim and conceal the very real long-term impacts that such an extended build-out would impose on the Petitioners' surrounding neighborhoods. In this regard, we took note in the Court below, and we take note here, of some of the principal deficiencies in the Technical Analysis.

1. Long-Term Cumulative Impacts. The most glaring deficiency of the Technical Analysis was its failure to consider the long-term cumulative effects of

25 years of ongoing construction on the health of the surrounding neighborhoods. Not the physical health of residents but the fabric of the neighborhood: the willingness of residents to stay in the face of prolonged construction, the willingness or reluctance of owners to make improvements or renovate existing housing stock – in short, the impact of Project construction over 25 years in diminishing the ambiance and natural growth of adjacent areas.

This failure was not one of inadequate consideration; it was one of never identifying, much less addressing, these impacts. The Prospect Heights Petitioners had complained about this failure from the time comments were accepted on the 2009 MGPP and again in their court papers (A. 608-10), but ESDC and its consultants did not respond. It was to fill this void that the Prospect Heights Petitioners submitted the affidavits of Professor Shiffman and Mr. Goldstein referred to previously. These affidavits addressed the impacts of stalled and extended construction, citing specific examples in and beyond New York. Yet despite the history of these and other projects, the Technical Analysis did not address the cumulative implications of long-term construction or otherwise identify the potential of the negative effects on the well-being of adjoining neighborhoods.

Instead, the Technical Analysis evaluated each area of potential impact in isolation. What it did was simply take a series of separate elements – traffic, noise, neighborhood character and the like – and assessed them separately; and it compounded this approach by evaluating impacts on a "localized" basis, as if the Project were a series of separate buildings. Nowhere was there to be found an analysis of the overall implications to the surrounding neighborhoods of 25 years of continuous construction.[23]

2. "Temporary" Impacts: Open Space. Expanding upon the approach taken in the 2009 Technical Memorandum, the Technical Analysis dismissed many adverse impacts resulting from the extended construction schedule as simply being "temporary." For example, in assessing the impact of the extended build-out on open space and the requirements of the GPP and 2009 MGPP that eight acres of publicly accessible open space be provided, the Analysis justified its assertion that no new impacts were involved by stating that "the temporary impact identified in the FEIS would extend longer, but would continue to be

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[23] At one point, the Technical Analysis acknowledges that that the Project would have "significant adverse neighborhood character impacts in the vicinity of the Project site during construction, but these impacts would be localized and would not alter the character of the larger neighborhoods surrounding Project site." (Technical Analysis, p. 69) However, there is nothing in the Analysis that supports this assertion – no reference to other similar situations, no citation of studies regarding the cumulative impacts of long-term construction on adjoining neighborhoods. It is simply a bare statement made by the unknown authors of the document.

addressed by the incremental completion of the Phase II open space." (A. 223) In this case, however, the "temporary" negative impact would last up to 15 years longer than assumed in the FEIS – 15 years in which the adjacent neighborhoods would be without the promised open space benefits of the Project.[24] Three years without adequate open space is an impact that might be characterized as "temporary;" 15 years is clearly something else.

3. Block 1129. This huge block lies between two sections of the Prospect Heights Historic District and is directly across Dean Street from a residential area. The Block once supported a variety of structures, including a historic bakery, but these have been razed by FCRC. Under the 10-year Build-Out, Block 1129 was to be use for interim parking and construction staging for four years, following which underground parking would become available (A. 2296). Under the 25-year build-out schedule, the Block would instead remain as an 1100-vehicle surface parking lot (accommodating Arena and other traffic) and also be used as a staging site for 12 years or more. The residents in the

[24] In addition, because FCRC will not be acquiring the full Project site up front, as it was required to do under the GPP, but will rather take possession of the individual building sites only when it is ready to build on them, FCRC will not provide (or be able to provide) temporary open space on many of the lots, as it supposedly would have done under its original obligations. This change was not identified in the Technical Analysis, which mistakenly assumed that the temporary open space identified in the GPP and 2006 EIS would continue to be provided under the 2009 MGPP. As a consequence, the impacts of the lost open space were not addressed.

Historic District and along Dean Street would thus have to contend with the adverse impacts of a huge lot filled with autos, construction vehicles and construction equipment for three times longer than had been assumed and evaluated in the FEIS.

For the nearby residents, the eight years of additional impacts would include the pollution of their views, the congestion from the traffic and, perhaps more than any other negative, the *noise* of a facility that would be active from dawn (when construction workers arrived) to late at night (when the crowds from the last of the Arena shows – whether a basketball game or the Circus or some other event – exited in search of their cars). Moreover, as a result of other Project changes, the demand for parking on Block 1129 increased under the 2009 MGPP, and this, in turn, would require FCRC to turn to "stackers" to meet that demand (A. 222) – something not planned under the 10-year construction schedule [*see* A. 2042-43]. The stackers would add to the noise that would be especially intrusive at night; yet no analysis of the impact has been provided – not for one day, much less over 12 years. In fact, the noise impacts of the surface parking lot have never been studied – not only the impact of the stackers but of doors being slammed, engines starting up, horns blowing, tires squealing and users talking in loud voices – and not for one year, much less 12. This

constituted a significant change in impacts on a large number of people for many years, but it was not addressed in the Technical Analysis.

4. Delay in Underground Parking. Under the 10-year construction schedule, underground parking for the Arena was to be provided once Phase 1 was completed. This was held out as a major mitigation element by buffering adjacent neighborhoods from the noise and other negative impacts that accompany surface parking. This mitigation would be lost for eight years or more as a result of the delays in completing Phase 1 and slower progress anticipated for Phase II construction. This, too, represented a significant change that was not addressed in the Technical Analysis.

5. Multiple Arena Events. FCRC recently announced that it has booked the Ringling Brothers Barnum & Bailey Circus for the Arena (A. 900-02). Based on its operations at Madison Square Garden and other venues, the Circus will present two or three shows a day on weekends and two on some weekdays. Other booked acts, such as Disney on Ice, may also present more than one show a day. This is a new development that was not addressed in the FEIS, the Technical Memorandum or the Technical Analysis; the worst case analyzed in those documents assumed only one show a day. Multiple shows a day would have significantly greater impacts than those presented in the

environmental analyses to date. Traffic congestion would extend over longer periods and the emission of air pollutants would be greater as a result. This has particular implications in terms of the 8-hour ambient air quality standards, which cumulate emissions over that period of time; a second event within eight hours of the first would have the potential to cause a violation that would not have been projected assuming only a single show, as the FEIS did for its worst case evaluation. The imminent booking of the Circus was undoubtedly known to ESDC at the time it prepared the Technical Analysis, but was not mentioned in that document.

Many of the deficiencies noted above were also identified by the Supreme Court in its Final Decision. In presenting these, the Petitioners did not ask Justice Freedman to evaluate or otherwise pass judgment on the severity of the impacts, and she did not do so or attempt to do so. Rather, they asked the Court below, as they ask this Court, to take note of the potential impacts that, in the haste with which it was put together or because ESDC had not made the analyses required to address the issues, the Technical Analysis simply ignored. It may be that when these impacts are analyzed in accordance with SEQRA, they will be found by ESDC to require no modifications to the Project or no further mitigation. But it is also possible that after considering the potential

impacts, the agency will conclude that there are steps that can be taken to moderate or mitigate those impacts.[25] This is the purpose and mandate of SEQRA and the process that the Supreme Court has ordered ESDC to undertake. We ask this Court to affirm that decision.

[25] ESDC lays considerable emphasis on the mitigation plan that it is required to implement, suggesting that this will work to mitigate any additional impacts of the extended build-out. But that plan does not address such impacts as long-term cumulative effects, since these were never identified, nor does the plan consider mitigation that might offset or reduce the loss of open space or the extended duration of surface parking on Block 1129. Furthermore, while not a matter of record, the current mitigation plans as set forth in the Amended Memorandum of Environmental Commitments are not being effectively enforced.

Conclusion

For the reasons set forth above, the Decision and Order of the Supreme Court entered on July 19, 2011 should be affirmed and the Petitioners should be granted such further relief as this Court deems just and proper, including their costs in this proceeding.

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Respectfully submitted,

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