SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

- x

In the Matter of the Application of

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

Petitioners,

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

- against -

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

Respondents.

- x

Assigned to Justice Friedman

Index No. 116323/09

PETITIONERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL PETITION

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PETITONERS' REPLY MEMORANDUM OF LAW
IN SUPORT OF SUPPLEMENTAL PETITION

This Reply Memorandum of Law is submitted on behalf of the Prospect Heights Neighborhood Development Council and the other petitioners in support of their Supplemental Petition and in reply to the answering papers of the Empire State Development Corporation ("ESDC") and the Forest City Ratner Companies ("FCRC"). The background of the case is well known to the Court, and we will not repeat it here,

respectfully referring the Court to the earlier proceedings herein and, more specifically, to the Supplemental Petition and the Affirmation of Albert K. Butzel, the affidavit of Stuart Pertz and the petitioners' Memorandum of Law filled in support thereof. We limit this Reply Memorandum to responding to the points raised by the respondents in their answering papers.

A. Beating a Dead Horse

In its efforts to avoid preparation of a supplemental EIS before it approved the Modified General Project Plan for the Atlantic Yards Project, ESDC bet on a long shot. Despite the collapse of both the residential and commercial real estate markets by the summer of 2009, ESDC continued to maintain that the Project could be completed in 10 years and based its environmental analysis on that horse. The animal managed to stumble across the finish line but it did not take long to realize that it had come in at the back of the pack. Even before the MGPP was approved, the MTA Agreement provided ample evidence that the 10-year schedule had been lost along the back-stretch; and the terms of the Master Development Agreement, although only revealed after the finish line had been crossed, made it all the clearer that the horse ESDC had bet on had not come home a winner, but, to the contrary, that the build-out of the Project would extend well beyond 10 years and very probably for as long as 25 years. On November 9, 2010, the horse broke down in the face of the Court's decision and order granting the petitioners' motion to reargue and renew.

The respondents, however, continue to contend that their 10-year bet was not a loser. In this regard, they acknowledge that the 10-year build-out is not going to

happen. But they insist that the results of the race are irrelevant, insist that they placed their bet on a rational basis and contend that the finish line order should be disregarded. In this, we submit, ESDC and FCRC are beating a dead horse.

The respondents have made what seems to us an unlikely interpretation of the Court's November 9 remand order. As they read it, ESDC's obligation was to decide how, if at all, the Master Development Agreement (the "MDA") *affected* the 10-year construction timetable that ESDC has used in its environmental analysis [*see* ESDC Memo of Law, pp. 7-8, 10-13; FCRC Memo of Law, pp. 7-9]. Not surprisingly, the agency concluded that the MDA had *no effect* on the construction schedule for the Project. In our view, however, that is not what the Court was asking ESDC to determine.

Rather, the central issue posed by the Court's remand order was how the MDA and the MTA agreement bore on the continuing validity of the 10-year construction timetable – what they *reflected* in terms of that timetable, not how they *affected* it. Indeed, it is difficult to understand how the agreements could have affected the time-table at all, since the decision to analyze construction impacts on the basis of a 10-year build-out was made before they were finalized. But what the agreements did bear on was the rationality – or irrationality – of using a 10-year construction timetable for the purposes of the environmental review, when the MDA and MTA agreements, executed or being drafted at the same time, provided for completion dates 25 years out and did not require even the start of Phase 2 for 15 years. It is that dichotomy that led the petitioners to believe the continued use of the 10-year build-out was irrational

and presumably led the Court to entertain its own doubts in that regard and ask ESDC for a "reasoned elaboration" that could explain the disconnect. That, however, is not what ESDC has provided. Instead, it has simply repeated the same arguments it made in opposing the petitioners' motion to reargue and renew. *There remains no rational explanation for the dichotomy identified above.*

The heart of the respondents' arguments is that the completion dates do not necessarily represent that dates when different elements of the Project may be finished – they could be completed in advance of those dates. The Petitioners agree that this is possible – but no more possible than that the Project and its elements will be completed *after* those dates. Just as a "for instance," the three projects that ESDC cites in a different context – 42nd Street, Riverside South and Battery Park City – remain unfinished after 26 years, 30 years and 40 years, respectively. For none of them was it anticipated that their completion would take so long.

Equally to the point, the likelihood that the completion dates in the MDA best reflect the most reasonable construction schedule is found in the proof: the statement of ESDC's CEO, made in 2009 before the MGPP was approved, that the Project would take decades to complete;[1] and the market data that we have cited in our papers in support of the Supplemental Petition, which made it clear to everyone except ESDC's

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[1] The respondents dismiss the comments of ESDC's then-CEO Marisa Lago as being no more than offhand remarks. In fact, they were considered remarks made at an industry forum that were later transcribed into written form – an action that can hardly be described as "offhand." ESDC also contends that remarks were outside of the record and should not be considered. But Ms. Lago's comments were made *before* ESDC issued its Negative Declaration with respect to the MGPP and thus are competent evidence to impeach the agency's claim that it acted on a rational basis (or for that matter, in good faith) when it continued to evaluate the impacts of construction on the basis of a 10-year build-out.

paid consultant that the real estate markets were in free-fall and no one expected that to change for some years.[2] The respondents argue that that data did not speak to the long-term [see ESDC Memorandum, p. 15]. But that is willful blindness. It is perfectly clear that FCRC understood the dire condition of the market and thus pressed not only for a 25-year period to complete the Project, but also for an immediate $80 million of relief in the form of deferred payments to the MTA. Perhaps it is *possible* that the market could have turned around quickly enough to allow the Project to be completed in less than 25 years, but to have based the analysis of construction impacts on that wistful hope was clearly irrational and, we believe, quite possibly dishonest.

We take note of two other assertions made by ESDC. The first is that the failure to impose any significant penalties on the Phase 2 construction is because the agency supposedly decided that FCRC's self-interest would encourage it to move forward promptly [ESDC Memo of Law, p. 12]. To us, this seems a poor substitute for specified penalties imposed in the *public's* interest. It also makes us wonder why huge penalties have been identified in case the Arena construction drags on, when FCRC's investment in that facility is already (according to it) in the hundreds of millions of

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[2] It is worth noting that the ESDC's real estate consultant based its opinion in significant part of the assertion that the demand for affordable housing would continue to be strong, a contention that is undoubtedly true. But for the Project, the affordable housing is to be integrated into, and constitute a part of, the market-rate housing, for which financing, as well as market demand, had collapsed by mid-2009. Moreover, as it has turned out, under the MDA, *FCRC's obligation to construct affordable housing is made explicitly contingent on its ability to obtain government subsidies for the affordable units*, something that is hardly guaranteed over 10 years (or even 20 years), given that thousands of units of affordable housing that other developers are obligated be built as a part of projects approved by the City over the last several years. For example, in the last 18 months alone, and taking account only of the units that have required review by the City Planning Commission, some 5,000 units of affordable housing have been approved [*see* City Planning Reports from 8/19/09 to 2/16/11]; and that does not include the huge potential of Hudson Yards and other previously approved projects.

dollars (not including its investment in the New Jersey Nets) and thus it would appear to have an even greater self-interest in seeing the Arena to prompt completion than in completing Phase 2 (especially since it is free to sell off the Phase 2 properties).

The second point involves ESDC's extended presentation on the Legal Notice that it published in June 2009 [ESDC Answer, pp. 14-16]. It is not clear what purpose this elongated description is intended to serve (unless it is to call into question the Court's conclusion that the agency withheld important information), but in our view what it does is to underscore the fact that well before ESDC approved the MGPP, it was aware that a much extended construction schedule was inevitable. At the same time, the fact that the attorneys for the agency have only now chosen to emphasize the Legal Notice is a clear indication of how unlikely it would have been for members of the public to ferret out, much less understand, those implications.

B. Reasonable Worst Case

Both respondents argue that the "reasonable worst case" for construction impacts was the 10-year build-out. But they cite no authority for this proposition and do not (and cannot) deny the emphasis on "Duration" of impacts found in the CEQR Technical Manual (cited in our initial Memorandum of Law at 9-10 and the Butzel Affirmation ¶18). Nonetheless, disregarding Macbeth's admonition that "if it were done, when 'tis done, then 'twere well it were done quickly," the respondents continue to insist that exposing the neighborhood to 10 years of construction would be worse than subjecting it to 25 years. In response to this claim, the petitioners are submitting with their reply papers the Affidavit of Ronald Shiffman, co-founder of the Pratt Institute

Center for Community and Environmental Development and a recognized expert in planning and environmental issues.[3] As set forth in Mr. Shiffman's affidavit, ESDC's use of the 10-year construction schedule is not supported in fact or in law.

C. Annulment of MGPP Approval

In its Memorandum of Law, FCRC indicates confusion as to what the petitioners are claiming and seeking. At one point, it notes that our position seems to be that the record previously before the court requires it to invalidate the MGPP [FCRC Memo of Law, p. 5]. At another point, it suggests we are contending that ESDC exceeded its authority [FCRC Memo of Law, p. 11]. We want to be clear.

We agree with FCRC that at the time of its November 9 Decision granting reargument and renewal, the Court was not satisfied that the record showed ESDC had fully complied with SEQRA. We also agree that at that time, the Court was not persuaded that ESDC was required to prepare an SEIS. As we understand it, it was for that reason – to see if ESDC could provide a "reasoned elaboration" (and a rational basis) for its continued use of the 10 year construction schedule – that the Court remanded the matter to ESDC.

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[3] Mr. 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.

If the petitioners are correct in their position that ESDC has failed to provide a rational basis for why it used the 10-year timetable despite the market collapse and the other indicia we have described, then they submit that it follows that the agency did not comply with SEQRA in connection with its approval of the MGPP. If that is the case, the petitioners believe the approval must be set aside and ESDC directed to reconsider its decision, taking account of the impacts of the longer construction schedule. That, it turn, should require it to comply with the procedural steps described in both SEQRA and the UDC Act, including providing an opportunity for the public to comment on the evaluation of impacts.

The petitioners do not believe or agree that ESDC's failure to have evaluated the impacts of a longer construction schedule at the time it considered the MGPP can be or has been cured by the 2010 Technical Analysis. This is true to begin with as a matter of law, following the Court of Appeals' decision in Matter of Tri-County Taxpayers Association v. Town of Queensbury, 55 N.Y,2d 41 (1982), where exactly the same solution was proposed and rejected by the Court. But it is also true for the reasons the Court warned about; 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 here. If, as we believe to be the case, ESDC failed to comply with SEQRA in connection with its approval of the MGPP, it should be required to evaluate the MGPP anew after an objective prospective analysis of the environmental impacts of a 25-year construction timetable.

D. Technical Analysis Deficiencies

1. Long-Term Cumulative Impacts. The deficiencies of the Technical Analysis in this area are identified in the Butzel Affirmation at paragraphs 22-23. The respondents discount the points made there as unsupported conclusions. This is not so – the severe adverse impacts of the extended construction of the Cross Bronx and Gowanus Expressways are matters of record and should have alerted ESDC and its consultants to the potential for similar impacts in conjunction with the Atlantic Yards Project.[4] *Under SEQRA, the burden was on ESDC, not the petitioners or the general public, to identify and evaluate such impacts.* Nonetheless, responding to ESDC's claims that the petitioners' identification of the problem was unsupported and that we failed to explain the defects in the agency's evaluation [*see, e.g.*, ESDC Answer, ¶¶112, 116], we are submitting with our reply papers the affidavits of Ronald Shiffman, James Goldstein of the Tellus Institute in Boston,[5] and Marjora Carter,[6] which identify

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[4] Contrary to ESDC's contention [ESDC Answer, ¶110], construction of the Cross Bronx and Gowanus also proceeded incrementally.

[5] 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.

[6] Ms. Carter is president of the Majora Carter Group, an economic and environmental consulting firm. Prior to forming MCG, from 2001 to 2008, she was Executive Director of Sustainable South Bronx, a non-profit organization focused on community development, environmental justice and green job training in the south Bronx. In 2005, she was a recipient of a MacArthur "genius" grant for her work on the environment and environmental justice. Ms. Carter also hosts a public radio series, "The Promised Land," which addresses topics relating to community-based planning and sustainability.

the negative impacts of development initiatives similar to Atlantic Yards.

We would also like to emphasize another point. The respondents assert that the analyses presented by the petitioners are conclusory and unsupported, while at the same time contending that ESDC's "finding" that construction impacts would be localized only was "the result of careful analysis and reasoning," [ESDC Answer, ¶114]. That is questionable. Nowhere in the Technical Analysis or earlier Technical Memorandum is there any identification of the persons who undertook that "careful analysis and reasoning" or of their qualifications, if any. Where traffic and air quality impacts are assessed, it can reasonably be assumed that the consultants working in those areas have expertise. But it is an entirely different matter when it comes to long-term impacts on neighborhood character or community fabric and well-being.

We have no idea whether the persons who wrote those sections of the Technical Analysis had *any* expertise whatever; it is just as likely that they were chosen for their writing abilities. Moreover, even if they had some qualifications, we have no idea whether they ever dealt with the environmental implications of a 25-year construction process. Certainly, the Technical Analysis references no examples of other similar situations and contains no data to support the conclusion that the elongated build-out would have no significant environmental impact. It is all very well for the respondents to assert that the petitioners' claims are conclusory and unsupported – an assertion we are responding to with the Shiffman and Goldstein affidavits.[7] The petitioners suggest, however, that the respondents should look in the mirror as they speak.

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[7] In their memoranda of law, ESDC and FCRC both asked rhetorically what issue the petitioners take with the methodology for projecting 25 years of construction impacts. Mr. Shiffman's affidavit also addresses this question

2. <u>Open Space Deficiency</u>. The Technical Analysis dismissed as simply "temporary" the fact that the open space required as a part of the Project might be delayed for 15 years – as if those 15 years were meaningless. In its response, ESDC contends that the delay in the Project would mean a correlative delay in the need to provide open space. But this ignores the fact that the open space was to be provided not simply to serve the Project residents but also for the benefit of the surrounding communities as mitigation for negative offsite impacts. That these benefits could be lost for as long as 15 years is certainly a significant change that should have been taken into account.

3. <u>Construction Staging</u>. The respondents claim that construction staging will never be in the streets. They support this claim by referencing the various phases of construction that are being projected and pointing out that at each phase, there will be room on Block 1129 or some other block to store the construction equipment and materials. This might be convincing but for the fact that ESDC's analysis does not address the issue during the period when Buildings 1 through 5 are to be constructed. The Technical Analysis does address staging during construction of the Arena but before Buildings 1 through 5 are in the works. Then it jumps directly to Phase 2, when Buildings 1 to 5 are assumed to be complete. In this way, it avoids addressing the staging problems for those five buildings (whose construction may not be completed for 12 years), which is when the work is likely to spill into the streets. During that period, Block 1129 will need to accommodate worker parking, Arena parking, police parking and who knows what else. There is no showing that it, or any other location,

will provide adequate space for construction staging for Buildings 1 to 5.[8]

4. Block 1129. FCRC asserts that the block is derelict and contains no historic structures [FCRC Memo of Law, p. 18]. The latter is true but only because FCRC has already torn down the historic structures, including the historic Ward Bakery.

With respect to the use of the Block for parking, FCRC also asserts that the "sporadic" sounds of car doors closing and people speaking while parking "have never been recognized as significant impacts requiring examination." [FCRC Memo of Law, p. 19]. Not surprisingly, no citation is offered to support this claim – it is just a bare assertion. And it runs counter to the statement in the 2006 FEIS which recognized that outdoor crowds could create a noise problem, but would not do so at the Project because "people attending events would not be expected to congregate in any significant numbers on Dean Street or other relatively quiet streets." FEIS, p. 15-6. That may have been so before, but it will certainly not be the case with Block 1129 flooded with vehicles and their drivers and guests for as long as 12 years. In this case, we are talking about a 1,100 car *open* parking lot for the *Arena* just across Dean Street from residential buildings that overlook it. When events are over, the Arena patrons will spill out to the lot as a group. The accompanying noise will be significant and particularly disturbing in the later evening; and this could happen more than 200

[8] In fact, the Technical Analysis introduces a completely new use for Block 1129, stating at page 44 that the lot will provide 1,100 parking spaces "to accommodate parking demand from the area *and other Project buildings.*" (emphasis added). The italicized words not only reflect a new use that has not been analyzed – they are inconsistent with the Memorandum of Environmental Commitments that ESDC and FCRC hold up at other times as so important. That Memorandum provides that Lot 1129 will be used for Arena parking, not for other project buildings. The inconsistency also raises the question of whether there is adequate parking spaces will be available during Phase 1 of the Project.

times a year. This should have been recognized and analyzed as a significant impact that no longer could be passed off as "temporary."

ESDC contends that the construction staging on Block 1129 will be on the north side of the block and thereby diminishes the impacts on the residences on the south side or east side [ESDC Answer, ¶103]. But even so, the staging will take place only 100 feet from those residences – an impact that cannot be dismissed as insignificant.

ESDC also contends that the impacts from parking on Block 1129 will be less than under the 10-year construction schedule, because the Phase 2 underground parking would contain nearly double the 1100 surface spaces under any longer construction timetable [ESDC Answer, ¶108]. However, this ignores several realties. First, surface parking will be noisier and visibly busier than underground spaces. Second, it will last for up to 15 years, compared to the four years assumed in the FEIS. Third, the surface parking will accommodate two or more shifts on many days – filled up and then emptied of construction workers, followed by the arrival and late departure of Arena patrons. And on some event weekends, there could be three shifts, as for the circus.[9] There is no analysis of this kind of flow of vehicles in the Technical Analysis.

[9] FCRC argues that a sold out basketball game at the Arena will present the worst case traffic situation [FCRC Memo of Law, pp. 20-21]. Perhaps so, though the Circus regularly fills Madison Square Garden, and it is hard to understand why the situation would be any different in Brooklyn. More importantly, the point we made in our initial papers was that the circus and other attractions will offer two or even three shows a day, thereby extending congested traffic conditions and impacting for a longer period of time on neighboring residents. There is no analysis of these multi-show events in the Technical Analysis or the earlier FEIS. ESDC argues that the issue cannot be brought up now, as it is not the result of the longer Project build-out. This is, to say the least, a crabbed interpretation of what the agency's obligations are under SEQRA. If a further analysis of environmental impacts is to be undertaken, it should not be confined to imaginary conditions that are known no longer to be true. It should address – and attempt to mitigate – the actual impacts.

E. Law of the Case

The respondents both argue that "law of the case" prevents the petitioners from asserting that the Technical Memorandum was defective because it erroneously used a 10-year construction timetable to measure environmental impacts when it should have based its evaluation on a longer build-out [ESDC Memo of Law, pp. 28-30; FCRC Memo of Law, pp. 6]. This makes no sense. The issue of whether ESDC proceeded on a rational basis in continuing to use the 10-year build-out was the essential question the Court posed in remanding the matter to the agency for further consideration and explanation. It was the central issue raised in the petitioners' motion to reargue and renew, which the Court granted. To suggest in these circumstances that "law of the case" precludes the petitioners from pressing these contentions now is without basis; and none of the cases cited by either respondent is similar in any way to the circumstances of this proceeding or has any effective bearing on this case.

As we have noted above, we believe that the respondents' reading of the remand order as requiring no more than a finding as to how the MDA and the MTA agreement affected the reasonableness of the assumed 10-year construction schedule is not only too narrow, but misses the essential question that concerned the Court. On the other hand, the petitioners do not contend, as FCRC seems to fear, that the remand has freed them to make any argument about defects in the 2009 Technical Memorandum that they care to. They are limited in their challenge to claims arising out of or relating to the misapplication of the 10-year construction schedule; and that is

all they have argued in this supplemental proceeding.

That being said, at this point we believe it is well within the discretion of the Court to direct ESDC to prepare an SEIS before it acts again on the MGPP. In that case, the analysis would not have to be limited to construction impacts, but should take in all the areas of impact that were implicated as a result of the MGPP. This is the normal process; where a single environmental impact is found to be significant, an EIS must be prepared for all potential impacts [*see* 6 NYCRR §617.7(a)(1), (2) and CEQR Technical Manual, p. 1-10].

In this case, we believe that ESDC acted in doubtful good faith in adhering to a 10-year build-out when it evaluated construction impacts in the 2009 Technical Memorandum, and it compounded that behavior by failing to disclose the terms of the MDA when the case was first argued to the Court. Indeed, it continues to press the same story even now, after it has become apparent and has been acknowledged that a 10-year schedule cannot be met. ESDC is unrepentant in its denials and unjustified in its adhering to an unjustifiable position. Accordingly, the petitioners submit that it would be appropriate for the Court to order the agency to prepare a full supplemental EIS as a remedy for its intransigence.

F. Relief: Stay

The respondents assert that even if the Court determines that ESDC did not comply with SEQRA in connection with its approval of the MGPP, there is no basis for staying further construction of the Project pending compliance with the law. We have set forth in our initial supplemental papers the reasons why we believe a stay should

follow if the Court finds that there has been a violation of SEQRA, and we will not repeat those arguments here. We would, however, like to emphasize one point.

As indicated above, the petitioners believe that in its analysis of environmental impacts at the time it considered the MGPP, ESDC selected a 10-year construction schedule that it knew had ceased to be applicable in an effort to avoid having to address the impacts of a much longer build-out and thus avoid having to prepare an SEIS. It is also the petitioners' view that when ESDC came into court to defend against their claims, the agency continued to perpetuate the same story and compounded this by failing to disclose (and resisting disclosure of) the MDA, which, in our view, provided clear evidence that the timetable would extend well beyond 10 years. As a result of these actions, ESDC was able to persuade the Court, initially, that it had complied with SEQRA. However, when the petitioners were finally able to bring the MDA before the Court, the potential that the 10-year schedule was misused was made clear enough that the Court granted the petitioners' motion to reargue and renew. In the meantime, FCRC had been able to close on its bond financing, providing it with the funds it needed to proceed with the construction of the Arena. But for suppression of the MDA, it is possible that the Court would have reached the conclusion reflected in its November 9 Decision in March; and if that had been the case, it is quite possible that FCRC could not have secured the release of the bond proceeds.[10]

[10] We have explained why, under the Commencement Agreement, the release of the bond proceeds would have been problematic in our supplemental Memorandum of Law at pp. 15-16 and most specifically in footnote 4 on p.16. FCRC contends that this would not have been the case [FCRC Memo of Law, p. 27], but offers no counter-analysis to explain how the proceeds could have been released if the Court's March 10 decision had invalidated the approval of the MGPP.

As a first thought, the petitioners submit that ESDC and FCRC should not be rewarded for having concealed the terms of the MDA until after the bond proceeds were released and that a proper remedy would be to enjoin them from continuing the construction that the proceeds are financing until there is compliance with SEQRA. But there is another interest to be served. That is the interest in preserving the rule of law. Whatever public benefits the respondents may claim will derive from the Project – and the petitioners have a quite different view on that score – those benefits should not be conferred as the result of a ruse or on the basis of illegal action. We live in a society in which the ends are generally thought not to justify the means unless the means are themselves in conformity with the law. If the Court concludes that there has not been conformity in this case, to allow the work set in motion by the illegality to continue would, the petitioners submit, serve to undercut, rather than validate, the rule of law.

The petitioners recognize that because the Arena is already well advanced, it may well be inevitable that one day it will be completed. The petitioners lost their chance to stop Arena construction when the bond proceeds were released and work on the Arena was allowed to proceed unimpeded. But that simply reinforces the importance of halting construction for the time being. There is little chance a stay will stop work for any great length of time. It will, however, send a message that the law is there for a purpose and that it is not to be subverted by attempts to conceal.

CONCLUSION

For the reasons set forth above and in the petitioners earlier papers, the Supplemental Petition should be granted, along with the requested relief.

Dated: March 3, 2010

Respectfully submitted,

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