To be argued by:
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Supreme Court of the State of New York

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 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,

(Additional Caption On the Reverse)

REPLY BRIEF FOR RESPONDENT-APPELLANT FOREST CITY RATNER COMPANIES LLC

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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,

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.

Table of Contents

Page

Table of Authorities ii

Preliminary Statement 1

Argument 3

I. THE MOTION COURT'S REQUIREMENT THAT ESDC PREPARE A SUPPLEMENTAL EIS WAS PREMISED IMPERMISSIBLY ON CHANGES IN ECONOMIC CONDITIONS, NOT CHANGES IN THE PROJECT 3

II. ESDC'S DETERMINATION THAT A SUPPLEMENTAL EIS WAS UNNECESSARY WAS WITHIN ITS DISCRETION 6

III. ESDC'S USE OF AN ASSUMED 10-YEAR BUILD-OUT IN THE 2009 TECHNICAL ANALYSIS WAS REASONABLE, AND PETITIONERS' ACCUSATIONS OF A COVER-UP ARE NOTHING MORE THAN SPECIOUS RHETORIC 14

IV. PETITIONERS' CRITICISMS OF THE SUBSTANCE OF THE 2010 TECHNICAL ANALYSIS ARE WITHOUT MERIT 21

V. THERE IS NO BASIS FOR EXPANDING THE RELIEF THAT WAS GRANTED TO PETITIONERS 26

Conclusion 29

Table of Authorities

Page

Cases

Action for Rational Transit v. West Side Highway Project,
536 F. Supp. 1225 (S.D.N.Y. 1982) 21

Akpan v. Koch,
75 N.Y.2d 561 (1990) 13

C/S 12th Avenue LLC v. City of New York, 32 A.D.3d; 1, 7 (1st Dep't 2006) 16

Chatham Towers, Inc. v. Bloomberg,
6 Misc.3d 814 (Sup. Ct. N.Y. Co. 2004), *aff'd*, 18 A.D.3d 395 (1st Dep't 2005) 29

Chinese Staff & Workers Assoc. v. City of New York,
68 N.Y.2d 359 (1986) 8-9

Coalition Against Lincoln West, Inc. v. City of New York,
208 A.D.2d 472 (1st Dep't 1994) 4

Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Council of City of New York,
214 A.D.2d 335, *app. denied*, 87 N.Y.2d 802 (1995) 16

Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.,
59 A.D.3d 312 (1st Dep't 2009), *app. denied*, 13 N.Y.3d 713, *rearg. denied*, 14 N.Y.3d 748 (2010) 3, 16, 27

Featherstone v. Franco,
95 N.Y.2d 550 (2000) 21

Fisher v. Giuliani,
280 A.D.2d 13 (1st Dep't 2001) 13

Gernatt Asphalt Prods. v. Town of Sardinia,
87 N.Y.2d 668 (1996) 14-15

Golden v. Metropolitan Transportation Authority,
126 A.D.2d 128 (2d Dep't 1987).....29

Hells Kitchen Neighborhood Ass'n v. City of New York,
81 A.D.3d 460 (1st Dep't 2011) 15-16

Jackson v. *N.Y.S. Urban Development Corp.*,
67 N.Y.2d 400 (1986) 10, 24

Kahn v. Pasnik,
90 N.Y.2d 569 (1997) 9

Merson v. McNally,
90 N.Y.2d 742 (1997) 13

Muir v. Town of Newburgh,
49 A.D.3d 744 (2d Dep't 2008) 5n.2

Neville v. Koch,
79 N.Y.2d 416 (1992) 15, 16

New York City Coalition to End Lead Poisoning v. Vallone,
100 N.Y.2d 337 (2003) 9

Nixbot Realty Associates v. N.Y.S. Urban Dev. Corp.,
193 A.D.2d 381 (1st Dep't 1993) 4

Plotnick v. City of New York,
148 A.D.2d 721 (2d Dep't 1989) 20

Riverkeeper, Inc. v. Planning Board of Town of Southeast,
9 N.Y.3d 219 (2007) 6, 7, 10

Save Open Space v. Planning Board of Town of Newburgh,
74 A.D.3d 1350 (2d Dep't 2010) 5n.2, 24

Sierra Club v. United States Army Corps of Engineers,
541 F.Supp. 1367 (S.D.N.Y. 1982) 22

Town of Newburgh, 74 A.D.3d 1350 (2d Dep't 2010) 5n.2

Tudor City Assoc., Inc. v. City of New York,
225 A.D.2d 367 (1st Dep't 1996) 4

Village of Westbury v. Dep't of Transportation,
146 A.D.2d 578, *aff'd*, 75 N.Y.2d 62 (1989) 29

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).....5, 6

Statutes

CPLR 217.....27

ECL § 8-0109.....7

Regulations

6 NYCRR § 617.7(c)(1)(i).....25

6 NYCRR § 617.7(c)(1)(v).....25

6 NYCRR § 617.7(c)(1)(viii).....25

6 NYCRR § 617.9(a)(7)(i).....8

22 NYCRR § 130-1.1.....20

Miscellaneous

CEQR Technical Manual.....23

The SEQR Handbook.....8

Preliminary Statement

The opposing brief submitted jointly by the *DDDB* and *Prospect Heights* petitioners tries to mask the fundamental bankruptcy of petitioners' theory of the case with specious accusations of deception, cover-up and misrepresentation.[1]

Petitioners have not refuted FCRC's showing that the motion court's determination improperly expands the scope of SEQRA by using the approval of minor changes to the Project to require a supplemental EIS that examines the impact of changes in economic conditions. Similarly, petitioners have not refuted the showing by both FCRC and ESDC that ESDC took the required "hard look" at the environmental impacts of the 2009 MGPP and made reasoned elaborations of its decision not to prepare a supplemental EIS – first, in the 2009 Technical Memorandum and then, after remand, in the 2010 Technical Analysis, which thoroughly considered the potential environmental impacts of an attenuated 25-year construction schedule for the Project, and thus cured the alleged deficiency in the 2009 Technical Memorandum. Significantly, petitioners' opposition brief is devoid of any suggestion of what sorts of studies supposedly were omitted from the 2010 Technical Analysis but could be performed for and included in the court-

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[1] Unless otherwise indicated, the abbreviations and references in this reply brief are the same as those in FCRC's initial brief. Citations to "Opp. Br." refer to petitioners' opposition brief on this appeal, and citations to "FCRC Br." refer to FCRC's opening brief.

ordered supplemental EIS. Clearly, the motion court's decision was erroneous and should be reversed.

At bottom, the opposing brief exposes petitioners as irreconcilably opposed to the Project. Petitioners are determined to use litigation to eviscerate the Project by imposing on the responsible agencies a fanciful vision of an unrealistic small-scale development that never would be economically feasible in view of the enormous costs required for site acquisition and construction of infrastructure and public improvements, including a new subway entrance, a new LIRR rail yard and a platform covering the new rail yard so that residential buildings and open space may be constructed.

While petitioners' opposition may be steadfast, there also is widespread public support for the Project, including community groups that are parties to a Community Benefits Agreement binding the Project's sponsors to carefully articulated commitments to make housing and job training and opportunities available to local residents (A516-18), and also the Downtown Brooklyn Partnership, a not-for-profit local development corporation formed by leading Brooklyn businesses and institutions, which appeared as *amicus curiae* in the motion court in opposition to the supplemental petitions objecting to the 2010 Technical Analysis and insisting on a supplemental EIS. Public support for the Project also was demonstrated at the public hearings held by ESDC on the 2009

MGPP, at which 501 individuals and organizations submitted comments in favor of the Project while 222 commentators – 157 of whom simply signed a petition – expressed opposition. In addition, the Project consistently has enjoyed the support of numerous elected officials (A518).

Argument

I.

THE MOTION COURT'S REQUIREMENT THAT ESDC PREPARE A SUPPLEMENTAL EIS WAS PREMISED IMPERMISSIBLY ON CHANGES IN ECONOMIC CONDITIONS, NOT CHANGES IN THE PROJECT

It is undisputed that the physical changes in the Project that were approved by the 2009 MGPP were minor and environmentally inconsequential – *i.e.*, they had no significant adverse environmental impacts that had not already been studied in 2006 in the FEIS approved by this Court in *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *app. denied*, 13 N.Y.3d 713, *rearg. denied*, 14 N.Y.3d 748 (2010) ("*DDDB II*").

In other words, the Project as approved in the 2009 MGPP is really the same one that was approved in the 2006 MGPP. Nevertheless, the motion court has required a supplemental EIS as a result of the coincidental fact that the intervening deterioration of over-all economic conditions has increased the likelihood that construction of the Project will take longer than previously expected, and has led to modification of the 2006 MGPP to allow ESDC to acquire

properties in multiple sequential condemnations rather than all at once at the outset. This change parallels a similar change in the business terms between FCRC and the MTA allowing FCRC's sequential acquisition from the MTA of properties and development rights required for the Project. Significantly, the change in the MGPP allowing sequential condemnation is not the cause of potential delay in the Project, but a response to economic conditions that may cause delay. This Court repeatedly has held that SEQRA is not about the economics of a project. *Tudor City Assoc., Inc. v. City of New York*, 225 A.D.2d 367, 368 (1st Dep't 1996); *Coalition Against Lincoln West, Inc. v. City of New York*, 208 A.D.2d 472 (1st Dep't 1994); *Nixbot Realty Associates v. N.Y.S. Urban Dev. Corp.*, 193 A.D.2d 381 (1st Dep't 1993).

The motion court's decision therefore erroneously requires the re-examination of a previously approved project on the basis of what are really global economic conditions.

Petitioners characterize this argument as "strange," because maintaining an open-air parking lot "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" are "certainly changes in the Project components" (Opp. Br. at 45). In fact, however, what petitioners are complaining about is not a change in Project components. Indeed, petitioners cite no authority supporting

their notion that a change in the timing of a project's implementation resulting from changed economic circumstances is a change in the project itself that requires new environmental analysis.

To the contrary, this Court faced the precise issue presented here in a prior case, *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). There, a change in the Times Square Redevelopment Project to "sequential" or "staggered" site acquisition led to a challenge by project opponents who claimed that the change necessitated a further environmental review. This Court definitively rejected the claim in *Wilder* and should reach the same result here.[2]

Petitioners also assert that "FCRC's position runs counter to ESDC's, which recognized the 2009 MGPP as effecting a sufficient change as to require the

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[2] Petitioners distinguish *Wilder* on the basis of an unsupported assertion that the opponents in *Wilder* were concerned about the possibility that a delay in completion of the Times Square project would lead to different impacts at the completion of the project "due to traffic growth and the like" (Opp. Br. at 51 n. 21). This supposed distinction is meaningless, because this case and *Wilder* concern the same issue of whether changes in the approvals of a previously studied project that do not alter project components but only affect implementation of the project require further environmental review. Where there are no environmentally significant physical changes in a project's components, there is no need for a supplemental EIS. *See Save Open Space v. Planning Board of Town of Newburgh*, 74 A.D.3d 1350 (2d Dep't 2010) (no SEIS needed where developer only sought to subdivide the property to be occupied by a previously approved shopping center); *Muir v. Town of Newburgh*, 49 A.D.3d 744 (2d Dep't 2008) (no SEIS needed where a change in a project's components would have impacts less severe than those previously studied).

modification of the GPP and undertake a SEQRA review of that action" (Opp. Br. at 45). However, the fact that ESDC determined that sequential condemnations required a modification to the 2006 MGPP only reflects the fact that the 2006 MGPP contemplated that the Project site would be condemned all at once at the outset, which no longer was feasible in light of the deterioration in over-all economic conditions and the drying up of financing. The need to modify the 2006 MGPP to allow for sequential acquisition is distinct from the issue of whether this change in the Project's implementation has environmental consequences requiring a supplemental EIS.[3]

Wilder plainly governs here and compels reversal of the motion court's decision. Petitioners have not cited – and cannot cite – any authority that reaches the opposite result in a comparable situation.

II.

ESDC'S DETERMINATION THAT A SUPPLEMENTAL EIS WAS UNNECESSARY WAS WITHIN ITS DISCRETION

An agency's determination whether to prepare a supplemental EIS is discretionary, as the Court of Appeals made clear in *Riverkeeper, Inc. v. Planning*

[3] This particular change in the MGPP is not the only change considered by ESDC in the 2009 Technical Memorandum, because the 2009 MGPP approved changes in several physical components of the Project (which, however, were recognized by the motion court and by petitioners as having no environmental significance and requiring no supplemental EIS).

Board of Town of Southeast, 9 N.Y.3d 219 (2007). There, the Court expressly distinguished this standard from the standard governing a determination to prepare an EIS, which the agency must prepare if a project can reasonably be expected to have any significant adverse impact. *Id*. at 231. Therefore, petitioners are wrong in asserting (Opp. Br. at 39) that, under *Riverkeeper*, the standard for preparing an SEIS is the same as the standard for an EIS.

Petitioners thus assert that, under SEQRA, ESDC was "required to prepare an EIS (in this case an SEIS) if the modification might have a significant impact on the environment" (Opp. Br. at 37) (emphasis in original), that a supplemental EIS must be prepared if the "action generates new impacts that may have a significant impact on the environment" (*id.* at 38) (emphasis added), and that a SEIS must be prepared "[w]here significant adverse impacts on the environment are likely" (*id.* at 37) (emphasis added). These statements apply to a determination to prepare an EIS, as the statute itself makes clear. *See* ECL § 8-0109, entitled "Preparation of environmental impact statement," which provides that agencies or applicants "shall prepare, or cause to be prepared ... , an environmental impact statement on any action they propose or approve which may have a significant effect on the environment") (subd. 2) (emphasis added).

The statute itself does not mention a supplemental EIS, and its mandatory standard for an EIS does not apply to the preparation of a supplemental

EIS. Instead, the State's SEQRA regulations explicitly provide that "the lead agency may require a supplemental EIS" (emphasis added), which should be

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

6 NYCRR § 617.9(a)(7)(i). The word "may" clearly indicates a discretionary standard under which the agency may – but is not mandated to – require preparation of a supplemental EIS if changes would have significant adverse environmental impacts not already addressed in the EIS. *See also Riverkeeper*, 9 N.Y.3d at 231. *The SEQR Handbook* published by DEC similarly makes clear that preparation of a supplemental EIS is exceptional, and that it "would be unreasonable" to make it "easy" to require a supplemental EIS (at p. 6).

By contrast, none of the cases that petitioners cite for the proposition that courts invalidate actions where an agency fails to prepare an EIS, or prepares an inadequate EIS (Opp. Br. at 37), is relevant here, because none of them involved a supplemental EIS. Therefore, the courts were applying a standard that is completely different from the one applicable here. *See Chinese Staff & Workers Assoc. v. City of New York*, 68 N.Y.2d 359 (1986) (an EIS was inadequate); *Kahn v. Pasnik*, 90 N.Y.2d 569 (1997) (the determination not to prepare an EIS was improper) ; *New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337 (2003) (same).

Therefore, it clearly is entrusted to the lead agency's discretion to determine whether an SEIS is necessary.

Here, ESDC properly exercised its discretion not to prepare a supplemental EIS in 2009 upon its approval of the 2009 MGPP, and again in 2010 on the motion court's remand. The potential impacts of the Project, including impacts from Project construction, had been exhaustively studied in the FEIS in 2006. Potential changes were carefully examined in the 2009 Technical Memorandum, which analyzed a three-year delay in the anticipated completion of the Project from 2016 (the assumed completion date in the FEIS) to 2019, and also included a "Delayed Schedule Analysis" that assumed that persistent adverse economic conditions might further delay the Project's completion to 2024 – an analysis that petitioners ignore. Then the 2010 Technical Analysis examined permanent impacts of the completed Project, as well as interim impacts of Project construction, resulting from a delay in the Project's completion until 2035. These documents show that ESDC took a "hard look" at the relevant areas of environmental concern and "made a reasoned elaboration of the basis for its determination." *Riverkeeper*, 9 N.Y.3d at 231 (quoting *Jackson* v. *N.Y.S. Urban Development Corp.*, 67 N.Y.2d 400, 67 N.Y.2d at 417 (1986)).

In addition, contrary to petitioners' assertions that ESDC concealed or ignored impacts (Opp. Br. at 57), these documents disclosed that the Project would have significant adverse impacts, both upon completion and during construction.

With regard to impacts during construction, the Findings Statement adopted by ESDC pursuant to SEQRA in 2006 disclosed that construction activity associated with the Project "will have significant adverse localized neighborhood character impacts in the immediate vicinity of the project site during construction," and described these impacts in considerable detail (A3236).

The 2009 Technical Memorandum and the 2010 Technical Analysis also addressed construction impacts, including impacts on neighborhood character. The 2009 Technical Memorandum disclosed that the temporary surface parking lot for arena patrons would remain in place for longer than described in the FEIS, but stated that "this would not result in a change to the conclusions of the FEIS, which disclosed that traffic, noise and other effects of the active uses of the project site upon completion of Phase I would have localized adverse neighborhood character impacts on Dean Street" (A158). It also disclosed that "the extension of the schedule would result in an additional period of time during which portions of the project site would be undergoing active construction," and that "[t]herefore, the localized significant adverse neighborhood character impacts at Dean and Pacific Streets would continue through the prolonged construction period" (*id*.). It

concluded that, while "construction activities may be prolonged with the schedule change but would be similar to those of the approved project analyzed in the FEIS," nonetheless "the intensity of these activities would not increase" (A159).

The 2010 Technical Analysis assessed potential neighborhood character impacts from construction at each of seven hypothetical construction stages (A241-244; *see also* FCRC Br. at 51). It similarly concluded that a construction schedule that extended to 2035 would not have significant adverse impacts substantially different from what previously had been addressed in the FEIS (A266).

Petitioners have not identified any significant analyses that should have been performed by ESDC but were omitted, or any scientific evidence that ESDC has ignored. Similarly, petitioners have not identified any studies or information that would be included in a supplemental EIS but have not already been reviewed and considered by ESDC.

Petitioners claim that they "documented" negative environmental impacts of extended construction before the motion court (Opp. Br. at 43). This assertion is bogus. Petitioners' purported "documentation" consists of two reply affidavits, one by Ronald Shiffman, a professor of architecture and former city planner (A1176-80), and one by James Goldstein, the director of a research and policy organization in Boston (A1185-97), both of which were submitted in

support of the supplemental petitions challenging the adequacy of the 2010 Technical Analysis. Both affidavits consist for the most part of anecdotal assertions about other projects that have no bearing on whether the environmental analysis of potential construction impacts for this Project was adequate; the three projects discussed in the Goldstein affidavit were not even in New York, but in Massachusetts and Connecticut. In fact, neither affidavit indicates that the affiant actually read the 2010 Technical Analysis or any of the prior environmental analyses of the Project. Furthermore, neither affidavit identifies any alternative methodologies that ESDC should have used to assess impacts or could use in a supplemental EIS.

Moreover, even if Shiffman and Goldstein are considered experts in some aspect of environmental impact review (and there is no indication in their affidavits that they are), and even if they actually had proffered data or analyses that conflict with ESDC's conclusions, a reviewing court's role is limited to deciding whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). It is not the function of a reviewing court to resolve disagreements among experts or substitute its judgment for that of the agency as to

which expert is more persuasive. *Merson v. McNally*, 90 N.Y.2d 742, 752 (1997). *See also Fisher v. Giuliani*, 280 A.D.2d 13, 19-20 (1st Dep't 2001).

In an effort to avoid this principle, petitioners suggest that, while their affiants (Shiffman and Goldstein) are experts, there supposedly is no indication that the 2010 Technical Analysis was prepared by experts (Opp. Br. at 23 n. 9), because nothing in the 2010 Technical Analysis is attributed to any particular individual. However, there is no case law under SEQRA holding that the portions of an EIS or other environmental analysis must be attributed to a particular individual. Here, as petitioners' counsel is fully aware, the 2010 Technical Analysis was prepared by ESDC and an outside environmental consulting firm. This preeminent firm was retained by the City of New York to assist it in drafting the *CEQR Technical Manual*, which was published by the City to provide authoritative guidance on best practices for the conduct of environmental reviews for projects in New York City, and which is frequently cited by petitioners in their brief on this appeal (*see* Opp. Br. at 47, 48, 49). ESDC's staff also has considerable expertise in assessing environmental impacts based on its experience in conducting environmental reviews of numerous large development projects in New York City, including the Times Square redevelopment, the renovation and expansion of the Jacob K. Javits Convention Center and the Queens West project.

Finally, there is no merit to petitioners' effort to discredit the 2010 Technical Analysis having been prepared in only five weeks (Opp. Br. at 57). *See Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 689 (1996) (an agency's ability to complete an environmental assessment quickly "does not establish that its review was inadequate as a matter of law"). Petitioners have no information as to how many individuals worked how many hours to prepare the 2010 Technical Analysis. In the end, the document speaks for itself in terms of its thoroughness and soundness.

III.

ESDC'S USE OF AN ASSUMED 10-YEAR BUILD-OUT IN THE 2009 TECHNICAL ANALYSIS WAS REASONABLE, AND PETITIONERS' ACCUSATIONS OF A COVER-UP ARE NOTHING MORE THAN SPECIOUS RHETORIC

It is axiomatic that the substance of an agency's compliance with SEQRA is reviewed by the courts under a "rule of reason," because "not every conceivable environmental impact ... need be addressed in order to meet the agency's responsibility," and "only environmental effects that can reasonably be anticipated must be considered." *Neville v. Koch*, 79 N.Y.2d 416, 425, 427 (1992) (emphasis in original). *See also Hells Kitchen Neighborhood Ass'n v. City of New York*, 81 A.D.3d 460, 462 (1st Dep't 2011), quoting *C/S 12th Avenue LLC v. City of New York*, 32 A.D.3d 1, 7 (1st Dep't 2006).

A build year is a tool for creating a "baseline" for conducting environmental analysis, not a hard and fast deadline. *Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Council of City of New York*, 214 A.D.2d 335, 337 (1st Dep't), *app. denied*, 87 N.Y.2d 802 (1995). *See also DDDB II*, 59 A.D.3d at 318.

Here, it was reasonable for ESDC to conclude that a 10-year build-out represented the reasonable worst-case scenario for examination of the potential impacts of construction activities at the Project site, because a 10-year build-out would entail the greatest intensity of construction-related impacts that reasonably could be expected as there would be simultaneous construction at multiple locations within the Project site. ESDC's determination as to what represented a reasonable worst-case scenario is entitled to deference and "must be viewed in light of a 'rule of reason'." *Neville v. Koch*, 79 N.Y.2d 416, 417 (1992).

Petitioners' reliance on the Development Agreement that was executed by FCRC and ESDC at the master closing in December 2009, nearly three months after ESDC's final approval of the 2009 MGPP, is misplaced. The document did not exist when the 2009 MGPP was finally approved. Furthermore, it is unprecedented for a court to use business contracts completed after the conclusion of an environmental review to impeach the build-year that was used for the environmental review. Petitioners are unable to cite a single other case where

this was done, but conclusorily assert that the failure to consider subsequently concluded business contracts "would sanction fraud and lack of disclosure" (Opp. Br. at 52). This assertion is false. Business agreements governing a development project, such as agreements for construction financing, construction contracts and leases with major tenants, typically are not finalized – and cannot be finalized – until the parameters of the project have been fixed in a regulatory approval process that will include an environmental review if required by SEQRA. To allow such later documents to be used retroactively to impeach the prior environmental review is inconsistent with the need to perform environmental analyses early.

It also would be unfair to project sponsors, lenders, etc., and to the public officials who administer the approval and environmental review processes. It would be an excellent recipe for fomenting perpetual litigation about controversial projects.

Here, moreover, petitioners nowhere address the significance of – and the motion court's unwarranted denigration of – FCRC's obligation under the Development Agreement to use "commercially reasonable efforts" to complete the Project by 2019.

Instead, petitioners repeatedly accuse ESDC of engaging in a "cover up," of having "suppressed information," and of acting in "bad faith" when it approved the 2009 MGPP (Opp. Br. at 1, 2, 3, 12, 13, 15, 26-30). Petitioners'

main contention is that ESDC's staff allegedly misled the ESDC Board of Directors, and that ESDC and FCRC then misled the motion court, by wrongfully failing to disclose the Development Agreement or fully disclose the Agreement's terms.

Petitioners also claim that, when ESDC's board adopted the 2009 MGPP in reliance on the environmental review in the 2009 Technical Memorandum, ESDC's board had no idea that construction of the Project could extend longer than 10 years, and made its decision on false information. Petitioners state that this information was "hidden away" among the hundreds of pages of documents presented by the staff to the board (Opp. Br. at 11).

This contention is completely without merit. If nothing else, the contention that ESDC's staff hid the potential for a 25-year build-out from ESDC's board is inconsistent with petitioners' reliance on a publicized statement by ESDC's Chief Executive Officer that completion of the Project could take "decades."

In fact, the record shows that ESDC's board was advised that the renegotiated terms between the MTA and FCRC allowed for FCRC's acquisition of development rights over 25 years. In the materials presented to the board, ESDC's staff also made clear that the "Non-Arena Development Leases" between ESDC and FCRC affiliates, which would be in effect while components of the

Project other than the arena were being built, would not expire for 25 years (A3965).

At meetings of the Board of Directors held on June 23 and September 17, 2009, during consideration of the 2009 MGPP, members of the public who spoke specifically asserted that the Project would not be completed in 10 years but, in view of the revised business terms that FCRC and the MTA had agreed to, could take until at least 2030 (AR 4869, 4880-81, 7153, 7179-80).[4]

In addition, Exhibit B, entitled "Summary of Comments," to the "ESDC Staff Request for Affirmation of the MGPP" that was presented to ESDC's board for its September 17, 2009 meeting (at which the board gave its final approval to the 2009 MGPP) shows that the board was made aware of comments at the prior public hearings on the 2009 MGPP about the possibility that the Project would not be completed until 2025 (A3958). Prior to its meeting, the board members also were given the transcript of these public hearings and the written comments submitted at the hearings (A3929). Those comments included numerous assertions by members of the public that the Project would not be built in 10 years (*see, e.g.*, AR 5096, 5151 -55, 5184, 5204, 5324, 5331).

[4] Citations to "AR" refer to the Administrative Record submitted to the motion court by ESDC.

Contrary to petitioners' assertions, this information thus was "hidden" from the ESDC board when it made its determinations to adopt and then affirm the 2009 MGPP. *See Plotnick v. City of New York*, 148 A.D.2d 721, 726 (2d Dep't 1989) (holding that the Board of Estimate had not been "insulated from consideration of environmental factors").

Petitioners' assertions that the Development Agreement or its terms were concealed from the motion court are similarly fallacious. The fact is that at the very first hearing before the motion court, held on January 19, 2010, counsel to the *DDDB* petitioners was the first to raise the issue, advising the court that he anticipated that ESDC would tell the court about the Development Agreement (which had only recently been executed). He then objected to the court's giving the document any consideration, because "[t]hose documents are not part of the record and cannot be a basis for this determination" (tr. at 24). Not only did counsel to the *DDDB* subsequently change his tune and ask the court to consider the Development Agreement, but after the court had reversed itself in its November 9, 2010 decision (A44-66) on the basis of the Development Agreement, the *DDDB* petitioners actually moved in the motion court for the recovery of their attorneys fees on the theory that ESDC, FCRC and their respective attorneys had engaged in sanctionable conduct in violation of 22 NYCRR § 130-1.1(c)(3). The

motion court denied the motion, holding in a one-page order dated July 13, 2011, that "the respondents and their attorneys did not engage in sanctionable conduct."

There has been no cover-up. The Development Agreement was executed at the master closing that occurred December 21-23, 2009, nearly three months after ESDC had finally adopted the 2009 MGPP on September 17, 2009. There was no cover-up of the Development Agreement, which was not properly before the motion court. *See, e.g.*, *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

The Westway cases discussed at length by petitioners to support their claim of a cover-up (Opp. Br. at 32-34) have no relevance here. In those cases, the FEIS had concluded that part of the Hudson River that would be landfilled "lacks most of the normal estuarine marine life and is a 'biological wasteland'." However, a subsequent study concluded that this area was an important habitat for juvenile striped bass. *Action for Rational Transit v. West Side Highway Project*, 536 F. Supp. 1225, 1229 (S.D.N.Y. 1982). The court found that, instead of disclosing this study and addressing it, two final agencies (the Federal Highway Administration and the Army Corps of Engineers) manipulated study data and were "colluding ... for the purpose of avoiding the issuance of an environmental impact statement in connection with the landfill permit application." *Sierra Club v. United States Army Corps of Engineers*, 541 F.Supp. 1367, 1381 (S.D.N.Y.

1982). The court also found that the Corps of Engineers ignored the comments of three other federal agencies (the National Marine Fisher Service, the Fish and Wildlife Service and the Environmental Protection Agency) that had opined that the landfill "threatened serious adverse impact on Hudson River fisheries resources." *Id*. at 1369.

In this case, there has been no conspiracy to suppress anything. In contrast to the Westway cases, there has been full disclosure of significant environmental impacts resulting from the Project in the FEIS, the adequacy of which was sustained by this Court, and in the subsequent 2009 Technical Memorandum and 2010 Technical Analysis.

Finally, even if, contrary to law and fact, it was legally impermissible for ESDC to base its environmental review of the 2009 MGPP on an assumed 10-year build-out, that deficiency was cured by the 2010 Technical Analysis, which thoroughly examined the potential environmental impacts of a 25-year build-out.

IV.

PETITIONERS' CRITICISMS OF THE SUBSTANCE OF THE 2010 TECHNICAL ANALYSIS ARE WITHOUT MERIT

At page 57 of a 64-page brief, petitioners finally get around to addressing the purported substantive inadequacies of the 2010 Technical Analysis. Petitioners' criticisms are easily refuted.

Cumulative impacts. Petitioners claim that the Technical Analysis did not consider "the long-term cumulative effects of 25 years of ongoing construction on the health of the surrounding neighborhoods," and instead evaluated each impact in isolation (Opp. Br. at 57-59). The Technical Analysis comprehensively analyzed the impacts of construction at seven different stages over 25 years on "neighborhood character." It concluded that, as already disclosed in the FEIS, there would be significant localized adverse impacts in the immediate vicinity of the Project site during construction, but that these impacts would be less intense due to less simultaneous activity at multiple locations. The Technical Analysis also concluded that the character of the larger neighborhood surrounding the site would not be adversely effected (A241). "Neighborhood character" is an amalgam of several areas of recognized environmental analysis, including land use, urban design and visual resources, cultural resources, socioeconomic conditions, traffic and pedestrians, and noise (*CEQR Technical Manual* at 21-1), and the Technical Analysis considered each of these subjects in its assessment of neighborhood character (A241-44).

Open Space. Petitioners claim that the Technical Analysis dismissed as temporary the adverse impacts of a deficiency in open space that could last for up to 15 years (Opp. Br. at 59-60). This assertion fails to acknowledge that the need for open space also will be delayed in the event of a 25-year build-out. The

2010 Technical Analysis acknowledged that the temporary adverse impact of a shortage of open space for residential occupants of the Project site, which was disclosed in the FEIS, would be extended (A184). However, it is the creation of new residential units as part of the Project that increases demand for open space. Therefore, if new residential units come on line more slowly, the need for open space also occurs more slowly, and the adverse impact would be both created and mitigated at a slower pace as the Project is built. In any event, not every impact is required to be mitigated under SEQRA. Mitigation is only required to the "extent practicable." *Jackson*, 67 N.Y.2d at 421-22.

Block 1129. Next petitioners assert that a 25-year build-out will cause Block 1129 to remain a surface parking lot for 12 years or more, causing "pollution of views," traffic and noise from stackers, car doors slamming, engines starting and even people talking (Opp. Br. at 60-62). First, "pollution of views" is not a recognized subject of environmental analysis under SEQRA, although views are considered to the extent that there are potential impacts on public views of historic structures or landscapes, or existing view corridors. *See* 6 NYCRR §§ 617.7(c)(1)(v), (viii). None of these characteristics applies to Block 1129, which had no landscapes or view corridors, and only one arguably historic structure – a former bakery that has been demolished. The Technical Analysis did consider, however, the effect on neighborhood character of the temporary surface parking lot

on Block 1129. It concluded that the parking lot would not have adverse land use or urban design impacts, because it would be screened by a well-designed 10-foot tall fence and landscaping around the fence, which would provide a visual buffer for pedestrians and local residents (A225, 263). In addition, while a "substantial adverse change in ... noise levels" is an impact for consideration under the SEQRA regulations (*see* 6 NYCRR § 617.7(c)(1)(i)), not every imaginable noise is significant and must be studied. SEQRA analyses may examine noise from mobile sources such as vehicle engines and tires on a roadway, but the sporadic sounds of car doors closing or people speaking while parking or retrieving their cars from a parking lot never have been recognized as potentially significant impacts requiring examination under SEQRA. Petitioners' claim that ESDC was obligated to examine these sporadic sounds runs afoul of the "rule of reason" that governs judicial review of an agency's environmental analyses. Similarly, while petitioners complain about noise from stackers, which are used to park cars on top of other cars, this equipment typically operates by hydraulic lifts, which do not create noise substantial enough to be heard beyond the parking lot (A1131-32). Petitioners have presented no contrary evidence. Finally, although petitioners complain that the temporary parking lot will have traffic impacts, they provide no factual or technical analysis to support their claim.

Delay in underground parking. Petitioners complain that there will be a delay in underground parking, which was "held out as a major mitigation element by buffering adjacent neighborhoods from the noise and other negative impacts that accompany surface parking" (Opp. Br. at 62). What petitioners are claiming is not entirely clear. ESDC never found that significant noise or other adverse impacts would result from surface parking and never "held out" underground parking as mitigation for that purported impact. As discussed above, noise from doors closing, engines starting and people talking in a parking lot never has been recognized as a significant impact under SEQRA.

Multiple arena events. Petitioners also complain that the announcement that the Ringling Brothers Barnum & Bailey Circus has been booked for the arena is a new development that should have been studied in the FEIS, the 2009 Technical Memorandum or the 2010 Technical Analysis (Opp. Br. at 62-63). However, the FEIS analyzed the potential impacts of an arena that was expected to host 225 events per year, including family shows like the circus (A1303, 2026). Therefore, the subsequent announcement that an actual circus in fact will perform at the arena changes nothing. In any event, it is far too late to challenge the adequacy of the FEIS, because the four-month statute of limitation in CPLR 217 expired nearly six years ago and, moreover, this Court sustained the FEIS in *DDDB II*. In addition, the FEIS determined that Nets basketball games

represented the worst-case scenario for assessing the impacts of events at the arena, taking into account the frequency of home basketball games and the high number of attendees and associated demands on travel-related infrastructure that a professional basketball game is expected to generate (AR 2228 [FEIS, Appendix C, "Transportation Planning Assumptions"). Other events such as "family shows" were expected to occur less frequently, attract fewer spectators and generate a lower level of travel demand than a Nets game (AR 2228, *see also* A2026). The FEIS assumed a sold-out basketball game with 100% attendance for all 18,000 seats (A2026). By contrast, a circus would not generate anywhere near 18,000 spectators for a single performance. In addition, because families with children are a circus's target audience, more people can be expected to travel to the arena in each car, thus generating fewer car trips than a basketball game. Finally, the circus is in town only once per year for a limited engagement typically lasting two weeks. Therefore, multiple daily circus shows would occur only a handful of times per year. The circus's impacts thus are not greater than what previously had been studied in the FEIS (A930).

V.

THERE IS NO BASIS FOR EXPANDING THE RELIEF THAT WAS GRANTED TO PETITIONERS

In what appears to be a back-door effort to expand the relief that was provided to them by the motion court, petitioners criticize the court's refusal to

invalidate the 2009 MGPP notwithstanding the court's determination that ESDC's environmental review of the 2009 MGPP was inadequate (Opp. Br. at 26-34). There is no merit to this claim.

First, petitioners never served or filed a notice of appeal or notice of cross-appeal from the motion court's refusal to annul the 2009 MGPP. Therefore, this Court is without jurisdiction to consider petitioners' objection to the scope of the relief that they obtained.

Second, contrary to petitioners' claim, a judicial determination that there has been a failure to comply with SEQRA does not automatically require annulment of the approval at issue. Instead, it is subject to the court's discretion in the light of applicable circumstances. *See Village of Westbury v. Dep't of Transportation*, 146 A.D.2d 578 (2d Dep't), *aff'd*, 75 N.Y.2d 62 (1989) (allowing construction of an interchange to continue while the agency complied with SEQRA); *Golden v. Metropolitan Transportation Authority*, 126 A.D.2d 128, 133 (2d Dep't 1987) (refusing to order re-implementation of two-way toll collection on the Verrazano-Narrows Bridge even though one-way toll collection had been implemented without compliance with SEQRA); *Chatham Towers, Inc. v. Bloomberg*, 6 Misc.3d 814, 825-26 (Sup. Ct. N.Y. Co. 2004), *aff'd*, 18 A.D.3d 395 (1st Dep't 2005) (refusing to invalidate a security plan and order the removal of

barriers that had been installed without compliance with SEQRA, because they were protection against terrorist attack).

Here, the motion court's refusal to invalidate the 2009 MGPP and enjoin construction of the Project obviously was based on several considerations discussed in its decision, including: (1) "that the 2006 plan for the Project was approved after preparation of an FEIS ... , the sufficiency of which was affirmed on appeal" (A35); (2) that design changes effectuated by the 2009 MGPP "are not the subject of petitioners' challenge" (A35); (3) that the 2009 MGPP did not change "'the Project's land uses, building layout, density [or] the amount of affordable housing and publicly accessible open space'" (A35) (citations omitted); (4) that "petitioners do not claim that the MGPP effected a material change to the build-out of the arena or other Phase I construction" (A35-36); and (5) that substantial construction of public improvements and the arena already had occurred and substantial expenditures had been made to effectuate that work. Given these facts, there was no basis for invalidating the 2009 MGPP.

Conclusion

The motion court erred in directing the preparation of a supplemental EIS and other steps purportedly complying with SEQRA. Its final decision in these cases should be reversed, and the petitions dismissed.

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Respectfully submitted,

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