

To Be Argued By:  
Philip E. Karmel

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

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# 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)*

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## **BRIEF FOR RESPONDENT-APPELLANT EMPIRE STATE DEVELOPMENT CORPORATION**

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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.*

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**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, JIL-  
LIAN MAY and DOUG DERRYBERRY,

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	v
STATEMENT OF QUESTIONS PRESENTED .....	1
PRELIMINARY STATEMENT .....	2
STATEMENT OF FACTS .....	4
A.    ESDC Approved the Atlantic Yards Project in 2006. ....	4
B.    The Project Still Includes the Same Principal Features Approved in 2006.....	4
C.    ESDC Approved the Project in 2006 After Conducting a Thorough Review of Its Potential Environmental Impacts. ....	5
D.    Project Opponents Challenged the 2006 Approvals. ....	6
E.    With Litigation Pending, Substantial Steps Were Taken to Begin Construction.....	7
F.    In 2009, the Economic Downturn Forced ESDC and MTA to Consider Modification of the Timing of Acquisition of Portions of the Project Site.....	7
G.    ESDC Considered the Environmental Impacts of the Proposed Modifications – and the Prospect of a Delay in Construction – and Determined that an SEIS Was Not Warranted. ....	8
H.    ESDC Held a Hearing on the 2009 MGPP and the Terms for Disposition of Project Site Properties to FCRC.....	9
I.    ESDC Affirmed the 2009 MGPP and Determined that an SEIS Was Not Warranted.....	10
J.    ESDC, MTA, FCRC and Other Parties Negotiated and Executed Agreements for Implementation of the Project.....	10

K.	ESDC Undertook Additional Environmental Analysis and Made Additional Findings in Response to the Remand Order.....	12
L.	Phase I Construction Is Underway.....	13
	STATEMENT OF THE CASE .....	13
POINT I	ESDC HAS BROAD DISCRETION IN DECIDING WHETHER TO PREPARE AN SEIS, AND ITS DECISION-MAKING ON THIS ISSUE IS SUBJECT TO LIMITED AND DEFERENTIAL JUDICIAL REVIEW .....	15
A.	Judicial Review of a Substantive Agency Decision Under SEQRA Is Deferential to the Agency. ....	16
B.	An Agency Is Afforded Particularly Broad Discretion in Deciding Whether to Prepare an SEIS.....	18
C.	This Court Reviews an Agency’s SEQRA Determination Under the Same Standard the Lower Court Was Required to Use. ....	20
POINT II	ESDC IDENTIFIED THE RELEVANT ENVIRONMENTAL ISSUES, TOOK A HARD LOOK AT THEM AND PROVIDED A REASONED BASIS FOR ITS DECISION-MAKING.....	20
A.	The FEIS Provided a Sound Foundation for ESDC’s Decision.....	21
B.	ESDC Took a Hard Look at the Potential Impacts of the 2009 MGPP in the 2009 Technical Memorandum. ....	26
C.	In Response to the Remand Order, ESDC Conducted Additional Environmental Analyses to Determine Whether an SEIS Was Warranted in Connection with the 2009 MGPP.....	31
1.	ESDC Took A Hard Look At Operational Impacts Upon Completion of the Project in 2035.....	32

2.	ESDC Took a Hard Look at the Effects of Construction Activities Taking Place over an Extended Period of Time. ....	35
3.	ESDC Also Took a Hard Look at Impacts Associated With the Condition of the Project Site During an Extended Construction Period. ....	37
POINT III	ESDC PROPERLY CONSIDERED DURATION IN ITS ASSESSMENT OF THE POTENTIAL IMPACTS OF A DELAY IN PROJECT CONSTRUCTION.....	38
A.	ESDC Considered the Duration of Construction Activities in Assessing Neighborhood Character Impacts. ....	39
B.	ESDC Considered the Duration of Construction Activities In Assessing Air Quality Impacts.....	43
C.	ESDC Considered the Duration of Construction Activities in Assessing Noise Impacts.....	46
D.	ESDC Considered the Duration of Construction Activities in Assessing Traffic Impacts.....	50
E.	ESDC Considered the Duration of Construction Activities in Assessing Open Space Impacts.....	53
F.	ESDC Considered the Duration of Construction Activities in Assessing Socioeconomics Impacts.....	55
G.	ESDC Considered the Duration of Construction Activities in Assessing Land Use and Urban Design Impacts. ....	56
H.	ESDC Did Not Depart from <u>The CEQR Technical Manual</u> in Assessing the Issue of Duration.....	60
POINT IV	THE LOWER COURT SUBSTITUTED ITS OWN JUDGMENT FOR ESDC’S IN ORDERING THAT AN SEIS BE PREPARED FOR THE 2009 MGPP.....	62
A.	The Court Substituted Its Judgment for That of the Agency with Respect to the Build Year. ....	64

B. The Court Substituted Its Judgment for That of the Agency  
with Respect to the Details of the Technical Analysis. ....74

C. The Court Substituted Its Judgment for That of the Agency  
with Respect to the Need and Value of an SEIS.....77

CONCLUSION.....79

PRINTING SPECIFICATIONS STATEMENT .....80

## TABLE OF AUTHORITIES

### CASES

<i>Akpan v. Koch</i> , 75 N.Y.2d 561 (1990) .....	17
<i>Aldrich v. Pattison</i> , 107 A.D.2d 258 (2d Dep’t 1985) .....	66
<i>Anderson v. N.Y.S. Urb. Dev. Corp.</i> , 45 A.D.3d 583 (2d Dep’t 2007) .....	6
<i>Baker v. Vill. of Elmsford</i> , 70 A.D.3d 181 (2d Dep’t 2009).....	62
<i>Committee to Preserve Brighton Beach v. Council of City of N.Y.</i> , 214 A.D.2d 335 (1st Dep’t 1995) .....	21
<i>Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp.</i> , 59 A.D.3d 312 (1st Dep’t 2009).....	<i>passim</i>
<i>Fisher v. Giuliani</i> , 280 A.D.2d 13 (1st Dep’t 2001) .....	17, 65
<i>Goldstein v. N.Y.S. Urb. Dev. Corp.</i> , 13 N.Y.3d 511 (2009) .....	6
<i>Goldstein v. Pataki</i> , 516 F.3d 50 (2d Cir.), <i>cert. denied</i> , 554 U.S. 930 (2008).....	6
<i>Halperin v. City of New Rochelle</i> , 24 A.D.3d 768 (2d Dep’t 2005) .....	19
<i>Jackson v. N.Y.S. Urb. Dev. Corp.</i> , 67 N.Y.2d 400 (1986).....	<i>passim</i>
<i>Neville v. Koch</i> , 79 N.Y.2d 416 (1992) .....	17
<i>In the Matter of N.Y.S. Urb. Dev. Corp.</i> , 2010 WL 702319 (Sup. Ct. Kings Co. 2010).....	11
<i>Pell v. Board of Education</i> , 34 N.Y.2d 222 (1974).....	20
<i>Peter Williams Enterprises Inc. v. N.Y.S. Urb. Dev. Corp.</i> , 28 Misc.3d 1239(A), 2010 WL 3703264 (Sup. Ct. Kings Co. Sept. 20, 2010) .....	11
<i>Riches v. N.Y.C. Council</i> , 75 A.D.3d 33, 39 (1st Dep’t 2010) .....	19

<i>Riverkeeper, Inc. v. Planning Board of Town of Southeast</i> , 9 N.Y.3d 219 (2007) .....	<i>passim</i>
<i>Save the Pine Bush, Inc. v. Common Council of City of Albany</i> , 13 N.Y.3d 297 (2009) .....	16
<i>S. Bronx Clean Air Coalition v. N.Y.S. Dep’t of Transp.</i> , 218 A.D.2d 520 (1st Dep’t 1995) .....	18
<i>Schiff v. Board of Estimate</i> , 122 A.D.2d 57 (2d Dep’t 1986).....	66
<i>Serdarevic v. Town of Goshen</i> , 39 A.D.3d 552 (2d Dep’t 2007) .....	63
<i>Tupper v. City of Syracuse</i> , 71 A.D.3d 1460 (4th Dep’t 2010) .....	63
<i>Wilder v. N.Y.S. Urb. Dev. Corp.</i> , 154 A.D.2d 261 (1st Dep’t 1989) .....	67, 77

**MISCELLANEOUS**

Michael Gerrard, et al., <i>Environmental Impact Review in New York</i> (Matthew Bender) .....	19
ECL § 8-0109[4] .....	67
6 N.Y.C.R.R. § 617.9[a][7][i] .....	18, 19, 21, 77

## **STATEMENT OF QUESTIONS PRESENTED**

The court below concluded that no Supplemental Environmental Impact Statement (“SEIS”) is required for Phase I of the Atlantic Yards Project (the “Project”), and there has been no cross-appeal. Accordingly, the only issue before this Court is whether the New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) acted arbitrarily or capriciously or abused its discretion in not preparing an SEIS with respect to Phase II of the Project. This appeal raises the following two questions, both of which ESDC asserts should be answered in the negative:

1. Did ESDC – after considering the extensive analyses of the Project’s environmental impacts in the Final Environmental Impact Statement (“FEIS”), 2009 Technical Memorandum and 2010 Technical Analysis and the measures already imposed to mitigate impacts to the maximum extent practicable – act arbitrarily or capriciously or abuse its discretion when it decided not to prepare an SEIS for Phase II of the Project?

2. In exercising its discretion not to prepare an SEIS for Phase II of the Project, did ESDC – after thoroughly analyzing the impacts of both a 10-year and a delayed construction schedule – act irrationally in its assessment of environmental impacts in light of the uncertainty that existed with respect to the Project’s construction schedule?

## **PRELIMINARY STATEMENT**

These cases present yet another challenge to the 17-building Atlantic Yards Project in Brooklyn. ESDC initially affirmed the Project's Modified General Project Plan in 2006 (the "2006 MGPP"), after an extensive public review process that included preparation of an FEIS under the State Environmental Quality Review Act ("SEQRA"). The FEIS identified a number of significant adverse environmental impacts and also the mitigation required to address such impacts to the maximum extent practicable, as required by SEQRA. In 2009, ESDC approved certain modifications to the 2006 MGPP, resulting in a 2009 MGPP, but only after taking a "hard look" at potential environmental impacts under SEQRA, this time in a 2009 Technical Memorandum which concluded that the proposed modifications and potential construction delays would not result in new adverse impacts, not previously disclosed and mitigated in the FEIS, that would warrant preparation of an SEIS.

In the instant litigations, Project opponents allege that SEQRA required ESDC to prepare an SEIS before approving the 2009 MGPP. When the court below initially questioned the reasonableness of the construction schedule analyzed by ESDC in the 2009 Technical Memorandum, ESDC undertook yet another environmental assessment under SEQRA of an even longer potential delay in a detailed 2010 Technical Analysis, which affirmed

the determination of the 2009 Technical Memorandum that a delay in the construction schedule would not result in new environmental impacts not previously disclosed in the FEIS. In connection with the 2010 Technical Analysis, ESDC also prepared a detailed explanation of the basis for its discretionary decision not to prepare an SEIS.

Notwithstanding these environmental studies, the lower court held that “ESDC failed to comply with its obligation under SEQRA to take a hard look at the environmental impacts of the 2009 MGPP” (Final Decision at 17) and that ESDC must prepare an SEIS “assessing the environmental impacts of delay in Phase II construction of the Project.” Id. at 21.

The court directed that an SEIS be prepared, but it did not identify any specific errors in ESDC’s environmental analysis or any new information that an SEIS would yield that would have been pertinent to ESDC’s decision-making. The court’s decision is based on a misapprehension of the extensive environmental studies in the record and other errors and, at bottom, is based on no more than its disagreement with ESDC’s decision. The court exceeded the proper scope of judicial review by substituting its judgment for that of the agency in overturning the agency’s exercise of its discretion as to whether to prepare an SEIS for the 2009 MGPP.

## STATEMENT OF FACTS

### **A. ESDC Approved the Atlantic Yards Project in 2006.**

On December 8, 2006, ESDC approved the Project after a public review under SEQRA, the Urban Development Corporation Act (“UDCA”) and the Eminent Domain Procedure Law (“EDPL”). ESDC concluded these administrative processes by (i) adopting a Findings Statement under SEQRA (A3182-275); (ii) affirming the 2006 MGPP under the UDCA (A3276-814); and (iii) issuing the Determination and Findings required by the EDPL.

### **B. The Project Still Includes the Same Principal Features Approved in 2006.**

The Project design that was approved in 2006 has not changed materially since that time. The Project still includes an Arena to bring a major professional sports team to Brooklyn and provide a venue for other events. It still includes new housing units, including 2,250 affordable units, and eight acres of open space. It still includes a new subway entrance and an improved Long Island Rail Road (“LIRR”) rail yard. All of this development is still to be located on the same 22-acre site approved in 2006. The anticipated locations of the Arena and 16 other Project buildings have not changed since their approval in 2006. *Compare* 2009 MGPP (A3844-46, 3850-62) *to* 2006 MGPP (A3276-77, 3282-92); *see also* A428.

Phase I of the Project includes construction of the Arena and four other buildings on three blocks and adjacent street beds (combined into one “Arena Block”) west of 6<sup>th</sup> Avenue. A3890. Phase I also includes a new subway station entrance on the Arena Block, a new building west of the Arena Block, construction of the new LIRR rail yard and construction of permanent and interim parking lots for the Arena, including interim surface parking on Block 1129 at the east end of the Project site. A3852-58. The five non-Arena buildings in Phase I are to contain residential, office, retail, community facility and potentially hotel uses. A3852-56. The new rail yard will be located on the northeastern portion of the Project site and will have a “portal” connection to Atlantic Terminal. A3856-57.

Phase II will include 11 predominantly residential buildings east of 6<sup>th</sup> Avenue and eight acres of open space. A3858-61. Six of the buildings and most of the open space will be built on a platform to be constructed over the rail yard, using air rights acquired from the Metropolitan Transportation Authority (“MTA”). *Id.*; A3864-65, 3872-73.

**C. ESDC Approved the Project in 2006 After Conducting a Thorough Review of Its Potential Environmental Impacts.**

ESDC’s adoption of the Findings Statement on December 8, 2006 was the culmination of an extensive and thorough environmental review process. The FEIS prepared in 2006 examined 16 environmental areas in great

detail. A1198-3181. Where it identified significant impacts, ESDC also developed and described, as required by SEQRA, a number of measures to mitigate or avoid such impacts “to the maximum extent practicable.” A3275, 2426-518. ESDC determined that, even after the imposition of such measures, the Project would result in significant adverse environmental impacts related to schools, cultural resources, visual resources, shadows, traffic, noise and construction. A3268-70.

**D. Project Opponents Challenged the 2006 Approvals.**

Opponents challenged ESDC’s 2006 approvals, attacking the findings made under SEQRA, the UDCA and the EDPL. The courts dismissed all of these lawsuits. *See, e.g., Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d 312 (1st Dep’t) (dismissing SEQRA and UDCA challenges to the FEIS and 2006 MGPP), *leave to appeal denied*, 13 N.Y.3d 713 (2009); *Anderson v. N.Y.S. Urb. Dev. Corp.*, 45 A.D.3d 583 (2d Dep’t 2007) (same), *leave to appeal denied*, 10 N.Y.3d 710 (2008); *Goldstein v. N.Y.S. Urb. Dev. Corp.*, 13 N.Y.3d 511 (2009) (dismissing constitutional challenges to use of eminent domain); *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.) (same), *cert. denied*, 554 U.S. 930 (2008).

**E. With Litigation Pending, Substantial Steps Were Taken to Begin Construction.**

The litigations delayed acquisition of the Project site by eminent domain. ESDC and the developer – Forest City Ratner Companies and its affiliates (collectively, “FCRC”) – nonetheless did what they could to advance the Project. Between 2006 and 2009, FCRC – which had acquired much of the site through market purchases – removed numerous buildings to clear the site for construction, and re-routed sewers, water and electric lines and other utilities to prepare the Arena Block for excavation. A422-23. FCRC also built a temporary rail yard adjacent to the original facility to accommodate LIRR trains while the new, permanent rail yard is built. Id.

**F. In 2009, the Economic Downturn Forced ESDC and MTA to Consider Modification of the Timing of Acquisition of Portions of the Project Site.**

In June 2009, two and a half years after the Project was approved, ESDC and MTA commenced a process to modify the 2006 approvals to allow the Project to move forward in the face of a serious downturn in the real estate market. The principal change to the plans was that instead of requiring FCRC to pay for the acquisition of the entire 22-acre Project site up front – in some cases years before particular development parcels were needed – ESDC and MTA agreed to allow the property to be acquired in phases. A3837-38.

Thus, on June 23, 2009, ESDC adopted the 2009 MGPP for purposes of a public hearing. A171. The 2009 MGPP permits the acquisition of privately owned Project site parcels by condemnation in phases, rather than all at once. A3865. The first acquisition phase, already concluded, encompassed the properties needed for the Arena, Arena parking, the new rail yard and construction of these improvements. A982, 996. The 2009 MGPP did not change the Design Guidelines (A3322-430) that were annexed to the 2006 MGPP and that dictate the location and design of the 17 Project buildings and eight acres of open space. A983, 3893.

The amended terms of the agreement with MTA provided that ESDC would initially acquire from MTA only the property rights and air rights on the Arena Block. A3831. The balance of the MTA air rights are to be transferred to ESDC in one or more conveyances after FCRC constructs the new rail yard and pays the allocated purchase price of each parcel to be conveyed. A3826-34, 275-76, 4395-452.

**G. ESDC Considered the Environmental Impacts of the Proposed Modifications – and the Prospect of a Delay in Construction – and Determined that an SEIS Was Not Warranted.**

Before adopting the 2009 MGPP for public review, ESDC prepared a Technical Memorandum (the “2009 Technical Memorandum”). A87-170. This document examined the environmental impacts of the

modifications proposed to be included in the 2009 MGPP – including, most importantly for present purposes, a shift in the 10-year construction schedule from 2016 to 2019 – and the potential for further delays, to determine whether they warranted preparation of an SEIS. A91-92, 95, 98. The 2009 Technical Memorandum concluded that neither the modifications nor the potential for Project delays would result in any significant adverse impacts not previously addressed. A170.

On the basis of the FEIS, Findings Statement and 2009 Technical Memorandum, ESDC determined not to prepare an SEIS for the 2009 MGPP. A171.

**H. ESDC Held a Hearing on the 2009 MGPP and the Terms for Disposition of Project Site Properties to FCRC.**

On June 23, 2009, the ESDC Directors also authorized a hearing on the 2009 MGPP and related matters. A1064. The legal notice for the hearing advised the public of ESDC’s intention to enter into individual “Development Leases” that would commence at the point FCRC began construction of an individual Project building and expire when the construction of that building was completed, at which time the building and associated land would be conveyed to FCRC. A1065, 3914. The outside date for expiration of the Development Leases was set at 25 years from a condemnation milestone date (later established as May 12, 2010). Id.

The public hearing was held on July 29 and 30, 2009, and written comments were accepted through August 31, 2009. Extensive public comment was submitted on a wide range of issues, including the timetable for construction. A3928, 3932-34.

**I. ESDC Affirmed the 2009 MGPP and Determined that an SEIS Was Not Warranted.**

ESDC responded to the public comments in a document presented to the ESDC Directors prior to their September 17, 2009 meeting. A3926-61. The ESDC Directors were also presented with an abstract of the proposed terms for disposition of Project site properties. A3964-66.

On September 17, 2009, the ESDC Directors affirmed the 2009 MGPP. A172-73. The Directors found that the comments received during the public comment period did not disturb their determination that no SEIS was warranted and further found that an SEIS would not provide information useful to the determination whether to affirm the 2009 MGPP. A172.

**J. ESDC, MTA, FCRC and Other Parties Negotiated and Executed Agreements for Implementation of the Project.**

In the resolution affirming the 2009 MGPP, the ESDC Directors authorized ESDC staff to take appropriate actions to effectuate the plan. A173. Accordingly, over the course of the next three months, staff members completed intensive negotiations of the Project documents with FCRC.

The three-day master closing of the Project documents occurred from December 21 through December 23, 2009. A992. Participating parties included ESDC, MTA, FCRC, the City of New York and other private and public entities. Id. The closing involved execution of several hundred contracts, agreements, letters and other documents pertaining to the construction, financing and leasing of the Project. Of central concern to the lower court were: (i) the Development Agreement, which sets the terms for FCRC's development and construction of the Project, A4024-211; and (ii) certain agreements relating to the sale and development of MTA properties on the Project site (the "MTA Agreements"). A4212-619.

On December 23, 2009, ESDC initiated an EDPL proceeding to acquire the first-phase properties. A994. On March 1, 2010, the condemnation court issued an order vesting ESDC with title to these properties. See In the Matter of N.Y.S. Urb. Dev. Corp., 2010 WL 702319 (Sup. Ct. Kings Co. 2010). The condemnation court subsequently dismissed a separate Article 78 proceeding that alleged that the 2009 MGPP, Development Agreement and MTA Agreements had effected significant changes to the Project, requiring a new Determination and Findings under the EDPL. See Peter Williams Enterprises Inc. v. N.Y.S. Urb. Dev. Corp., 28 Misc.3d 1239(A), 2010 WL 3703264 (Sup. Ct. Kings Co. Sept. 20, 2010).

**K. ESDC Undertook Additional Environmental Analysis and Made Additional Findings in Response to the Remand Order.**

As described in the Statement of the Case, *infra*, on November 9, 2010, the lower court issued an order (the “Remand Order”) directing ESDC to make further findings “on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted.” Remand Order at 18.

Working with the same environmental consultants that had assisted in the preparation of the FEIS and 2009 Technical Memorandum, ESDC complied with the Remand Order by preparing two interrelated documents. The first – titled “ESDC Response to Supreme Court’s November 9, 2010 Order” (hereinafter “Response to Remand”) – set forth the specific findings required by the Remand Order and provided a detailed summary of the basis of ESDC’s findings. A265-301. The second – titled “Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project” (hereinafter the “2010 Technical Analysis”) – provided the technical information on which the Response to Remand was based. A174-264.

On December 16, 2010, the ESDC Directors approved a resolution making three findings, as explained in the Response to Remand: (i) that the Development Agreement and MTA Agreements did not have a material effect

on whether it was reasonable to use a 10-year construction schedule for the purpose of assessing environmental impacts; (ii) that it appeared unlikely that the Project would be constructed on a 10-year schedule, because construction had lagged behind the schedule provided by FCRC to ESDC in 2009 and because of “continuing weak general economic and financial conditions”; and (iii) that the analysis of the potential environmental impacts of a 25-year construction schedule (to 2035) confirmed the conclusion reached by ESDC in 2009 that an SEIS was not required or warranted for the 2009 MGPP. A302.

**L. Phase I Construction Is Underway.**

After ESDC obtained vacant possession of the first-phase properties in 2010, intensive construction work began on the Arena. Most of the steel for that structure has now been erected, and it is scheduled to open in September 2012. A997. Substantial progress has also been made on the adjacent new subway entrance, the new rail yard and related work. *Id.* At the eastern end of the Project site, all but one of the buildings on Block 1129 have been removed. A996-97.

**STATEMENT OF THE CASE**

On October 16, 2009, petitioners-respondents in Develop Don't Destroy (Brooklyn) v. ESDC commenced their Article 78 proceeding to annul the ESDC Directors' determinations of September 17, 2009, claiming, *inter*

*alia*, that ESDC should have prepared an SEIS before affirming the 2009 MGPP. A306-413. On November 18, 2009, petitioners-respondents in Prospect Heights Neighborhood Development Council v. ESDC commenced their proceeding seeking similar relief on similar grounds. A569-656.

On November 12, 2009 in the first proceeding and on December 11, 2009 in the second proceeding, ESDC served its answer and a memorandum of law, together with the administrative record. A414-81, 657-720.

On March 10, 2010, the court issued a decision, order and judgment (the “March 2010 Decision”) dismissing both petitions. A67-86.

On April 7 and 8, 2010, the petitioners served motions to reargue and renew, arguing that the terms of the Development Agreement executed on December 23, 2009 – months after the 2009 MGPP and preparation of the 2009 Technical Memorandum – suggested that the Project might take much longer than 10 years to build. A771-805. On April 27, 2010, ESDC and FCRC served papers opposing the motions. A806-11. On November 9, 2010, the court issued the Remand Order granting petitioners’ motions to the extent of remanding the matter to ESDC for further findings on use of the 10-year build-out and the need for an SEIS. A44-66.

On December 16, 2010, ESDC made the Court-ordered findings. A302, 265-301. On or about January 18, 2011, the petitioners filed

supplemental petitions challenging these findings. A834-907. On February 18, 2011, ESDC served the supplemental administrative record, containing additional documents ESDC prepared or considered in response to the Remand Order, and filed its answer to the supplemental petitions. A908-1175.

On July 13, 2011, the court issued its decision, order and judgment (the “Final Decision”) granting the supplemental petitions to the extent of ordering ESDC to prepare an SEIS “assessing the environmental impacts of delay in Phase II construction of the Project” and make “further findings on whether to approve the MGPP for Phase II of the Project.” Final Decision at 21. The court denied petitioners’ request to stay construction. One set of petitioners served a notice of entry by U.S. Mail on August 12, 2011, and the other served its notice several days thereafter. A11-14. FCRC and ESDC each filed a timely Notice of Appeal in each proceeding on September 9 and 12, 2011, respectively. A1-10.

## **POINT I**

### **ESDC HAS BROAD DISCRETION IN DECIDING WHETHER TO PREPARE AN SEIS, AND ITS DECISION-MAKING ON THIS ISSUE IS SUBJECT TO LIMITED AND DEFERENTIAL JUDICIAL REVIEW**

Judicial review of a substantive agency decision under SEQRA is limited, *see* Point I.A, *infra*, but even more judicial deference is owed to an agency’s decision not to prepare an SEIS. *See* Point I.B, *infra*. On appeal, this

Court applies the same highly deferential standard to agency decision-making that the lower court was required to follow. *See* Point I.C, *infra*.

**A. Judicial Review of a Substantive Agency Decision Under SEQRA Is Deferential to the Agency.**

A court “may not disturb an agency determination as substantively flawed unless it is affected by an error of law, arbitrary and capricious, or constitutes an abuse of discretion.” Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d at 316. In the SEQRA context, this limitation “has been understood to confine judicial inquiry to a ‘review [of] the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.’” *Id.* (quoting Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d 400, 417 (1986) (“Jackson”)).

Agency obligations under this three-pronged test are “tempered” by the “rule of reason,” so that “[t]he degree of detail with which each factor must be discussed obviously will vary with the circumstances.” Jackson, 67 N.Y.2d at 417. Noting the “interminable delay” that SEQRA proceedings can generate, the Court of Appeals has recently emphasized that “[w]hile it is essential that public agencies comply with their duties under SEQRA, some common sense in determining the extent of those duties is essential too.” Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 308

(2009) (applying the “rule of reason” to an agency’s “decisions about which matters require investigation”).

Furthermore, “the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects .... Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency’s choice.” Jackson, 67 N.Y.2d at 417.

Thus, in Akpan v. Koch, 75 N.Y.2d 561 (1990), the Court of Appeals stated that in determining whether an agency “has given sufficient consideration to an environmental issue to constitute the required ‘hard look’ at the subject[,] ... it is not the court’s role to evaluate de novo the data presented to the agency.” 75 N.Y.2d at 571. Accordingly, a court “must ... refrain from substituting its judgment for that of the agency” and “challenges to the conclusions drawn from the data presented requiring such a substitution of judgment will likely fail.” Id.; *see also* Neville v. Koch, 79 N.Y.2d 416, 429 (1992) (rejecting petitioners’ assertion “that the review of offsite displacement was improperly truncated” because “it is clear that the City conducted the requisite investigation and reasonably exercised its discretion”); Fisher v. Giuliani, 280 A.D.2d 13, 19-20 (1st Dep’t 2001) (“[I]t is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for

that of the agency ....”); S. Bronx Clean Air Coalition v. N.Y.S. Dep’t of Transp., 218 A.D.2d 520, 522 (1st Dep’t 1995) (“[T]he court should not have substituted its analysis for the expertise of the lead agency” and, in favoring one study regarding potential site uses over another, “engaged in economic impact analysis, which is an inappropriate basis for review of an environmental clearance.”).

**B. An Agency Is Afforded Particularly Broad Discretion in Deciding Whether to Prepare an SEIS.**

An agency’s decision not to prepare an SEIS is reviewed under the three-pronged test described above, but particular deference is afforded to the agency where the question concerns its determination whether to prepare an SEIS, instead of whether to prepare an EIS in the first instance.

In Riverkeeper, Inc. v. Planning Board of Town of Southeast, 9 N.Y.3d 219 (2007) (“Riverkeeper”), the Court emphasized the discretionary nature of an agency’s decision not to prepare an SEIS, observing that “[t]he relevant SEQRA regulations provide that: ‘[t]he lead agency *may* require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS.’” 9 N.Y.3d at 231 (emphasis in original) (quoting 6 N.Y.C.R.R. § 617.9[a][7][i]). This deferential regulatory language “is distinguished from regulations regarding the preparation of a DEIS or FEIS, which a lead agency must itself prepare or

require the applicant to prepare.” *Id.*; *see also* Environmental Impact Review in New York § 3.13[2][d] (Matthew Bender) (noting that the Riverkeeper standard “for reviewing decisions whether to prepare supplemental EISs is different than the standards used for reviewing initial determinations of significance”); *cf.* Riches v. N.Y.C. Council, 75 A.D.3d 33, 39 (1st Dep’t 2010) (“may” implies considerable discretion).

Thus, broad latitude is given to an agency taking a “hard look” at whether an SEIS is warranted. “The lead agency ... has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts.” Riverkeeper, 9 N.Y.3d at 232. In making its “fact-intensive” determination, the agency “has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals.” *Id.* at 231; *see also* 6 N.Y.C.R.R. § 617.9[a][7][ii] (decision to require an SEIS as a result of newly discovered information is to be made in light of “the importance and relevance of the information” and “the present state of the information in the EIS”); Halperin v. City of New Rochelle, 24 A.D.3d 768, 777 (2d Dep’t 2005) (finding no evidence of adverse impacts “which were inadequately addressed in the FEIS that would warrant, let alone mandate, the preparation of an SEIS”).

Thus, the “considerable latitude,” Jackson, 67 N.Y.2d at 417, afforded to agencies in their substantive SEQRA decision-making is, under Riverkeeper, even more considerable with respect to whether to prepare an SEIS.

**C. This Court Reviews an Agency’s SEQRA Determination Under the Same Standard the Lower Court Was Required to Use.**

An appellate court applies the same standard of review of agency decision-making as the court below, *see* Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d at 316, and does so without deference to the lower court’s decision. *See generally* Pell v. Board of Education, 34 N.Y.2d 222, 232-34 (1974).

**POINT II**

**ESDC IDENTIFIED THE RELEVANT ENVIRONMENTAL ISSUES, TOOK A HARD LOOK AT THEM AND PROVIDED A REASONED BASIS FOR ITS DECISION-MAKING**

ESDC’s determination that no SEIS was warranted in connection with approval of the 2009 MGPP was made after the agency had identified each of the environmental issues affected by that approval, scrutinized those issues carefully, and explained why none of them warranted preparation of an SEIS. The decision not to prepare an SEIS was founded in the first instance on the comprehensive analysis set forth in the FEIS (A1198-3181), as supplemented by the 2009 Technical Memorandum. A87-170. In response to the Remand Order, ESDC conducted a further inquiry into the relevant issues, presented the

results of this further inquiry in the 2010 Technical Analysis (A174-264), and prepared a detailed statement of the reasons for its decision in the Response to Remand. A265-301. As discussed below, ESDC considered the uncertainty in the Project schedule in its environmental analyses. ESDC thereby satisfied, and indeed went well beyond, its statutory duty to take a “hard look” at the relevant issues and provide a reasoned elaboration for its decision not to prepare an SEIS in connection with the 2009 MGPP.

**A. The FEIS Provided a Sound Foundation for ESDC’s Decision.**

As required by 6 N.Y.C.R.R. § 617.9[a][7][ii], ESDC took account of the state of the information in the FEIS in making its decision regarding the need for an SEIS. The FEIS presented an exceedingly thorough analysis of the Project and its effects, describing in detail the potentially significant impacts of both the construction and operation of the Project in each and every relevant area of environmental concern (A1198-2425), and identifying a wide-ranging program of mitigation measures to ameliorate the impacts that had been identified. A2426-518.

To assist in its analysis of several impact areas, ESDC selected a “build year” for the Project. A1357-58. *See generally* Committee to Preserve Brighton Beach v. Council of City of N.Y., 214 A.D.2d 335, 337 (1st Dep’t 1995) (describing the “build year” as a “nonstatutory baseline” used “as a

device to provide assumptions derived from relevant environmental studies”). The FEIS assumed a 10-year construction schedule, with a build year of 2016. A1357-58; *see also* Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d at 315-19 (rejecting challenge to 10-year construction schedule).

The FEIS thoroughly examined the operational impacts of the Project upon completion of all 17 buildings (A1367-2284), but such impacts are not at issue on this appeal because the lower court did not discuss them in its Final Decision.

The FEIS also scrutinized the construction-period impacts that are the focus of this proceeding, as well as the measures needed to mitigate such impacts. A2285-402, 2513-18. As explained in the FEIS, ESDC employed the 10-year schedule for purposes of the construction period analysis since it determined, among other things, that doing so would “concentrate construction activities at the site and assure[ ] that the reasonable worst-case construction condition is analyzed.” A3079; *see also* A3074, 3080.

In the FEIS, ESDC studied each environmental area that could be affected while the Project is under construction. A2326-51 (construction-related traffic); A2355-81 (construction-related air quality issues); A2381-400 (construction-related noise issues); A2315-17 (construction-related land use issues); A2317-18 (construction-related neighborhood character issues);

A2218-19 (construction-related impacts on socioeconomic conditions); A2321-22 (construction-related impacts on community facilities); A2321-22 (construction-related impacts on open space); A2322-23 (construction-related impacts on historic resources); and A2311-14, 2402 (construction-related infrastructure issues).

The FEIS focused particular attention on the environmental impacts of: (i) construction-related traffic, including trucks and construction-worker vehicles; (ii) construction-related air emissions, focusing primarily on fine particulate matter and dust associated with construction activities; and (iii) construction-related noise associated with the operation of both vehicles and equipment. It assessed each of these areas using quantitative models based on identified peak periods of construction during the 10-year construction period, when multiple buildings were assumed to be under simultaneous construction in close proximity to each other at the site. A2329-32, 2358-63, 2388. In connection with these analyses, the FEIS identified and assessed one or more peak periods for both Phase I and Phase II of the Project when construction would be taking place at a level most likely to result in the potential for significant adverse traffic, air and noise impacts. Id.

As a result of its extensive analysis, ESDC found that construction of the Project would result in a number of significant environmental impacts,

particularly with respect to traffic, noise and neighborhood character in the immediate vicinity of the site. To address these impacts, the FEIS identified a robust mitigation program, which was included in the SEQRA Findings Statement (A3228-38, 3250-51) and imposed upon FCRC in an enforceable “Memorandum of Environmental Commitments” incorporated into the Development Agreement. A4044, 4133-55. The measures included:

1. dust minimization requirements, including a speed restriction for on-site construction vehicles, wetting down unpaved surfaces, covering or water-misting stockpiled materials, and tire washing and sealing of trucks leaving the site;
2. a diesel emissions reduction program requiring the use of ultra-low sulfur diesel fuel and best available tailpipe emissions reduction technologies, enforced idling restrictions and the placement to the extent practicable of stationary engines at a minimum of 50 feet from sensitive locations, and the use of electric engines, rather than diesel equipment, where practicable;
3. a community air monitoring plan;
4. a comprehensive program to minimize construction noise, including the use of equipment with noise emission levels conforming to those specified in the FEIS and the provision of a minimum 8-foot high perimeter barrier, with a 16-foot high barrier adjacent to sensitive locations (and operation of noisy vehicles, such as concrete-mixing trucks, behind the barriers);
5. provision of double-glazed or storm windows and alternative ventilation for off-site residential locations the FEIS identified as likely to experience significant noise impacts, where such windows and air conditioning units are not currently installed;

6. Maintenance and Protection of Traffic plans in consultation with the New York City Department of Transportation (“DOT”), to minimize the effects of construction activities on the flow of vehicular and pedestrian traffic in the vicinity of construction sites;
7. specified permanent roadway improvements designed to reduce traffic impacts during construction and operation, subject to DOT approval;
8. the provision of on-site designated staging areas throughout the construction period to store materials and accommodate construction vehicles that require early arrival and marshalling for material delivery to high-demand construction areas, in order to reduce the presence of construction vehicles and materials on local streets;
9. the provision of off-street parking for construction workers at levels appropriate in light of the number of workers employed at the site during different stages of construction, to reduce construction worker parking on local streets;
10. a construction protection plan to prevent impacts on historic resources within 90 feet of any construction;
11. vibration monitoring;
12. a construction health and safety plan to prevent potential impacts related to contamination that could be encountered during the course of environmental remediation and excavation;
13. a rodent control program; and
14. the appointment of an environmental monitor to ensure that FCRC and its contractors comply with the commitments set forth in the Memorandum of Environmental Commitments.

*See* A4133-55.

Nothing in the FEIS or Findings Statement indicates that the identification of significant construction-related impacts or related mitigation was limited in any way by the assumed 10-year duration for Project construction.

**B. ESDC Took a Hard Look at the Potential Impacts of the 2009 MGPP in the 2009 Technical Memorandum.**

Before approving the 2009 MGPP, ESDC examined the potential environmental impacts of the proposed modifications in the 2009 Technical Memorandum. This analysis included an assessment of the environmental impacts of the physical Project modifications under consideration (such as changes to the height of Building 1 and the Arena façade, the elimination of the green roof on the Arena, the addition of 100 spaces to the parking facility on Block 1129 and changes to the rail yard). A92-95. In addition, by 2009, the economy and real estate market had deteriorated, causing ESDC to consider once again what “build year” should be used for environmental analysis purposes. In considering this issue, ESDC first reviewed, with the assistance of an independent construction consultant, the 10-year schedule proposed by FCRC, which was updated to reflect Project changes and the deferral of the FEIS-assumed build year of 2016 to 2019 due to the three-year delay in initiating the 10-year period of construction. The consultant found the revised schedule to be viable and appropriate from a constructability standpoint.

A3820. ESDC also took several additional factors into account, including FCRC's financial incentive to recognize a return on the substantial investment it had made in the Project as soon as possible, the current severe housing shortage in Brooklyn, projected population growth and the need for additional affordable and market-rate housing in Brooklyn in the coming decades and the Project's transit-accessible site. A3932-34. Moreover, prior to affirming the 2009 MGPP, ESDC was advised by its independent financial consultant (KPMG LLP) that it would not be unreasonable to assume that the Brooklyn market would absorb the Project's residential units over a 10-year period. A3971-4018.

Since ESDC had already determined a 10-year schedule to be the reasonable worst-case scenario for construction period impacts (A3079-80), it ultimately decided, in light of the prospect of continued economic uncertainty, that it should assess the environmental impacts of the 2009 MGPP using the revised 10-year construction schedule (A98) *and* a prolonged delay scenario that assumed construction would extend beyond 10 years (A151). The 2009 Technical Memorandum was loud and clear in recognizing that “[c]urrent economic conditions ... have led to decreases in demand for both residential and commercial real estate, while turmoil in the financial market has made it more difficult to obtain financing for development projects.” A151. Therefore,

the “delayed construction scenario” included in the 2009 Technical Memorandum analyzed whether a delay in Project construction would give rise to new or different significant environmental impacts upon Project completion, and whether an extended construction period would result in a material change in the significant construction-related impacts that the FEIS had disclosed. R 4816.

Among other things, the 2009 Technical Memorandum included a quantitative assessment of the impacts of the Project’s operation upon its completion with respect to traffic, transit, pedestrian and parking conditions assuming a build year of 2024, which was considered illustrative of a significant delay in Project construction. A155-58. No specific build year was utilized in the assessment of the Project’s operational impacts in other environmental analysis areas, such as neighborhood character and land use, because there was no need to account for annual background growth with respect to those areas. A152-53, 158-59. ESDC determined, based on the 2009 Technical Memorandum, that the delayed construction scenario would not result in any significant operational impacts not previously disclosed in the FEIS. A159. The court’s Final Decision does not discuss the Project’s operational impacts.

The 2009 Technical Memorandum also took a hard look at construction-period impacts in the delayed construction scenario to determine whether they would be appreciably different if construction were to be extended for many years beyond the 10-year period assumed in the FEIS analysis. A159.

The analysis acknowledged that the FEIS had identified significant adverse localized neighborhood character impacts in the immediate vicinity of the project site during the construction period. Id. It further acknowledged that an extension of the schedule would prolong the period when portions of the project site would be undergoing construction, and prolong the period when a small portion of the study area in the immediate vicinity of the site – along Dean and Pacific Streets – would experience those significant impacts. Id.

ESDC noted that in a delayed build-out scenario the development would likely go forward on a parcel-by-parcel basis, with each building being individually financed and constructed, and with the platform over the LIRR rail yard being built out in sections. Id. It further noted that as construction progresses across the site and each of the buildings is completed, the landscaped open space area associated with that building would be provided in accordance with the Design Guidelines, id., which ESDC approved in 2006 and imposed upon FCRC in the Development Agreement. The document also noted that in the event construction were to be suspended, major equipment would be

removed and the inactive development sites would be maintained and secured.

Id. ESDC acknowledged that the surface parking lot on Block 1129 would be in place for a longer period of time under the delayed construction scenario.

A153. However, the FEIS had examined thoroughly the environmental impacts of utilizing this parcel for surface parking and construction staging. A1406, 1409, 2315-16, 3076; *see also* A681-83. The Technical Memorandum also noted that Block 1129 had been “characterized by large abandoned manufacturing buildings in the No Build condition described in the FEIS,” A153, and concluded that “a surface parking lot at this location would be compatible with the mix of light manufacturing, commercial, and residential uses that are adjacent to the project site.” A153.

In view of these and other considerations, the 2009 Technical Memorandum concluded that a “delay in the full build out year for the ... Project as a result of prolonged adverse economic conditions would not result in any significant adverse environmental impacts that were not addressed in the FEIS.” A159. ESDC concluded that no SEIS was warranted, either under a 10-year construction schedule or a delayed build-out. A170-71.

**C. In Response to the Remand Order, ESDC Conducted Additional Environmental Analyses to Determine Whether an SEIS Was Warranted in Connection with the 2009 MGPP.**

As discussed above, ESDC thoroughly analyzed the relevant environmental issues in the 2009 Technical Memorandum. Nevertheless, in response to the Remand Order, ESDC and its technical consultants undertook additional studies of an “extended build-out scenario” all the way to 2035 (the outside date set forth in the Development Agreement), and upon completion of those studies ESDC prepared a further elaboration of its conclusions. Those additional studies and analyses – embodied in the 2010 Technical Analysis and Response to Remand – leave no doubt that ESDC took a hard look at the effects of an extensive delay in the construction of the Project, and provided further explanation as to why it had determined not to require an SEIS.

In preparing this analysis, ESDC and its consultant first worked with FCRC to develop a conceptual sequence of construction-related activities consistent with a hypothetical build year of 2035. The analysis assumed that construction of the Project would proceed from west to east on a sequential basis, with each building individually designed, financed and built. A175-76, 220, 253-59. It also accounted for the fact that during certain periods multiple buildings could be expected to be under construction simultaneously. A220. In its deliberations, ESDC was aware of the fact that although the overall

completion of the Project would be delayed under the extended build-out Scenario, the time and activities involved in constructing each of the Project buildings would not be substantially affected by the calendar year of its construction. A235.

As discussed below, the 2010 Technical Analysis examined: (i) operational impacts upon completion of the Project in 2035; (ii) the effects of construction activities taking place over an extended period of time; and (iii) impacts associated with the condition of the Project site during an extended construction period.

**1. ESDC Took A Hard Look At Operational Impacts Upon Completion of the Project in 2035.**

Since the date for completion of the Project would not affect its ultimate program, site plan or building bulk and configuration, ESDC concluded that the Project, once completed under the extended build-out scenario, would not have significant adverse impacts not previously addressed in the FEIS in the areas of Land Use and Public Policy (A180-81), Socioeconomic Conditions (A181), Open Space (A184), Shadows (A184), Historic Resources (A185), Urban Design and Visual Resources (A185), Hazardous Materials (A185), Infrastructure (A186), Air Quality (A205), Noise (A205), Neighborhood Character (A205) or Public Health (A206). Therefore,

ESDC focused its attention on the operational effects of the extended build-out scenario on Community Facilities, Traffic, Parking, Transit and Pedestrians.

*Community Facilities*

With respect to Community Facilities (which include public schools and publicly funded day care), ESDC noted that the FEIS had found that the additional students generated by the Project would have a significant adverse impact on public elementary and intermediate schools, and that FCRC is obligated to provide space, at the option of the School Construction Authority, for a public school on the Project site. A183. The extended build-out scenario was found to delay the occurrence of the significant adverse impact to public schools (since impacts would arise as additional students are added by the Project to the study area), but this delay was found not to affect the ultimate conclusion in the FEIS that the Project will result in a significant adverse impact to public schools, or FCRC's obligation to address that impact, as set forth in the Memorandum of Environmental Commitments. A182.

ESDC also considered the Project's potential impacts under the extended build-out scenario on publicly funded child care facilities, and found that FCRC's obligation under the Memorandum of Environmental Commitments to monitor for and avoid a significant adverse impact on such facilities would remain the same under the extended build-out scenario. A184.

*Traffic, Parking, Transit and Pedestrians*

As explained in the Response to Remand, the traffic analysis in the FEIS: (i) identified existing traffic conditions in the study area during each of the relevant peak hours; (ii) projected how traffic conditions would evolve without the Project by the 2016 build year (the “No Build” condition); (iii) estimated the additional trips to be generated by the Project upon completion; (iv) superimposed that additional traffic on the affected roadway network as of the Project’s build year; and (v) assessed the impact of the Project-generated traffic on the No Build traffic conditions that would otherwise exist in the build year. A292. ESDC reasoned that a delay in the year of Project completion would not change the number of Project-generated trips at full build-out. Id. Accordingly, it found that any additional traffic or parking impacts under the extended build-out scenario would be caused by a worsening of the No Build conditions in the years up to 2035. With respect to this issue, the Technical Analysis found the assumptions made in the FEIS for the 2016 No Build conditions were sufficiently conservative to reflect projected background conditions in 2035, because: (i) traffic conditions in the study area had become less congested between 2006 and 2010; (ii) there had been changes in anticipated No Build projects; and (iii) the 2010 revisions to the CEQR Technical Manual had recommended the use of a much lower growth rate for

predicting future background conditions than the growth rate used in the FEIS. A189-90. ESDC found that the conclusions in the FEIS regarding operational traffic impacts would not change materially under the extended build-out scenario (A197), and came to similar conclusions with respect to parking, transit and pedestrian conditions. A197-204.

**2. ESDC Took a Hard Look at the Effects of Construction Activities Taking Place over an Extended Period of Time.**

ESDC also assessed the potential for construction activities during the extended build-out scenario to result in new or different impacts. The analysis examined seven successive stages of Project completion (described and depicted in the Technical Analysis as Stages 1 through 7), which were used as “snapshots” in time, showing how the Project site would appear, and how its construction would affect the surrounding area, at various points in the construction process. A218-222, 253-59. ESDC found generally that significant new construction-related impacts would not arise because, *inter alia*: (i) construction over 25 years would not increase the amount of work needed to complete each Project component; (ii) construction would advance from one area to another sequentially across the 22-acre site; (iii) for that reason, most adjoining areas would experience intensive construction activities for far less than the full 25-year period of overall construction; (iv) the effect of a delay

would be to reduce the level of construction activities occurring simultaneously on the site, thus reducing the intensity of construction at any one time; and (v) the construction mitigation identified in the FEIS to address adverse impacts to the maximum extent practicable would also apply to the construction work in an extended build-out scenario. A222, 224, 232, 241-44.

The lower court faults the Technical Analysis as failing to “undertake any analysis of extensive delays between completion of the arena, anticipated for 2012, and Phase II construction.” Final Decision at 13. But as explained above, the 2009 Technical Memorandum indicated that if construction is suspended, heavy construction equipment is to be removed, the site is to be maintained and secured, A159, and where possible undeveloped parcels are to be made available as publicly accessible, well-maintained temporary open space with a design and program approved by ESDC. A154, 4135, 4153-54, 4054. Moreover, the buildings completed as of the time of any such suspension would have been landscaped in accordance with the Design Guidelines. A2815, 3239-40, 3368, 3419-29, 3944. The effects of the condensed construction activities that would take place once construction resumes were studied in the analysis of the reasonable worst-case 10-year build-out appearing in both the FEIS and 2009 Technical Memorandum.

**3. ESDC Also Took a Hard Look at Impacts Associated With the Condition of the Project Site During an Extended Construction Period.**

The Technical Analysis also presented a detailed description of the urban design, neighborhood character and open space conditions that would exist at the Project site at each of the seven stages over the course of an extended delay in the construction of the Project buildings. The Response to Remand then synthesized the information presented in the Technical Analysis, and provided a summary – keyed to each Project building site – of the conditions that would exist in the event of a prolonged delay in Project construction. A297-300. On the basis of that parcel-by-parcel analysis, ESDC found that on a number of development sites the primary effect of a construction delay would be the continuation of conditions that have existed for decades and that would be improved as the Project advances. Id. ESDC found, among other things, that an SEIS would not provide information that would be useful in addressing any potential delay in Project completion. Id.

\* \* \* \*

In sum, as directed by the Remand Order, ESDC amplified the analysis previously performed to determine whether an SEIS should be prepared in connection with the 2009 MGPP. After scrutinizing the effects of a prolonged delay at seven different stages of construction, it determined that an

SEIS would not provide information that would be of material utility and was not warranted in light of the extensive environmental analysis and mitigation measures previously set forth in the FEIS and 2009 Technical Memorandum. That determination was based on a hard look at the impacts of the 10-year, delayed and prolonged delay construction schedules, and was eminently rational.

### **POINT III**

#### **ESDC PROPERLY CONSIDERED DURATION IN ITS ASSESSMENT OF THE POTENTIAL IMPACTS OF A DELAY IN PROJECT CONSTRUCTION**

The keystone of the court’s Final Decision is its conclusion that ESDC failed to consider the duration of construction-related activities in its assessment of the potential impacts of a delay in Project construction. Thus, the court held that ESDC failed to consider the duration of impacts resulting from prolonged construction with respect to: neighborhood character (Final Decision at 11-13, 18), air quality (id. at 11-12), noise (id. at 11-12), traffic (id. at 11-12), open space (id. at 11, 14), socioeconomic conditions (id. at 11-13) and land use (id. at 11). The court also emphasized this holding in its summary at the end of its opinion, stating that the “Technical Analysis assumes, without any corroborating studies, that the environmental impacts will largely be independent of the duration of construction.” Id. at 17. But as explained

below, ESDC did not make any such assumption; rather, with respect to each area of environmental concern, it assessed whether and to what extent increasing the duration of construction activity would result in new environmental impacts that warranted further analysis in an SEIS. ESDC thus took the duration of impacts squarely into account in exercising its discretion whether to prepare an SEIS, and the court's contrary holding was error.

**A. ESDC Considered the Duration of Construction Activities in Assessing Neighborhood Character Impacts.**

The FEIS carefully examined the impacts of intensive construction activities over a 10-year period on the character of surrounding neighborhoods.

The FEIS noted that “[c]onstruction activities would be disruptive and concentrated on some blocks for an extended period of time.” A2286.

However, the FEIS also noted that “no portion of the project site, and thereby the immediately adjacent neighborhood, would be subject to the full effects of construction for the entire 10-year period.” A2317. The FEIS further indicated that the extent of the impact on any one area of the site “would depend on the type of construction activity being performed, the location and the length of time this disruption is expected to occur, and the character of the immediately adjacent neighborhoods.” *Id.* While acknowledging that the intensity of impacts could vary in different parts of the site, the FEIS concluded that due to the scale of the construction activities and their “extended” duration, the

“[c]onstruction activity associated with the proposed project would have significant adverse localized neighborhood character impacts in the immediate vicinity of the project site during construction.” A2286. Thus, the duration of construction over a 10-year period was one fundamental reason the FEIS found that Project construction would affect the character of the surrounding area.

To address this impact, the FEIS identified numerous mitigation measures with respect to noise, traffic, vibrations, dust and other effects of construction activities to reduce the impacts of those activities to “the maximum extent practicable.” A2513-18, 3227-28, 3250-52, 3275. ESDC imposed these measures through the Memorandum of Environmental Commitments incorporated into the Development Agreement. A4044, 4133-55. The lower court did not identify any shortcomings in the FEIS analysis or explain why its findings would not be equally applicable to a construction period that extended beyond the 10-year period considered in the FEIS.

In the 2009 Technical Memorandum, ESDC also considered the duration of construction with respect to neighborhood character. ESDC noted that the FEIS already had considered a lengthy construction period of 10 years in concluding that the construction activity would result in significant adverse impacts on neighborhood character. A158. ESDC further noted that in a delayed build-out scenario, the “construction activities would be substantially

the same,” but 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.” Id. ESDC concluded that the localized impacts on Dean and Pacific Streets (the two residential streets most affected by Project construction) “would continue through the prolonged construction period,” but that “[a]s with the FEIS, these impacts would be experienced in a small area adjacent to the project site and would not affect the character of the larger Prospect Heights neighborhood.” Id. ESDC also noted that the delay in the construction of the Project buildings would prolong the time that certain interim site conditions (namely, the absence of residential buildings buffering the Arena and the surface parking lot on Block 1129) would remain, contributing to the localized adverse effect on neighborhood character the FEIS had identified. Id. Thus, contrary to the lower court’s opinion, ESDC clearly did consider duration in its analysis, but concluded that the longer duration of the construction period did not warrant an SEIS because the FEIS had already disclosed the adverse impacts on neighborhood character and had already mitigated those impacts to “the maximum extent practicable.” A3275. The lower court did not specifically discuss this analysis, or explain why it was insufficient.

In the 2010 Technical Analysis, ESDC provided yet another analysis of neighborhood character impacts of prolonged Project construction.

That document noted that under an extended delay scenario, fewer buildings would be under construction at one time, reducing the intensity of impacts. A241. It also noted that a longer overall construction schedule would not prolong the period of construction activity associated with any particular Project building, nor prolong the period during which areas near any building site are affected by such activities. Id. The 2010 Technical Analysis nevertheless found that if construction is delayed, impacts would occur over a longer time period, particularly in certain areas that are adjacent to multiple Project buildings. A241-44, 297. The Technical Analysis further noted that measures had already been imposed to mitigate construction-related impacts at areas adjacent to the Project site to the maximum extent practicable. A207, 217-19, 232-33, 237, 241.

The lower court's unexplained assertion that ESDC failed to consider duration in assessing neighborhood character impacts is clearly inconsistent with the multiple studies in the record. Since ESDC disclosed the adverse construction-related impact on neighborhood character in the FEIS, and put into place comprehensive mitigation measures to address this impact to the maximum extent practicable, there is no basis for requiring an SEIS to revisit this well-studied issue again.

**B. ESDC Considered the Duration of Construction Activities In Assessing Air Quality Impacts.**

The Final Decision is also in error in asserting that ESDC failed to consider duration in assessing the impact of Project construction on air quality.

The key reference points for the assessment of air quality impacts in the FEIS were the National Ambient Air Quality Standards (“NAAQS”), the New York City *de minimis* criteria to assess the significance of incremental increases in carbon monoxide concentrations, U.S. Environmental Protection Agency significant impact levels and the New York City Department of Environmental Protection (“NYCDEP”) interim guidance criteria for fine particulates (PM<sub>2.5</sub>). A2200-03. Each of these reference standards, by its own terms, takes duration into account because each standard references concentrations of a certain air pollutant over a certain time period. *Id.* To cite three examples, the NAAQS for respirable particulate matter (PM<sub>10</sub>) (which includes both dust from construction activities and diesel emissions) refers to PM<sub>10</sub> concentrations over a 24-hour period; the NAAQS for sulfur dioxide (SO<sub>2</sub>) identifies permissible SO<sub>2</sub> concentrations over 3-hour, 24-hour and one-year periods; and two of the NYCDEP interim guidance criteria relate to incremental concentrations of PM<sub>2.5</sub> over a one-year period. A2200, 2203.

According to the construction air quality assessment in the FEIS, pollutant concentrations at individual receptor locations would be affected by

emissions associated with the operation of nearby construction equipment. The FEIS therefore analyzed the impacts of construction on air quality by assuming that Project development would proceed with the simultaneous construction of multiple buildings over the “reasonable worst-case” period of 10 years. A3079.

The conclusion of the analysis was that, with the emission reduction measures identified by the FEIS and imposed by the Memorandum of Environmental Commitments in place, emissions associated with equipment operation would not cause significant adverse impacts to air quality during any of the seven modeling periods. A2380-81.

In the 2009 Technical Memorandum, ESDC concluded that a delay in the construction schedule would not affect its earlier conclusion that the construction activities would not result in any significant adverse impacts to air quality. A159. ESDC acknowledged that a delay would cause construction activity and emissions to “be spread over a longer period of time,” but found that the “level of impact would not be greater than that presented in the FEIS.” Id. This conclusion was informed by a new analysis of peak period emissions, which showed that the “level of intensity during the peak construction period with the revised schedule would be lower than that analyzed in the FEIS.” A147. ESDC performed a separate analysis to account for the potential that Building 1 (an office building) might be delayed to a greater extent than the rest

of the Project; that analysis also concluded that such a delay would not result in any significant adverse construction-period air quality impacts. A165. The court did not discuss or provide any specific criticisms of these air quality analyses.

The 2010 Technical Analysis presented yet another analysis of the potential impacts of Project delay on air quality. It concluded that peak emissions would be lower with a 25-year build-out (A205, 231-35) and that, as ESDC had concluded in earlier studies, the construction activity would not result in any significant adverse impact to air quality. Id. ESDC reached this conclusion by examining construction activities in each of the seven stages of construction. It found that the extended build-out scenario would prolong the overall duration of construction, but would not prolong intense operations near individual receptor locations since: (i) construction activities would move across the 22-acre site as the Project advances; and (ii) the construction duration of each individual Project building would not be affected by stretching out the overall construction schedule for the 17-building Project. As a result, ESDC found that an extended construction schedule would not be expected to increase the frequency, duration or intensity of elevated concentrations at those locations. A231-35.

ESDC found the same logic to hold true with respect to nuisance dust from construction activities. In addition, it found that since there would be less simultaneous work on multiple sites and buildings and more time in between the start of construction activities for particular buildings, the overall dust emissions at any stage in the extended build-out scenario would be less than that analyzed in the FEIS, but would occur over a longer period. A232.

The court, without any specific criticism of the 2010 air quality analyses, swept ESDC's conclusions aside with the inexplicable holding that duration had been ignored. But as explained above, the analysis did consider duration, as each of the reference standards for air quality require that elevated concentrations be considered with respect to specific periods of time (3-hours, 24-hours, one-year). The court did not explain why the air quality analysis should have been done any differently, and in particular did not identify any different reference standards or modeling that should be used or performed in an SEIS. Clearly, there is no basis for ordering ESDC to prepare an SEIS to go back over the potential air quality impacts of construction delays.

**C. ESDC Considered the Duration of Construction Activities in Assessing Noise Impacts.**

The FEIS also took a hard look at the noise impacts of Project construction and considered duration as a factor in assessing the significance of those impacts. The analysis was performed with quantitative modeling of

construction noise at more than 20 receptor locations surrounding the Project site. A2384-86. In determining whether the noise from construction activities should be considered a significant adverse impact at any particular receptor location, the FEIS considered both the magnitude of the construction noise at the receptor location *and* the period over which that noise would occur. A2382. With respect to duration, the FEIS considered any receptor location that would experience high noise levels “for 2 years or longer” to be significantly impacted by the construction work. Id. Using these criteria, the FEIS specified the nearby areas within which significant adverse noise impacts would occur. A2397. As a result of this finding, the FEIS identified, and the Memorandum of Environmental Commitments imposed, numerous measures to mitigate, to “the maximum extent practicable,” the noise from construction activities. A2388-91, 2399-3000, 3231-33, 3251, 3275. These measures included use of quieter construction equipment and construction techniques, erection of noise barriers and installation of double-glazed windows and alternative ventilation at apartments within the impact zone. Id.

In preparing the 2009 Technical Memorandum, ESDC was aware that the FEIS already had identified any receptor location that would experience significantly elevated construction noise for two or more years as within the area that would experience significant adverse noise impacts and thus require

mitigation. A2382. Accordingly, the 2009 Technical Memorandum reasoned that stretching out the construction period for more than 10 years would not result in any new significant adverse noise impacts. A159. ESDC noted that “[t]he effects of [the] delayed construction scenario on ... noise would be spread over a longer period of time but the level of impact would not be greater than that presented in the FEIS.” Id. The court did not discuss this analysis and did not explain why new noise modeling should be performed in light of the extensive noise modeling already performed in the FEIS.

The 2010 Technical Analysis reconsidered the noise impacts of construction delays. ESDC noted that, in a delayed construction scenario, there would be “a longer construction schedule whereby each building or construction task could be completed in the same amount of time, but there would be less overlap in construction of buildings and more time in between various construction activities.” A235. To assess the impacts of such a scenario, ESDC “revisited” the “construction noise analysis results presented in the FEIS” in order to assess “the duration and magnitude of noise levels” under the delayed construction scenario. Id. The ensuing review assessed the noise associated with construction activities in each of the seven construction stages and explained in exacting detail how noise-related impacts generally would move from one area to another as construction activities progress across the 22-

acre site. A238-41. ESDC concluded that the same noise receptor locations identified as significantly impacted in the FEIS would experience significant adverse construction noise impacts in a delay scenario, and no additional receptor locations would be significantly affected. A241. ESDC also acknowledged that a prolonged construction schedule may extend the duration of significant adverse construction-related noise impacts at some locations. However, ESDC found that most receptor locations would experience construction-related noise impacts only during a portion of the construction schedule, when noisy work is performed near them, rather than over the entire 25-year period. A236, 294-95. ESDC further noted that periods of high noise levels can be expected to be episodic at the affected receptors, because noisy activities would not occur throughout the entire period when a particular building is under construction. Id.

Finally, ESDC also took account of the fact that the noise mitigation measures identified in the FEIS would address the construction noise impacts of a delay scenario. A237, 241.

The court, without so much as acknowledging the methods or conclusions of ESDC's detailed analysis of construction noise impacts, overturned ESDC's findings with the holding – flatly contradicted by the record – that ESDC failed to consider duration in its assessment of construction noise.

The court did not explain what kind of additional noise analysis an SEIS would include. It is clear from the FEIS, 2009 Technical Memorandum and 2010 Technical Analysis that ESDC did consider the duration of construction noise in its assessment and that an SEIS is not required to address this issue again.

**D. ESDC Considered the Duration of Construction Activities in Assessing Traffic Impacts.**

The principal traffic issue associated with the Atlantic Yards Project relates to traffic from the *operation* of the Project (particularly the Arena) after it is built. The FEIS studied this issue in great detail. A1989-2079. In addition, however, the FEIS assessed the potential adverse traffic impacts of Project construction. A2326-51. Because construction activity generally begins at 7 AM and ends at 3 PM, the FEIS construction traffic analysis considered three peak hours (weekdays 6-7 AM and 3-4 PM and Saturday 3-4 PM). A2341. A quantitative analysis was performed for three peak construction periods (Phases 1A, 1B and 2B) (A2331-32, 2341), and concluded that “significant adverse traffic impacts would occur at numerous locations *throughout the construction period.*” A2326 (emphasis added). The analysis identified 19 specific intersections that would experience significant adverse impacts from construction activity (A2326, 2343-44) and prescribed mitigation (A2348-51). These mitigation measures were imposed by the

Memorandum of Environmental Commitments annexed to the Development Agreement. A4146-48.

In the 2009 Technical Memorandum, ESDC concluded that in a delay scenario, “[g]eneral construction practices, equipment, staging, maintenance and protection of traffic, and work hours would be similar to that described [in the 10-year construction schedule].” A159. ESDC also noted that “[c]ertain activities that were expected to take place during construction peaks on the arena block and Phase II sites would now be prolonged but the intensity of these activities would not increase.” Id. ESDC concluded that although the period during which construction-related traffic impacts would occur would be prolonged, significant new traffic impacts would not be expected. A155-56, 159.

In the 2010 Technical Analysis, ESDC concluded that under an extended build-out scenario, with the completion of buildings occurring in a more sequential manner, the “intensity of construction activities would be less than that assessed in the FEIS or the 2009 Technical Memorandum” and “the numbers of construction workers [and therefore the number of construction worker vehicles] and truck deliveries during all stages of the Project would be lower than those estimated for the FEIS analyses.” A226-27. This general observation was then followed by a detailed assessment of construction traffic

in each of seven stages of Project construction extending over the full duration of the assumed 25-year construction period. A227-31. ESDC further found that the extensive traffic mitigation measures identified in the FEIS and required upon the opening of the Arena would also mitigate construction-related traffic impacts in the delay scenario. A228.

The court did not identify any specific flaw in ESDC's assessment of construction traffic impacts, or why additional analysis is needed. The court suggested that "duration" should be considered in some different, unspecified fashion but did not explain what else is required. More fundamentally, the court overlooked the fact that, as explained in the FEIS, the accepted methodology for analyzing traffic impacts is to assess whether Project-generated traffic at particular intersections in particular peak hours will cause delays in traffic movements that exceed specified performance criteria, and to prescribe mitigation measures to reduce these delays. A1993-96. As noted in the 2010 Technical Analysis, under this widely used methodology, the identification of significant adverse traffic impacts at particular intersections "is not duration dependent but rather is keyed to the types and levels of construction activities while accounting for changing background conditions." A209. The court provided no basis for faulting either the approach that ESDC

took to analyzing construction traffic impacts or ESDC's conclusions with respect to those impacts.

**E. ESDC Considered the Duration of Construction Activities in Assessing Open Space Impacts.**

Prior to the commencement of the Project, the Atlantic Yards site did not contain any publicly accessible open space, and therefore the Project does not have any direct effect on the availability of open space resources.

A1605. Nevertheless, under the methodology used in the FEIS, a development project may have a significant adverse indirect impact on open space resources by introducing new residential or worker populations and thereby adversely affecting the ratio of persons to square feet of open space in the relevant study area. A1602-03. The FEIS concluded that Phase I of the Project would have such an indirect impact on open space resources in the non-residential (1/4-mile) study area (A1601), but that this adverse impact would be addressed incrementally (and ultimately eliminated altogether) as the buildings and associated open space are constructed in Phase II of the Project. Id.

In the 2009 Technical Memorandum, ESDC acknowledged that a delay in Phase II construction would also result in a delay in the delivery of the Phase II open space. A154. ESDC noted that “[t]he FEIS identified a temporary significant adverse open space impact between the completion of Phase I and the completion of Phase II. With the delayed build-out scenario,

this temporary impact would be extended, but would continue to be addressed by the Phase II completion of the 8 acres of publicly accessible open space.”

Id. ESDC also noted that “as each of the buildings [in Phase II] is completed, a certain amount of open space would be provided in conformance with the GPP’s Design Guidelines, thereby offsetting some of this temporary open space impact.” Id.; *see also* A3419-29 (Design Guidelines).

The 2009 Technical Memorandum also considered that the open space deficit would be partially ameliorated during certain stages of a delayed construction schedule through the provision of temporary public open space on portions of the Project site not needed for construction or parking. A154. This open space is to be publicly accessible and is to be designed and programmed as approved by ESDC. A4054, 4135, 4153-54. FCRC is required to “operate and maintain such interim public open space in good and clean condition until the property is needed for construction.” A4153.

In considering the effect of extending the duration of the temporary open space impact, the 2010 Technical Analysis considered qualitatively that major open space resources like Prospect Park and Fort Greene Park are available in the vicinity of the Project site. A223. Like the 2009 Technical Memorandum, the 2010 Technical Analysis noted that the Phase II open space would be provided incrementally as buildings are constructed, in conformance

with the Design Guidelines, and that FCRC is required to convert parcels not needed for construction or interim surface parking to temporary open space. Id. The Technical Analysis identified two areas of publicly accessible interim open space to be made available on the Arena block upon completion of the Arena; thus, unlike the scenario analyzed in the FEIS, the extended build-out scenario would introduce publicly accessible open spaces on the Project site in Phase I. Id.; A253, 260-61. The stage-by-stage analysis of this scenario described the interim and permanent open space resources that would be available during each of the seven stages. A253-59.

Since ESDC concluded in both the 2009 Technical Memorandum and 2010 Technical Analysis that a delay in Phase II would prolong the adverse indirect open space impact disclosed in the FEIS, the court erred in asserting that ESDC did not consider duration in its assessment. Moreover, the court did not identify any error in ESDC's assessment or explain what type of additional analysis of open space issues should be included in an SEIS.

**F. ESDC Considered the Duration of Construction Activities in Assessing Socioeconomics Impacts.**

The court also criticized ESDC's analysis as being deficient with respect to the socioeconomic impacts of Project construction, but the FEIS had thoroughly analyzed those potential impacts, focusing on the effects of construction on retail businesses in the neighborhood, outside the footprint of

the Project site. The FEIS identified the corridors (Atlantic, Flatbush and Vanderbilt Avenues) that contain such businesses, and assessed whether the construction activities for Phase I and Phase II of the Project would disrupt the travel routes of their customers. A2318-19. The FEIS noted that none of those businesses are located on the same blocks as the construction activity, and that the construction on the site was not expected to impede access to the businesses. Id. The FEIS also noted that the hundreds of construction workers and thousands of new Project residents could be expected to patronize local businesses, thereby offsetting any construction-related disturbance. Id.

Since the FEIS analysis assumed a lengthy 10-year construction period for the Project and a delay in construction would not expand the footprint of the construction activity, both the 2009 Technical Memorandum and 2010 Technical Analysis concluded that a delay would not change the conclusions of the FEIS with respect to socioeconomic conditions. A159, 223. The court does not explain why ESDC's conclusion was irrational or what type of additional analysis would be warranted in an SEIS.

**G. ESDC Considered the Duration of Construction Activities in Assessing Land Use and Urban Design Impacts.**

The court also held that ESDC failed to consider duration in assessing the impacts of vacant lots, the surface parking lot on Block 1129 and construction staging, all of which would be in place for a longer period of time

under a delayed construction scenario. But ESDC did take a hard look at duration in assessing these impacts.

The FEIS anticipated that certain portions of the project site, like Block 1129, would be used for construction staging and surface parking for many years. A2315-16, 3076, 3419-29. Accordingly, the FEIS examined carefully the impacts of these activities and concluded that: (i) the surface parking lots (and the vehicular traffic they would attract) would create significant adverse traffic and noise impacts in the area (A2035-41, 2250, 2275) but that similar noise and traffic impacts would exist upon completion of the Project, when a facility with many more parking spaces will be situated below grade at the same location (A2068-74, 2255, 2283); (ii) surface parking would be compatible with adjacent manufacturing and commercial uses (A1409), but the traffic, noise, signage and activities associated with the Arena would have localized adverse land use and neighborhood character effects on the residential buildings on Dean Street (A1409, 2275-76); (iii) construction staging and other construction activities for the Project would have significant adverse traffic, noise and neighborhood character impacts on the local area (A2317), but impacts arising from construction staging would be less intense than those associated with active building construction (id.); and (iv) to minimize the

construction impacts, a comprehensive program of mitigation measures should be imposed. A2513-18, 3227-37, 3250-52.

In the 2009 Technical Memorandum, ESDC considered whether the construction period impacts identified in the FEIS would be materially different if they were to be extended as a result of Project delay. It determined that the nature of the impacts would not change, but that they would be prolonged. A158-59. The Technical Memorandum also noted, however, that in the event of a “cessation[] of site construction,” the site “would be maintained and secured” and all heavy construction equipment at the site would be removed. A159. ESDC further noted that since building sites are to be landscaped upon completion of each building (A2815, 3239-40, 3368, 3419-29, 3944) and since parcels that are not under development or required for construction staging are to be converted to temporary open space (A3368, 3419-29, 3853, 3861, 151-52, 154, 161-64), the neighborhood would not be burdened by a long-term idle construction site, even if more time elapses between the construction of individual buildings.

ESDC noted that the surface parking lot on Block 1129 would be fenced and screened, and would be equipped with directional lighting to limit the light falling on nearby buildings. A3943. Moreover, the traffic and traffic-related noise impacts of the surface parking lot would not differ significantly

from the impacts associated with the much larger subsurface parking garage that will be in place on Block 1129 at the conclusion of the Project. A2035-41, 2068-74, 2250, 2255, 2275, 2283.

In the 2010 Technical Analysis, ESDC came back to these issues, and again considered duration in that assessment. A223-26. ESDC described how the progressive construction of the Project in multiple stages would gradually change the appearance of the site as buildings and associated open space and underground parking garages are constructed. Id.; A253-59. It found that even if construction of the very last of the 17 buildings were delayed until 2035, most of the Project buildings would be completed far sooner. Id. ESDC also noted that prior to initiation of the Project, Block 1129 was a blighted area, characterized by a mix of abandoned industrial buildings, commercial structures, residential buildings, a homeless shelter and smaller surface parking lots. A224, 243, 3627-703. The 2010 Technical Analysis provided an illustrative rendering of the screening and directional lighting on the Block 1129 parking lot that had been described in the 2009 Technical Memorandum. A263.

In the Response to Remand, ESDC synthesized the information provided in the 2010 Technical Analysis with reference to vacant lots, surface parking and construction staging, and explained the basis for its decision not to

prepare an SEIS on these issues. A297-301. It is clear from that discussion, which the court did not cite in its decision, that ESDC did consider duration in its decision-making very carefully. The discussion focuses on each of the Phase II building sites, specifically examining how they would appear in the event of a construction delay. In general, ESDC found that a delay would either (as in the case of the rail yard building sites) perpetuate long-standing conditions or (as in the case of the surface parking lot on Block 1129) perpetuate site conditions that had already been thoroughly analyzed and addressed through screening, landscaping and other mitigation measures. *Id.* ESDC’s discussion acknowledges that these conditions would be in place “for a longer period of time” but explains why an SEIS would not be likely to provide information that would be helpful either in limiting the extent of any delay or mitigating its impact. A300. The record clearly establishes that ESDC did consider the issue of duration in deciding whether to require additional analysis in an SEIS on the land use impacts of a delay in Phase II of the Project.

**H. ESDC Did Not Depart from The CEQR Technical Manual in Assessing the Issue of Duration.**

The court also suggested that ESDC departed from the procedures set forth in a non-binding New York City guidance document – The CEQR Technical Manual – in determining not to prepare an SEIS. Final Decision at 11. The court correctly noted that the City guidance requires duration to be

considered in assessing the significance of certain environmental impacts. But as discussed in detail above, ESDC did take duration into account in assessing each impact area, in a manner consistent with City guidance. With respect to neighborhood character, the FEIS already had called out the construction work as having a significant adverse impact on the character of the immediately adjacent area, precisely because the Project would be constructed over 10 years; ESDC reasonably concluded that stretching out construction over an even longer period would not change this conclusion and did not warrant an SEIS. With respect to air quality, ESDC used the same reference standards that are in the City guidance and that it had used in the FEIS, and those accounted for the duration of elevated pollutant concentration levels. With respect to noise, ESDC also followed the same reference standards that are in the City guidance and that it had used in the FEIS, which considered two years of elevated noise levels at a particular receptor location to be a significant adverse impact. With respect to construction traffic, ESDC used the same intersection/peak hour methodology found in the City guidance and that had been used in the FEIS; this methodology discloses adverse impacts based on traffic congestion in peak hours, and does not screen out impacts based on duration. Likewise, ESDC adhered to the City guidance in its consideration of open space, socioeconomics and land use.

For all of the foregoing reasons, the court’s assertion that ESDC failed to consider duration in its environmental analyses is belied by the record.

#### **POINT IV**

#### **THE LOWER COURT SUBSTITUTED ITS OWN JUDGMENT FOR ESDC’S IN ORDERING THAT AN SEIS BE PREPARED FOR THE 2009 MGPP**

The court below correctly recited the three-pronged “hard look” standard generally applicable to a substantive agency determination under SEQRA. Final Decision at 15. It also acknowledged that an “agency’s determination whether to require an SEIS is discretionary”; that such a decision “must be reviewed in light of the rule of reason”; and that the “hard look” an agency must undertake will “vary with the circumstances and the nature of the proposal.” *Id.* Yet, as explained below, the court did not apply those principles in its decision.

Citing three reported cases, the court stated that SEQRA determinations will be set aside “where the agency’s review of the environmental impacts is unsupported by studies and data or is conclusory.” Final Decision at 16. But in two of the cases, the court identified specific environmental impacts that the agencies had failed to acknowledge or address in any way. *See Baker v. Vill. of Elmsford*, 70 A.D.3d 181, 190 (2d Dep’t 2009) (Environmental Assessment Form and negative declaration did not

mention “[t]he central basis for questioning the discontinuance of the streets, relating to their use during times of periodic flooding”); Serdarevic v. Town of Goshen, 39 A.D.3d 552, 554-55 (2d Dep’t 2007) (“Town’s declaration of nonsignificance was made without reference to any empirical or experimental data, scientific authorities, or any explanatory information”). In the third case, the agency failed to undertake any environmental review at all, instead claiming that a “whereas” clause in its resolution adopting an ordinance constituted its negative declaration and “reasoned elaboration.” *See* Tupper v. City of Syracuse, 71 A.D.3d 1460, 1461-62 (4th Dep’t 2010). The wholly unsupported negative declarations in these cases are a far cry from the FEIS, two detailed supplemental environmental reviews and multiple findings now before the Court.

The lower court’s citation to these negative declaration cases illustrates a fundamental error running through its decision, in that it ignores the fact that an agency enjoys broad discretion on the question of supplementation. Instead of affording to ESDC the considerable deference called for by Riverkeeper, *see supra* Point I.B., the court disregarded the extensive analytical work performed by ESDC and substituted its own judgment for that of the agency with respect to: (i) the selection of the build year to be to assist ESDC in assessing the effects of the 2009 modification to the 2006 MGPP; (ii) the

adequacy of the 2009 Technical Memorandum; and (iii) the details of the “fact-intensive” assessment presented in the 2010 Technical Analysis and Response to Remand.

**A. The Court Substituted Its Judgment for That of the Agency with Respect to the Build Year.**

In preparing the 2009 MGPP, ESDC recognized explicitly that adverse economic conditions gave rise to uncertainty as to the timetable for construction of the Project. A151. Consequently, ESDC looked carefully at whether it was reasonable to continue to assume that the Project would be constructed over a period of 10 years, going so far as to retain construction and financial experts to provide advice on construction logistics and the economic factors that would affect the pace of the development. *Supra* at 26-27.

Ultimately, based on such independent expert advice, ESDC concluded that it was reasonable to consider, as one important component of its assessment, a 10-year build-out as the reasonable worst-case condition, as it had in the FEIS. At the same time, ESDC acknowledged that the Project could be delayed for years beyond the 10-year period, and took a hard look at the potential impacts of such a delay. A151.

In each of its major decisions below, the lower court turned the 10-year period into the focal point of this litigation, as if ESDC had the burden of proving that the Project will be built within that time frame. This was a

fundamental error, because the issue is not whether the Project is likely to be built in 10 years, but whether ESDC took a hard look at the environmental impacts of the Project, and whether the assumptions employed in examining those impacts were reasonable for purposes of the analysis. If the court had framed the issue correctly, it would have found that ESDC acted rationally in assessing the Project's impacts, because – after recognizing that there was uncertainty in the construction schedule – it considered *both* a 10-year schedule (as the reasonable worst-case scenario, capturing the impacts of intensive construction activity) and a delayed build-out scenario (and then, in the 2010 Technical Analysis, a prolonged delay scenario).

In second-guessing ESDC's assumptions as to the Project's timetable, the court failed to recognize that the build year is but one of many discretionary judgments made by the lead agency in preparing an analysis that fairly identifies environmental impacts. In Fisher v. Giuliani, 280 A.D.2d 13 (1st Dep't 2001), this Court upheld the City Planning Commission's ("CPC's") "hard look" under SEQRA with respect to the likely development induced by zoning amendments affecting the Manhattan Theater District. The petitioners in that case argued that CPC had looked only at impacts within a 10-year horizon, and claimed that the agency should have tried to look further into the future and based its analysis on a later build year. Rejecting that claim, this

court held that “[t]o adopt a ten-year time frame was hardly an irrational examination of the long-term foreseeable future.” 280 A.D.2d at 21.

The same principles that apply to judicial review of other agency choices, *see* Point I.A *supra*, also apply to an agency’s selection of a build year. Thus, the question under the law is not whether ESDC correctly identified the build year for the Project, but whether the agency gave “reasoned consideration” to the issue. *See Jackson*, 67 N.Y.2d at 417; *see also Aldrich v. Pattison*, 107 A.D.2d 258, 267 (2d Dep’t 1985) (SEQRA “leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances.”); *Schiff v. Board of Estimate*, 122 A.D.2d 57, 59 (2d Dep’t 1986) (“[T]he Legislature has left the agencies considerable latitude in evaluating environmental effects....”).

In the earlier litigation upholding the 10-year construction schedule, this Court stated “that reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized in an EIS.” *Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d at 318. Furthermore, delays in project completion do not invalidate a SEQRA review and do not require it to be updated, even if its conclusions were based on older data, because the need for frequent updates would prevent any substantial progress on the construction of the project, contributing to further delay. *See*

Wilder v. N.Y.S. Urb. Dev. Corp., 154 A.D.2d 261, 262-63 (1st Dep’t 1989).

Thus, the law is clear that an agency has broad latitude in its selection and use of a build year, and its discretionary judgments on these matters will be upheld even if hindsight might suggest a different course.

Nevertheless, the lower court – without identifying any specific flaw in ESDC’s assessment of the economic factors that would help push the Project to completion (*see supra* at 27) – held “ESDC’s use of the 10 year build date” to “lack[] a rational basis” in light of the changes made to the MGPP and the provisions of the Development Agreement and MTA Agreements (the “Transactional Documents”). Final Decision at 9. This decision is contrary to well-established case law on build years, which establishes that a build year is an analytical tool to assist the agency with its analysis and that the potential for a delay in the construction schedule (or even an actual delay) does not require an SEIS. Moreover, SEQRA analyses are to be performed as early as possible in the planning process (*see* ECL § 8-0109[4]), and thus will generally occur long before outside dates are negotiated in transactional documents.

Here, the Transactional Documents do not require construction in a 10-year period, but they do encourage and permit construction within that time frame. A283-85; *cf.* Final Decision at 24 (acknowledging that the Transactional Documents “do not prevent a build-out in 10 years”). Thus, even if

consideration of the subsequently executed Transactional Documents were proper in assessing the 2009 MGPP, such documents do not change the conclusion that ESDC acted rationally, in the face of uncertain economic conditions, in assessing environmental impacts by looking at the reasonable worst-case 10-year construction scenario, as well as a delayed schedule.

Moreover, it is clear from the Response to Remand that the Transactional Documents are entirely consistent with the two-track approach ESDC took with respect to the build year. In that document, ESDC summarized each of the relevant agreements, acknowledging that they “have outside dates that extend up to an additional 16 years beyond 2019 (or potentially more than 16 years in certain limited circumstances).” A283.

However, ESDC also explained why those outside dates should not be confused with the actual timetable anticipated by the parties, as follows:

outside dates incorporated into complex, heavily negotiated development agreements do not reflect reasonable business projections as to the actual timetable for completing the project under discussion. Rather, they reflect the prudent business judgment of the parties and their transactional lawyers seeking to anticipate any and all of the possible risks, however unlikely, that potentially could arise as a project goes forward, including how and when a project may be deemed failed or incomplete. Thus negotiated contractual deadlines are not synonymous with reasonably expected project completion dates. A283.

In its December 2010 Response to Remand, ESDC found, based on the information available to it at that time, that it is “unlikely that the Project will be constructed on a 10-year schedule.” A286. In this same document, ESDC explained that the Transactional Documents were not intended to extend the construction schedule but to: (i) require construction to proceed towards completion of the Project at a commercially reasonable pace, with the goal being completion in 2019; and (ii) in addition, establish deadlines to define the outer allowable limits for Project completion. A283. With respect to the first requirement, ESDC noted that, as required by the 2009 MGPP (A4692), the Development Agreement is explicit that FCRC must “use commercially reasonable effort” to substantially complete the Project by 2019, and that the outside dates do not supersede this requirement. A283, 4048 § 8.1(d). Thus, the Response to Remand notes that “the Development Agreement establishes a two-tiered duty with respect to the schedule for the Project. First, FCRC must use commercially reasonable efforts to achieve completion of the Project by 2019, and second it may not, in any event, go beyond the outside limits set forth in the agreement (except for specifically defined reasons).” A283. The Response to Remand goes on to explain how this two-tiered regime is also apparent in the MTA Agreements, in that they also contain provisions drawing

a clear distinction between outside dates and the actual expected schedules for Project construction. A283-84.

Moreover, the Response to Remand provides a detailed explanation of how the agreements are structured to *facilitate* construction of the Project at a commercially reasonable pace. A284. In this regard, it notes that it was to get the Project going in a difficult economic climate that ESDC and MTA agreed to allow FCRC to purchase Project property in pieces and to proceed with construction in phases. Id. More specifically, it explained how the agreements: (i) established an expedited design review process with specified deadlines for the submission and review of documents, and (ii) dedicated LIRR staff to the review effort at FCRC's expense. Id. ESDC further noted that the agreements also put into place the financial safeguards needed to assure that the work, once commenced, is pursued and completed on time. A285.

ESDC noted that "FCRC has invested hundreds of millions of dollars in the Project and has a significant incentive, separate and apart from ESDC remedies, to pursue it to a successful and speedy conclusion because undeveloped land, the acquisition cost of which has been borne entirely by FCRC, does not earn any substantial return." A295. Accordingly, it determined that the Development Agreement did not require more stringent

penalties to induce FCRC to proceed with the Project with commercially reasonable diligence. Id.

Thus, ESDC reasonably found that the Transactional Documents “do not preclude the Project from being constructed in 10 years and both require and encourage construction to take place at a commercially reasonable pace.” Id. Since ESDC also recognized the potential for market conditions to extend the construction period for much longer than 10 years, it utilized *both* the 10-year construction schedule *and* a delayed build-out scenario in determining whether to require an SEIS in connection with the 2009 MGPP, and it was manifestly reasonable for it to have done so.

The court dismissed the thoughtful contractual analysis in the Response to Remand as portraying the outside dates as “the mere creation of ‘transactional lawyers’ anticipating risks” and putting forward the “wan assertion” that the Transactional Documents “do not ‘preclude’ or are not ‘inconsistent’ with a 10 year build out.” Final Decision at 8. Providing no alternative contractual interpretation of its own, the court cited instead ESDC’s acknowledgment that the negotiation of the Transactional Documents was “necessary due to the weak state of the economy”; that ESDC failed to provide “a financial analysis” to support its common sense observation that “FCRC has the financial incentive to pursue the Project to a speedy conclusion”; and that

FCRC's assurance that it would stand behind its commitment to use commercially reasonable effort to complete the Project in 10 years is "devoid of any detail showing its ability to do so." Id. at 8. Thus, instead of deferring to the agency's judgment with respect to the construction schedules to be used in its assessment, the court imposed its own view that the outside dates in the Development Agreement must dictate the time frame for the environmental analysis, in contravention of Jackson's admonition that agencies have "considerable latitude in evaluating environmental effects." Jackson, 67 N.Y.2d at 417; *see* Point I.A *supra*.

Apparently, the court rejected the delayed build-out analysis in the 2009 Technical Memorandum because it was prepared "on the basis of the potential for 'prolonged adverse economic conditions' ... and not on the basis of a change in the Project schedule to provide for construction beyond 2019." Remand Order at 14. But the impetus for ESDC's analysis should have no bearing on whether the agency took a hard look at the environmental impacts of potential construction delays.

The only other reason articulated by the court for giving short shrift to the delayed build-out analysis presented in the 2009 Technical Memorandum was that the build year studied for certain purposes was 2024 rather than the 2035 outside date in the Transaction Documents. But ESDC had

the discretion to “weigh and evaluate the credibility of ... reports and comments submitted to it,” Riverkeeper, 9 N.Y.3d at 231, and it is not the province of a court to second-guess and duplicate that effort. Here, ESDC in its discretion determined that 2024 was a suitable build year for disclosing the effects of a delay in Project construction in those areas requiring a quantitative analysis dependent on the build year. The fact that the Transactional Documents provide for outside dates that would permit an even more extensive delay does not make that judgment irrational.

Moreover, the 2024 build year cited in the 2009 Technical Memorandum was used only for the few impact analyses that require a build year to account for background growth. *See supra* at 28. The 2010 Technical Analysis took a hard look at a construction schedule extending to 2035 and determined that the 2024 build year assumption used for these purposes in the 2009 Technical Memorandum was not material to its conclusions with respect to environmental impacts or the need for an SEIS. A175.

At bottom, the lower court’s remarkable conclusion appears to be that ESDC was *required* to assume in its environmental analysis that Project completion will be coterminous with the 25-year outside dates in the Transactional Documents. This holding is illogical, because outside dates are not equivalent to the schedule anticipated by the contracting parties (*see supra*

at 68) or the schedule reflecting market forces (*see supra* at 27); nor are they equivalent to a reasonable worst-case development scenario upon which to most effectively analyze environmental impacts (*see supra* at 22). But it also stands as an unprecedented judicial usurpation of agency discretion, in that it imposes upon ESDC a mandate to utilize specific analytical assumptions for its environmental assessment of whether an SEIS should be prepared.

Indeed, had ESDC simply relied upon the 2035 build year favored by the lower court, it would be subject to criticism for failing to analyze the “reasonable worst-case scenario” that the FEIS had identified as having the greatest potential to result in concentrated traffic, air quality, noise and certain other quantitative impacts. *See supra* at 22. ESDC’s consideration of both a 10-year schedule and a delayed schedule in the 2009 Technical Memorandum was reasonable under the circumstances and should not have been second-guessed by the court in the Remand Order.

**B. The Court Substituted Its Judgment for That of the Agency with Respect to the Details of the Technical Analysis.**

The court below also substituted its judgment for that of ESDC in rejecting the well-considered 2010 Technical Analysis on the basis of various vaguely described deficiencies.

As discussed in Point III, *supra*, the court was profoundly mistaken in holding that ESDC has failed to take the issue of duration into account (*see*

Final Decision at 11). But even if the court had not erred so badly in its critique of ESDC's environmental analysis, it would have been improper for the court to substitute its judgment for that of the agency as to the weight to be given to the duration of project impacts in deciding whether an SEIS is warranted.

Similarly, the court rejected detailed findings appearing in the 90-page 2010 Technical Analysis for an unspecified failure to present "any technical studies" to further corroborate those findings. Final Decision at 11. This holding misconstrues an agency's responsibility in deciding on the need for an SEIS, and also goes beyond the role of a court in reviewing such a determination. *See Jackson*, 67 N.Y.2d at 417 ("The degree of detail with which each factor must be discussed obviously will vary with the circumstances...."). Because an EIS-level of analysis cannot be required to support a decision on whether an SEIS needs to be prepared, no technical studies beyond those presented in the Technical Analysis were needed to support ESDC's findings. Moreover, the court once again stepped into the shoes of the agency in assessing the level of technical detail needed to make the call on whether an SEIS was warranted. It was well within the agency's discretion to strike the balance between additional technical studies and "common sense," Final Decision at 11, and it was clear error for the court to assume that role.

The court's reference to the Technical Analysis as having been "hastily prepared" (*id.* at 16) reveals a further error in its decision. From that characterization, it appears that the court viewed the analysis prepared in response to the Remand Order as breaking all new ground, rather than as a further supplement to the years of effort that had been devoted to the environmental review of the Project, which began in earnest with the release of the draft scope for the EIS in 2005. Yet the court gives virtually no consideration to the exhaustive construction impacts analysis in the FEIS, or the program of measures that the FEIS put into place to mitigate those impacts. Indeed, the court mentions the construction-related mitigation measures only to brush them aside because "they were adopted to mitigate the adverse environmental impacts identified in the FEIS and Technical Memorandum, which assumed that the build-out of the project would take 10 years." Final Decision at 15. But the lower court provides no explanation as to why measures designed to minimize the impacts of construction over the course of a decade should not have weighed heavily in ESDC's decision-making. *See Riverkeeper*, 9 N.Y.3d at 233 (agency may rely on "material already in its file" in determining whether an SEIS should be prepared). The court's disregard for the "present state of the information in the EIS," *id.* at 231 (quoting 6

N.Y.C.R.R. § 617.9[a][7][ii]) – as well as its summary dismissal of the 2009 Technical Memorandum and 2010 Technical Analysis – were additional error.

**C. The Court Substituted Its Judgment for That of the Agency with Respect to the Need and Value of an SEIS.**

In determining that it would not prepare an SEIS in connection with the 2009 MGPP, ESDC also considered whether an SEIS would yield material new information as to the impacts of the Project and potential mitigation measures. A172. Having recognized in its assessment that an extended construction period would prolong certain impacts already disclosed in the FEIS, ESDC quite properly considered whether preparing an SEIS would provide information that would be useful to the agency in determining whether to affirm the 2009 MGPP. ESDC concluded, in light of the extensive analyses that had already performed, the extensive mitigation measures that had already been imposed, and the fact that the potential construction delays would be due to economic conditions rather than Project changes under the parties' control, that an SEIS would not yield such information and that the delay and expense of preparing another massive environmental review document would not be helpful to agency decision-making. A298-300; *accord* Riverkeeper, 9 N.Y.3d at 231 (an agency may weigh “environmental concerns in conjunction with other economic and social planning goals”); Wilder, 154 A.D.2d at 263 (considering the effect that SEIS-related delays would have on progress of a

complex project in upholding ESDC's determination not to prepare an SEIS to study the effect of project delays). Here, the FEIS, Technical Memorandum and Technical Analysis provided a firm foundation for deciding that the extraordinary additional effort and delay involved in preparing an SEIS was not warranted.

The lower court overruled ESDC's decision without explaining why ESDC had acted arbitrarily or capriciously in determining that an SEIS would not yield important new data to inform its deliberations. Indeed, the court ordered preparation of an SEIS without any explanation of what specific additional environmental analysis it would contain that was missing from the body of work ESDC had already performed.

In sum, the court abrogated the rule of reason, failed to account for the circumstances surrounding ESDC's decision and substituted its judgment for ESDC's on the question of supplementation. Accordingly, its decision should be reversed both under the principles generally applicable to the judicial review of substantive SEQRA determinations and under the record here, which makes clear that ESDC took multiple SEQRA "hard looks" at the impacts of the Project under various construction schedules. Given the particular deference due under Riverkeeper to agency decisions on whether to prepare an SEIS, there is no room for doubt that such missteps are cause for reversal.

## CONCLUSION

The Remand Order and Final Determination should be reversed, vacated and annulled, and these Article 78 proceedings should be dismissed.

Dated: New York, New York  
December 5, 2011

Respectfully submitted,

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## **PRINTING SPECIFICATIONS STATEMENT**

Pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(v), this brief was prepared as follows:

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DATED: New York, New York  
December 5, 2011

  
L. Margaret Barry



NEW YORK CITY COUNCIL MEMBER LETITIA JAMES,	:
ALAN ROSNER, EDA MALENKY, PETER KRASHES,	:
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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.	:
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1. The index numbers in the court below are 114631/09 and 116323/09. By order dated November 21, 2011 (copy attached), the Appellate Division allowed the two appeals to be perfected on one double-captioned Appendix.

2. The full names of the original parties to the proceedings are as stated in the caption above, except that (i) the full name of respondent-appellant Empire State Development Corporation (“ESDC”) is New York State Urban Development Corporation d/b/a Empire State Development Corporation and (ii) former petitioner State Assembly Member James F. Brennan discontinued his participation in the proceeding under Index No. 116323/09 and his name therefore is not listed in the caption above.

3. These proceedings were commenced in the Supreme Court of the State of New York, County of New York.

4. Petitioners-respondents Develop Don't Destroy (Brooklyn), Inc., et al. ("DDDB") commenced their proceeding (Index No. 114631/09) by filing and serving an Article 78 Petition on October 19, 2009. Respondents-appellants ESDC and Forest City Ratner Companies, LLC ("FCRC") each served an Answer on November 12, 2009. DDDB served a Supplemental Petition on January 18, 2011. ESDC served an Answer to the Supplemental Petition on February 18, 2011 and an Amended Answer on March 10, 2011. FCRC served an Answer on February 18, 2011.

Petitioners-respondents Prospect Heights Neighborhood Development Council, Inc., et al. ("PHNDC") commenced their proceeding (Index No. 116323/09) by filing and serving an Article 78 Petition on November 19, 2009. ESDC and FCRC each served an Answer on December 11, 2009. PHNDC served a Supplemental Petition on January 18, 2011. ESDC served an Answer to the Supplemental Petition on February 18, 2011 and an Amended Answer on March 10, 2011. FCRC served an Answer on February 18, 2011.

5. Both proceedings sought to annul ESDC's (i) affirmation on September 17, 2009 of a Modified General Project Plan ("MGPP") for the Atlantic Yards Land Use Improvement and Civic Project in Brooklyn; (ii) determination of September 17, 2009 not to prepare a supplemental environmental impact statement ("SEIS") in connection with the affirmation of the MGPP; and (iii) determination made on December 16, 2010 not to disturb its prior determination not to prepare an SEIS.

6. The appeals are taken from the decision, order and judgment issued by Justice Marcy S. Friedman on July 13, 2011 and entered in the office of the New York

County Clerk on July 19, 2011. The appeal of this final judgment brings up for review the interlocutory decision and order issued by Justice Friedman on November 9, 2010 and entered in the office of the New York County Clerk on November 10, 2010.

7. The appeals are being prosecuted on the original record using the appendix method.

Dated: December 5, 2011  
New York, New York

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**SUMMARY STATEMENT ON APPLICATION FOR  
EXPEDITED SERVICE AND/OR INTERIM RELIEF**  
(SUBMITTED BY MOVING PARTY)

Date 11/21/11  
Index/Indict # N.Y. Co. 114631/09  
N.Y. Co. 116323/09

Title of Matter Develop Point Destroy Brooklyn, Inc. v. Empire State Development Corp. and Prospect Heights Neighborhood Development Council v. Empire State Development Corp.  
County New York

Appeal by ESDC from judgment of Supreme Surrogate's Family Court entered on July 19, 20 11

Name of Judge M. Friedman Notice of Appeal filed on September 12, 20 11

If from administrative determination, state agency \_\_\_\_\_

Nature of action or proceeding Article 78 proceeding

Provisions of order judgment decreed appealed from Order to prepare supplemental environmental impact statement and to make further findings on whether to approve the Modified General Project Plan for Phase II of the Atlantic

This application by appellant respondent is for expedited consolidation of the Yards Project two proceedings and approval of scheduling stipulation to keep appeal on the February term

If applying for a stay, state reason why requested N/A

Has any undertaking been posted N/A If "yes", state amount and type \_\_\_\_\_

Has application been made to court below for this relief no If yes, state Disposition \_\_\_\_\_  
Has there been any prior application herein in this court no If "yes", state dates and nature \_\_\_\_\_

Has adversary been advised of this application yes Does he/she consent yes

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DISPOSITION

Pursuant to parties' stipulation, appellants + respondent  
may file one set of briefs and one appendix for both  
captioned cases following their agreed upon schedule  
for the February 2012 term.

[Signature] Justice DSS 11/21/11  
Date

Motion Date \_\_\_\_\_ Opposition \_\_\_\_\_ Reply \_\_\_\_\_

EXPEDITE \_\_\_\_\_ PHONE ATTORNEYS \_\_\_\_\_ DECISION BY \_\_\_\_\_

ALL PAPERS TO BE SERVED PERSONALLY.

[Signature]  
Court Attorney