SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

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

Petitioners,

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.

New York County
Index No. 116323/09

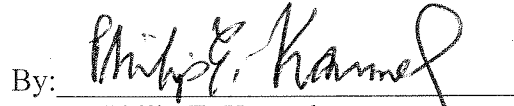
NOTICE OF APPEAL

PLEASE TAKE NOTICE that respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation hereby appeals to the Supreme Court, Appellate Division, First Department from the decision, order and judgment of the Court dated July 13, 2011 and entered in the office of the New York County Clerk on July 19, 2011, to the extent that it granted any relief to petitioners. The appeal of the final judgment brings up for

appellate review the earlier interlocutory decision and order of the Court dated November 9, 2010 and entered in the office of the New York County Clerk on November 10, 2010.

Dated: New York, New York
September 12, 2011

BRYAN CAVE LLP

By: 
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST DEPARTMENT

In the Matter of the Application of

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

Petitioners-Respondents,

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

- against

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

Respondents-Appellants.

New York County
Index No. 116323/09

PRE-ARGUMENT STATEMENT

Respondent-appellant New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") submits this Pre-Argument Statement pursuant to 22 N.Y.C.R.R. § 600.17:

1. The title of the proceeding is as it appears in the above caption. The proceeding was filed under Index No. 116323/09 in the Supreme Court of the State of New York, County of New York.

2. The full name of respondent-appellant ESDC is New York State Urban Development Corporation d/b/a Empire State Development Corporation. Except as noted below, the names of the other parties to the proceeding are listed in the above caption as they appeared in the original caption. By stipulation, former petitioner State Assembly Member James F. Brennan discontinued his participation in the proceeding and his name is therefore not listed in the caption above.

3. The name, address and telephone number of counsel for respondent-appellant ESDC is as follows:

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(212) 541-2000
Attention: Philip E. Karmel

The names, addresses and telephone numbers of counsel for respondent-appellant Forest City Ratner Companies, LLC, are as follows:

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The names, addresses and telephone numbers of counsel for petitioners-respondents are as follows:

URBAN ENVIRONMENTAL LAW CENTER
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Attention: Albert K. Butzel

4. This appeal is taken from the decision, order and judgment of the Supreme Court for New York County dated July 13, 2011 and entered in the office of the New York County Clerk on July 19, 2011, a copy of which is annexed as Exhibit A. The appeal of this final judgment brings up for review the interlocutory decision and order of the same court dated November 9, 2010 and entered in the office of the New York County Clerk on November 10, 2010.

5. An appeal from the interlocutory decision dated November 9, 2010 noted in the preceding paragraph was previously filed. A copy of the pre-argument statement in that earlier appeal – to which are annexed copies of the interlocutory decision and the order granting leave to appeal that decision – is annexed as Exhibit B. The earlier appeal has not been perfected. It is intended that the instant appeal of the final judgment would appeal both the final judgment and the earlier interlocutory order, in lieu of separately perfecting the earlier appeal of the interlocutory order.

6. A second proceeding related to the instant proceeding is captioned Develop Don't Destroy (Brooklyn), Inc., et al. v. Empire State Development Corporation, et ano., Index No. 114631/09. The petitioners in the two proceedings are different, but the respondents are the same, and the issues in the two proceedings are similar. The judgment and order appealed from in the instant appeal were double captioned to resolve both proceedings, but the two proceedings were never formally consolidated. A notice of appeal in this related proceeding is being filed simultaneously with this appeal. It is anticipated that both appeals will

be perfected on the same schedule, and it is respectfully suggested that both appeals be scheduled for argument on the same day before the same panel.

7. In this Article 78 proceeding, petitioners seek to annul ESDC's affirmation on September 17, 2009 of a Modified General Project Plan ("MGPP") for the Atlantic Yards Land Use Improvement and Civic Project (the "Project") in Brooklyn. Petitioners also seek to annul ESDC's determination of September 17, 2009 that under the State Environmental Quality Review Act ("SEQRA") a supplemental environmental impact statement ("SEIS") was not warranted in connection with its affirmation of the MGPP. Petitioners also challenge ESDC's determination made on December 16, 2010 not to disturb its prior determination not to prepare an SEIS.

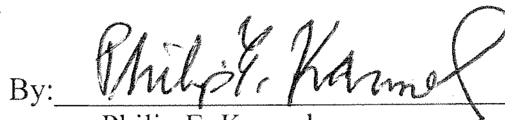
8. In its final judgment, the Court ordered ESDC to prepare an SEIS to assess the environmental impacts of a delay in construction of Phase II of the Project (*i.e.*, the Project buildings and associated open space east of 6th Avenue) and to make further findings on whether to approve the MGPP for Phase II of the Project.

9. The grounds for seeking reversal and annulment of the judgment are that the Court did not apply the correct standard of review, overlooked relevant factual information in the administrative record and made other errors. The relevant SEQRA regulations provide that an agency *may* require an SEIS for the evaluation of specific significant adverse environmental impacts not addressed or inadequately addressed in an earlier environmental impact statement. 6 N.Y.C.R.R. § 617.9(a)(7)(i). An agency determination whether to require an SEIS is discretionary and is therefore afforded more deference than other agency SEQRA determinations. *See* Riverkeeper, Inc. v. Planning Board of Town of Southeast, 9 N.Y.3d 219, 231 (2007). Under SEQRA, the agency is required to identify the "relevant areas of

environmental concern," take a "hard look" at them and make a "reasoned elaboration" of the basis for its determination. Id. at 231-32. ESDC fulfilled all of these obligations. It identified the relevant areas of environmental concern associated with affirmation of the MGPP, took a hard look at them and provided a reasoned elaboration for its determination. With respect to the construction schedule, ESDC set forth a detailed explanation for its reliance, for SEQRA analysis purposes, on a reasonable worst-case 10-year construction schedule upheld in earlier court proceedings (Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d 312 (1st Dep't 2009), *leave to appeal denied*, 13 N.Y.3d 713 (2009), *reargument denied*, 14 N.Y.3d 748 (2010)). ESDC also analyzed whether a delay in this construction schedule would result in new significant adverse impacts warranting an SEIS and concluded that such a delay would not warrant additional environmental review. Moreover, a delay in the Project, were it to occur, would be the result of poor economic conditions rather than the modifications made to the General Project Plan in the MGPP challenged in this proceeding. The administrative record documents provide a detailed explanation of the basis for ESDC's determination that an SEIS was not warranted in connection with the affirmation of the MGPP. Accordingly, the Supreme Court failed to provide the requisite deference to ESDC's discretionary determination not to prepare an SEIS and erred in holding that ESDC had not provided the requisite "reasoned elaboration" of the basis for its determination.

Dated: New York, New York
September 12, 2011

BRYAN CAVE LLP

By: 

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Forest City Ratner Companies, LLC

Exhibit A

SCANNED ON 7/19/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 114631/2009
DEVELOP DON'T DESTROY
vs.
EMPIRE STATE DEVELOPMENT CORP
SEQUENCE NUMBER : 006
ARTICLE 78

INDEX NO. 116323/09

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

this ~~motion~~ supplemental petition for Art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A
Answering Affidavits — Exhibits	2, 2A, 3, 3A
Replying Affidavits	
Memos of Law	M1–M4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ supplemental petition is decided in accordance with the accompanying decision and order of the same date.

ENTER:

FILED
JUL 19 2011
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7-13-11

MARCY S. FRIEDMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

——————————————————————— x

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Index No.: 114631/09

Petitioners,

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

- against -

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

Respondents.

——————————————————————— x

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al.,

Index No.: 116323/09

Petitioners,

DECISION/ORDER

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

- against -

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

Respondents.

——————————————————————— x

JUL 13 2011

Procedural History

These Article 78 proceedings, brought under the State Environmental Quality Review Act (SEQRA), challenge modification of the plan for development of the Atlantic Yards Project in Brooklyn. In prior proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc. (DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenged the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of the modified general project plan (2009 MGPP) for the Project, which is to be constructed by respondent Forest City Ratner Companies or its affiliates (FCRC). By decision and order dated March 10, 2010, this court denied the petitions. By decision and order dated November 9, 2010, the court granted leave to reargue and renew. On reargument, the court held that ESDC did not provide a reasoned elaboration for its continuing use of a 10 year build date for the Project and its determination not to require a Supplemental Environmental Impact Statement (SEIS), based on its wholesale failure to address the impact on the build date of the complete terms of its Development Agreement with FCRC and of a renegotiated Agreement between the Metropolitan Transportation Authority (MTA) and FCRC. The court remanded the matter to ESDC for findings on the impact of the Agreements on ESDC's continued use of the 10 year build date, and on whether an SEIS is warranted or required pursuant to SEQRA. (Nov. 9, 2010 Decision at 18.)

In December 2010, in response to the court's order, ESDC's environmental consultant, AKRF, Inc., prepared a Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project (Technical Analysis) (Supplemental Administrative Record

[SAR] 7637 et seq.) (fn 1) ESDC also issued a document entitled ESDC Response to Supreme Court's November 9, 2010 Order (ESDC Response) (SAR 7728 et seq.) By resolution dated December 16, 2010, ESDC concluded:

> "1. The Development Agreement and MTA Agreement (collectively, the "Development Contracts") do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project . . . .
> 2. As of the date of these findings, it appears unlikely that the Project will be constructed on a 10-year schedule. . . .
> 3. A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS [Final Environmental Impact Statement] and 2009 Technical Memorandum and would not require or warrant an SEIS . . . ."

(Dec. 16, 2010 Resolution, SAR at 7631.) ESDC further resolved that "such findings do not require any modification to the Tech Memo, and do not disturb the prior determination of the Corporation that no Supplemental Environmental Impact Statement is required for the Project's Modified General Project Plan." (Id.) Petitioners' Supplemental Petitions challenging ESDC's December 16, 2010 findings followed.

The Atlantic Yards Project has been described as "the largest single-developer project in New York City history." (Matter of Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312, 326 [1st Dept 2009] [Catterson, J. concurring] [DDDB I], lv denied 13 NY3d 713, rearg denied 14 NY3d 748 [2010].) The Project extends over 22 acres and is to be built in two phases. Phase I includes a sports arena that will serve as the new home of the New Jersey Nets, four to five buildings in the vicinity of the arena, a new MTA/Long Island Railroad (LIRR) rail yard, and transit access improvements including a new subway entrance. Phase II covers construction of 11 of the Project's 16 hi-rise buildings, which will contain commercial space and

approximately 5,000 to 6,000 residential units, 2,250 of which will be affordable housing units. Phase II also includes development of eight acres of publicly accessible open space.

Petitioners contend that the MTA Agreement and the Development Agreement, negotiated by ESDC at the time of the 2009 MGPP, have significantly extended the time frame for the build-out of Phase II of the Project, rendering the 10 year build date an impermissible basis for environmental analysis. Respondents dispute the impact of the Agreements on the build date. They contend that it was reasonable for them to rely on the 10 year build date, which ESDC used as the basis for its analysis in the 2006 FEIS prepared in connection with the original plan, and continued to use in the 2009 Technical Memorandum prepared in connection with the 2009 MGPP.

ESDC claims, and petitioners do not dispute, that even under a prolonged build-out, the timing of completion of the arena, one of the buildings in the vicinity of the arena, and the other Phase I construction would not be "materially" affected. (Technical Analysis, SAR at 7638.)

The court refers to its March 10 and November 9, 2010 decisions for an extensive discussion of the parties' claims and of the bases for the court's prior determinations.

Use of 10 Year Build Date

Petitioners' initial challenge to the 2009 MGPP was based on the MTA's renegotiation in June 2009 of its agreement with FCRC to sell FCRC the air rights to the rail yard owned by the MTA. These air rights are necessary to construct 6 of the 11 Phase II buildings which are to be built on a platform to be constructed over the MTA rail yard. Under the agreement between the MTA and FCRC that was in effect at the time of ESDC's approval of the Project plan in 2006, FCRC was required to pay $100 million to the MTA at the inception of the Project for the air

rights. Under the renegotiated agreement, FCRC will pay $20 million for acquisition of the property interests necessary for the development of the arena block,.will provide the MTA with a letter of credit to secure the obligation to build an upgraded MTA/LIRR rail yard, and will pay the balance of the $100 million on an installment schedule that affords FCRC until 2030 to acquire the air rights necessary for construction of 6 of the Phase II buildings, although it permits FCRC to acquire the air rights for each of the 6 parcels as the full price for the parcel is paid. (See Mar. 10, 2010 Decision at 3-4.) In connection with ESDC's approval of the 2009 MGPP, ESDC's staff characterized the change in site acquisition as a "major change" to the Project. (June 23, 2009 Memorandum, AR at 4677-4678.)

In its decision denying the petitions, this court held that under the applicable standard for SEQRA review, ESDC's elaboration of its reasons for continuing to use the 10 year build-out was supported, albeit minimally, by the factors articulated by ESDC, including its intent to obtain a commitment from FCRC, in a Development Agreement under negotiation, to use commercially reasonable effort to complete the Project in 10 years. (Mar. 10, 2010 Decision at 11.)

On the reargument motion, petitioners argued that the continuing use of the 10 year build-out was belied not only by the MTA Agreement but by the detailed terms of the Development Agreement that ESDC actually negotiated, including significantly extended dates for Phase II construction. In remanding to ESDC for findings on the reasonableness of its continuing use of the 10 year build date, this court reasoned that in approving the 2009 MGPP, ESDC claimed to have relied on a provision in the Development Agreement being negotiated with FCRC which would require FCRC to use "commercially reasonable effort" to complete the Project within 10 years, by 2019. The court found, however, that ESDC knew at the time of its approval of the