

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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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,
STATE ASSEMBLY MEMBER JAMES F. BRENNAN,
NEW YORK CITY COUNCIL MEMBER LETITIA JAMES,
ALAN ROSNER, EDA MALENKY, PETER KRASHES.,
JUDY MANN, RHONA HESTRONY, JAMES GREENFIELD,
MICHAEL ROGERS, ANURAG HEDA, ROBERT PUCA,
SALVATORE RAFFONE, RHONA HETSTONY, ERIC
DOERINGER, JILLIAN MAY and DOUG DERRYBERRY,

Index No. /2009

VERIFIED PETITION

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.

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Petitioners, by their attorneys, allege as follows:

Summary of The Proceeding

1. This proceeding seeks to annul the September 17, 2009 determination by the Respondent Urban Development Corporation doing business as the Empire State Development Corporation ("ESDC") to approve a Modified General Project Plan ("MGPP") for what is known as the Atlantic Yards Land Use Improvement and Civic Project in Brooklyn, New York ("the

Project"). The Project sponsor is Respondent Forest City Ratner Companies ("FCRC").

Petitioners include seven community groups that have long sought, unsuccessfully up to now, to provide the adjacent communities with a voice in the development of this massive project.

2. ESDC approved the first General Project Plan ("GPP") for Atlantic Yards on December 8, 2006. This GPP contemplated a huge, publicly-subsidized, mixed-use development covering 22 acres of land, including a basketball arena with a seating capacity of 18,000 and 16 towers containing up to 6,430 apartments, as well as possible office space and a hotel. The development was to be carried out in two phases, with a projected completion date of 2016. The Project site is surrounded by low-rise brownstone residential neighborhoods, so from the outset, there was great concern about its impact on the adjacent communities. An aerial view of the Project site and surrounding neighborhoods is attached hereto as Exhibit A.

3. In the two and a half years following approval of the GPP, FCRC did little to advance the Project. During this same period, the real estate and capital markets crashed, leaving the feasibility of the Project very much in doubt. Faced with this situation, FCRC, in June 2009, asked ESDC to modify the GPP to, among other things, extend the dates for construction and completion, increase surface parking capacity, and effectively give FCRC a free hand in the long-term build-out of the Project and the elements it would contain.

4. At about the same time, FCRC renegotiated the agreement it had had with the Metropolitan Transportation Authority ("MTA") to acquire the Long Island Railroad's nine-acre Vanderbilt Rail Yards at the center of the 22-acre Project site. Pursuant to an earlier understanding, FCRC was to pay \$100 million up front for this property and associated air rights, but under the new agreement, its upfront payment obligations were reduced to \$20 million and the

time to complete the acquisition and make final payment was extended to 2030. (A copy of the Staff Summary of the MTA Agreement is annexed as Exhibit A to the Affirmation of Albert K. Butzel submitted in support of the Petition.)

5. In response to FCRC's request to modify the Project, ESDC initiated a process to modify the original GPP. Recognizing that the changes could have significant environmental impacts under the State Environmental Quality Review Act ("SEQRA"), ESDC charged its staff with reviewing the modifications to determine their impact on the environment and to assess whether a supplemental environmental impact statement ("SEIS") was required under the law.

6. In a Technical Memorandum prepared in June 2009 (the "Technical Memorandum"), the staff reported back that the changes requested by FCRC would have no significant environmental impact beyond those described in the original EIS approved in 2006 and concluded that no SEIS need be prepared. (A copy of the Technical Memorandum is attached as Exhibit B to the Butzel Affirmation). In reliance on this document, on September 17, 2009, the ESDC Board found that no SEIS was required and approved a modified general project plan ("MGPP") incorporating the changes that FCRC had requested. (A copy of the MGPP is attached as Exhibit C to the Butzel Affirmation.)

7. These changes were of no small moment. They effectively extended the time that FRCR was given to complete the Project by 17 years. They modified FCRC's obligations so that it could delay for many years construction of the buildings that were to buffer the Arena from adjacent neighbor-hoods for years, with the obligation to provide public open space deferred even longer. At the same time, surface parking to service the Arena was expanded. The MGPP, in combination with the MTA Agreement, made it probable that large parts of the site would be left

undeveloped for 17 additional years as a kind of urban wasteland; and they also gave FCRC much of the control over determining the future configuration and content of development on the site.

8. Given the magnitude of the changes, including the prospect that the adjoining neighborhoods would be saddled with empty lots and huge surface parking lots for a greatly extended period of time – given the fact that the modifications threatened to extend the blighted conditions of the area, rather than redress them – there should have been a further analysis of the adverse environmental impacts resulting from the changes would have been provided through an SEIS, allowing other expert agencies, as well as the public, the opportunity to provide their input. Instead, relying on the in-house Technical Memorandum, the ESDC Board rejected any need for further environmental review and approved the MGGP without one. In this, petitioners submit, ESDC acted arbitrarily and capriciously and in violation of law, failing to identify critical areas of environment concern or take the “hard look” at them that SEQRA requires.

9. Petitioners also submit that in approving the MGGP, ESDC illegally delegated to FCRC much of its governmental power to determine the future content and configuration of the Project that the agency was obligated by law to exercise itself. This fundamental breach of government trust, as well as ESDC’s failure to comply with its SEQRA obligations, requires that its approval of the MGGP be set aside and that further work on the Project be enjoined unless and until the legal errors are corrected.

Venue

10. This proceeding is properly venued in New York County as that is the county in which ESDC maintains its principal offices and is the location where the primary determinations to be annulled were made.

Petitioners

11. Petitioner PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC (“PHNDC”) is a New York not-for-profit corporation with 501(c)(3) status. Formed in 2004, it is comprised of representatives of community organizations and block associations that work together to understand and help guide the future of development in Brooklyn’s Prospect Heights neighborhood, which lies adjacent to and immediately to the south of the Project site. Member organizations include the Carlton Avenue Association, Dean Street Block Association, Eastern Parkway Cultural Row Neighborhood Association, Friends of Underhill Playground, Park Place/Underhill Avenue Block Association, Prospect Heights Association, Prospect Heights Parents Association, and Vanderbilt Avenue Merchants District. PHNDC’s mission is, among other things, to assess the needs and concerns of the Prospect Height community in terms of housing, economic development and the physical environment; to prepare or sponsor analyses of potential development in the Prospect Heights community, including the impact of such development on the existing conditions in Prospect Heights; and to represent the interests of its member organizations in relations with elected officials, public agencies and commercial interests. Through its member organizations, PHNDC represents more than 500 individuals, many of whom live and/or work in close proximity to the Project site.

12. In fulfilling its mission, PHNDC has worked to communicate the priorities articulated by neighborhood residents to public officials and other organizations active in the community, and it provides Prospect Heights residents with independent, objective information with respect to major development projects proposed for this community, including, since 2004, the Atlantic Yards Project. Specific initiatives of PHNDC have included commissioning studies

on neighborhood priorities in respect to development, working with city agencies and officials to address Vanderbilt Avenue traffic safety, and the successful effort to have Prospect Heights designated as an historic district. Specifically with respect to Atlantic Yards, PHNDC has worked for greater involvement by the Prospect Heights community in the Project's planning, review and construction. PHNDC has also worked with other Brooklyn and citywide groups to increase public awareness of the impacts of Atlantic Yards, and to demand accountability from government in addressing them. PHNDC has authored and submitted community commentary on the draft EIS for the Project, the MGPP and the ESDC Technical Memorandum prepared in connection with the MGPP.

13. PHNDC, its member organizations and the members of both are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the increased demands on already-inadequate infrastructure, (b) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes and businesses, (c) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (d) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (e) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or configuration of the development.

14. PHNDC has standing to sue in that one or more of its members has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to make it an appropriate representative of those interests; and the participation of PHNDC's individual

members is not required to assert this claim or afford complete relief. In addition, PHNDC has by its involvement in the Project's review process, and the extensive work it has done to analyze the Project's impacts, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public.

15. Petitioner ATLANTIC AVENUE LOCAL DEVELOPMENT CORPORATION ("AALDC") is a Section 501(c)(3) not-for-profit organization committed to the economic development of the Atlantic Avenue area from Fourth Avenue to the waterfront in Brooklyn, which includes the section of Atlantic Avenue that borders the Project site. The mission of AALDC is to further economic development, historic preservation, and cultural enrichment in the greater Atlantic Avenue area. To that end, AALDC provides information, advocates, and produces events and projects that promote economic growth and vitality, for the preservation and development in downtown Brooklyn and the neighboring communities along Atlantic Avenue. AALDC supports responsible development in Brooklyn and has been outspoken in its opinions regarding other development projects affecting Atlantic Avenue merchants, landlords and residents (most recently supporting Brooklyn Bridge Park and opposing plans for the Brooklyn House of Detention). AALDC has participated in the review process for the Atlantic Yards Project by submitting public testimony to the ESDC on numerous occasions, voicing concern about, among other things, traffic, open space and affordable housing.

16. AALDC and its members, including merchants, landlords and residents, are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the increased demands on already-inadequate

infrastructure, (b) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes and businesses, (c) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (d) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (e) excluded from any role in the future planning or development of the Project, including modifications that could completely changed the content or configuration of the development. AALDC has standing to sue in that one or more of its members has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to make it an appropriate representative of those interests; and the participation of its individual members is not required to assert this claim or afford complete relief. In addition, AALDC has by its involvement in the Project's review process, and the extensive work it has done to analyze the Project's impacts, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public.

17. Petitioner BOERUM HILL ASSOCIATION, INC. ("Boerum Hill") is a New York not-for-profit organization formed in 1963 and incorporated in 1972 to represent and advocate for quality-of- life issues in the Boerum Hill area of Brooklyn, which borders the site of the Project. Over the years, Boerum Hill has been, and it is today, a strong advocate for all home owners, renters, and business owners and operators interested in preserving the Boerum Hill Historic District and improving the quality of life, cultural diversity and economic viability of the commercial establishments in Boerum Hill. Boerum Hill includes many members who live within 500 feet of the Project site. To the limited extent that they have been allowed, Boerum Hill and its members have participated actively in the review process for the Project, identifying

as particular concerns the adverse traffic impacts, compromised pedestrian safety, and the potential damage to the area's 19th Century housing stock by construction activities in proximity to those structures. Boerum Hill is a founding member of the Council of Brooklyn Neighborhoods and a founding sponsor of the BrooklynSpeaks initiative. Throughout 2004 and 2005, it sponsored a series of community forums to educate and prepare local residents and businesses to enable them to participate in the limited public process for the Project offered by ESDC.

18. Boerum Hill and its individual members are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to pedestrians resulting from such increased traffic, (b) subjected to construction activities that have the potential to damage their historic homes, (c) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes, (d) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (e) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (f) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or configuration of the development. Boerum Hill has standing to sue in that one or more of its members has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to make it an appropriate representative of those interests; and the participation of its individual members is not required to assert this claim or afford complete relief. In addition, Boerum Hill has by its involvement in the Project's review process, and the extensive work it has

done to analyze the Project's impacts, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public.

19. Petitioner BROOKLYN HEIGHTS ASSOCIATION, INC. ("BHA") is a not-for-profit neighborhood association founded in 1910 that is dedicated to enhancement of the quality of life for residents and businesses in Brooklyn Heights and to the preservation of the historic resources and character of the neighborhood, New York City's first historic district. In pursuit of these goals, BHA has a long history of working cooperatively with numerous neighborhood and business associations in the Downtown Brooklyn and Gowanus Corridor area on issues relating to quality of life, public safety, traffic and transportation, environmental quality and land use. Atlantic Avenue is the southern boundary of the Brooklyn Heights Historic District and is the first exit into Downtown Brooklyn from the Brooklyn-Queens Expressway and the Brooklyn Bridge. Both bring cars and trucks into and through Brooklyn Heights. Vehicles destined for and returning from the proposed Arena and other buildings planned for the Project site will join existing traffic from Atlantic Avenue and the congested BQE corridor, impinging heavily on Brooklyn Heights and its residents and businesses. To the limited extent that they have been allowed, BHA and its members have participated in the review process for the Project, identifying as particular concerns the adverse traffic impacts, compromised air quality, and the potential damage to the area's early 19th Century housing stock occasioned by increased car and truck traffic congestion at or within its Atlantic Avenue boundary.

20. BHA and its individual members are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project

and the dangers to pedestrians resulting from such increased traffic, (b) subjected to construction-related truck traffic activities that have the potential to damage their historic homes, (c) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, and (d) excluded from any role in the future planning or development of the Project, including modifications that could completely changed the content or configuration of the development. BHA has standing to sue in that one or more of its members has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to make it an appropriate representative of those interests; and the participation of its individual members is not required to assert this claim or afford complete relief. In addition, BHA has by its involvement in the Project's review process, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public

21. Petitioner FIFTH AVENUE COMMITTEE ("FAC") is a New York not-for-profit community development corporation incorporated in 1978. Its mission is to advance social and economic justice in South Brooklyn, principally by developing and managing affordable housing and community facilities, creating economic opportunities, organizing residents and workers, providing student-centered adult education opportunities, and combating displacement caused by gentrification. FAC's work helps to transform the communities and lives of more than 5,000 low and moderate income New Yorkers each year through a range of programs, including affordable housing development and workforce development. FAC currently has an affordable housing pipeline of more than 1,000 units of housing. In addition, the pipeline includes an eighty-unit LEED-certified, affordable mixed income homeownership project that is currently in

construction *directly across the street from Project site*. To the limited extent it has been permitted to do so, FAC has participated actively in the review process for the Project, with primary emphasis on affordable housing and the surrounding environment.

22. FAC and its clients and tenants are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to pedestrians, including FAC tenants and clients, resulting from such increased traffic, (b) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (c) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (d) excluded from any role in the future planning or development of the Project, including modifications that could completely changed the content or configuration of the development. FAC has standing to sue in that one or more of its clients and tenants has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to make it an appropriate representative of those interests; and the participation of its individual clients and tenants is not required to assert this claim or afford complete relief. In addition, FAC has by its involvement in the Project's review process, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public.

23. Petitioner PARK SLOPE CIVIC COUNCIL ("PSCC") is one of the longest established civic associations in Brooklyn, having been founded in 1896 as the South Brooklyn Board of Trade to advocate on behalf of the commercial interests in South Brooklyn. Eventually, the organization was renamed the Park Slope Civic Council, with a mission to facilitate revitalization

and improve the quality of life in the Park Slope section of Brooklyn, with an emphasis on traffic, transit and historic preservation. The organization has hundreds of paying household memberships in the Park Slope neighborhood. Among other things, PSCC organizes a variety of public meetings and forums on key issues affecting the neighborhood, as well as producing and hosting such community-building events as the annual House Tour, Halloween Parade and Clean Sweep. In addition, the Council's Grants Program awards grants annually to programs at local charities, schools and cultural organizations. PSCC was the first organization to hold a community meeting with the proposed developers of the Atlantic Yards project and is a founding member of Brooklyn Speaks and the Council of Brooklyn Neighborhoods. PSCC provided oral as well as written testimony at the ESDC hearings on the Project. Virtually all of the members of the Park Slope Civic Council live, work, worship and recreate in the neighborhood immediately adjacent to, and largely impacted by, the Project.

24. PSCC and its individual members are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to pedestrians resulting from such increased traffic, (b) subjected to construction activities that have the potential to damage their historic homes, (c) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes, (d) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (e) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (f) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or

configuration of the development. PSCC has standing to sue in that one or more of its members has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to make it an appropriate representative of those interests; and the participation of its individual members is not required to assert this claim or afford complete relief. In addition, PSCC has by its involvement in the Project's review process, and the extensive work it has done to analyze the Project's impacts, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public.

25. Petitioner PRATT AREA COMMUNITY COUNCIL ("PACC") was founded in 1964 as a membership organization and incorporated as a New York not-for-profit organization with 501(c)(3) status. PACC serves as a vehicle to empower the residents of the Fort Greene, Clinton Hill, Bedford Stuyvesant and Prospect Heights to fight for decent, affordable housing, tenants' rights, and commercial revitalization. In its history, through its Housing Committee, PACC develops and implements innovative strategies to save deteriorating housing stock, such as through anti-demolition efforts to seal vacant properties quickly and properly. PACC has advocated for a change in city policy away from demolition and towards preservation, and instigated federal policy to arrange for the sale of federally financed abandoned buildings to local residents and or community ownership. Since 1980, PACC has had a full-time, professionally staffed office concentrating on keeping people in their homes, developing and preserving affordable housing, protecting tenant rights, and helping community residents become first-time homeowners or improve the properties they already owned. To date, PACC Housing Development has rehabilitated 88 buildings comprising 770 low- and moderate-income residential units and 17 commercial spaces. Working with merchants and property owners on 23 blocks of Fulton

Street just north of the Project site, PACC facilitated the formation of the FAB Alliance BID which began providing services in October of this year. To the limited extent that they have been allowed, PACC and its members have participated actively in the review process for the Project, submitting oral and written testimony and identifying as particular concerns the adverse traffic impacts, compromised pedestrian safety, the demolition of affordable housing, the blight caused by the demolition of existing historic buildings by the developer, FCRC, and the adverse affect of the long construction period on small businesses on Fulton Street. PACC has been an active and founding member of both the Council of Brooklyn Neighborhoods and Brooklyn-Speaks and encouraged and educated local residents to participate in the environmental review process for this project.

26. PACC and its individual members and clients are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to pedestrians resulting from such increased traffic, (b) subjected to construction activities that have the potential to adversely impact business activity, (c) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes, (d) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (e) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (f) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or configuration of the development. PACC has standing to sue in that one or more of its members has standing to sue, the interests it advances here are sufficiently germane to its purpose so as to

make it an appropriate representative of those interests; and the participation of its individual members is not required to assert this claim or afford complete relief. In addition, PACC has by its involvement in the Project's review process, and the extensive work it has done to analyze the Project's impacts, shown itself and its members to be specially affected by the actions complained of in a manner significantly different from the general public.

27. Petitioner VELMANETTE MONTGOMERY is a New York State Senator representing residents of the 18th Senatorial District, which includes Brooklyn communities and areas within, near and/or in close proximity to the Vanderbilt Yards and the Project site, including portions of Park Slope, Prospect Heights, Downtown Brooklyn, Boerum Hill, Clinton Hill, Bedford Stuyvesant, Gowanus, Greenwood Heights, Red Hook, Sunset Park, Stuyvesant Heights and Ocean Hill. She is Chair of the Senate Children and Families and Social Services Committees and is a member of the Senate Committees on Finance, Health and Education, among others. Senator Montgomery and her constituents are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the increased demands on already-inadequate infrastructure, (b) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes and businesses, (c) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (d) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (e) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or configuration of the development.

28. Petitioner JAMES F. BRENNAN is a New York State Assembly Member representing residents of the 44th Assembly District, which includes Brooklyn communities and areas adjacent or in close proximity to the Vanderbilt Yards and the Project site, including portions of Park Slope, Windsor Terrace, Kensington, Prospect Park South, and Ditmas Park. He is also a member of the Assembly Committee on Corporations, Authorities and Commissions, which oversees the MTA. Assembly Member Brennan and his constituents are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the increased demands on already-inadequate infrastructure, (b) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes and businesses, (c) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (d) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (e) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or configuration of the development.

29. Petitioner LETITIA JAMES is a New York City Council member representing residents of the 35th Council District, which includes Brooklyn communities and areas within, near and/or in close proximity to the Vanderbilt Yards and the Project site, including Clinton Hill, Fort Greene, and parts of Crown Heights, Prospect Heights, Bedford Stuyvesant and Down-town Brooklyn. She is also Chair of the City Council Contracts Committee, a co-chair of the Council Task Force on Infrastructure and a member of City Council Committees on Economic Development, Parks & Recreation, Small Business, among others. Council Member James and her

constituents are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the increased demands on already-inadequate infrastructure, (b) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their homes and businesses, (c) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (d) deprived for many years, if not permanently, of the open space that was to be a part of the Project, and (e) excluded from any role in the future planning or development of the Project, including modifications that completely changed the content or configuration of the Project.

30. Petitioners ALAN ROSNER and EDA MALENKY reside at 861 Pacific St, Brooklyn, together with their one year child and two cats. Their brownstone residence, which they own, is located approximately 250 feet east of the Project site, and several of the new towers that comprise the Project will overhang and be clearly visible from their home. In addition, traffic along Pacific Street and past their home will be greatly increased by the Project, and many of the pedestrian crossings and vehicle intersections in close proximity to where they live would be overwhelmed with additional vehicular and pedestrian traffic when there were events at the Arena and at many other times. Petitioners Rosner and Malenky are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to pedestrians, themselves and their child included, resulting from such increased traffic, (b) subjected to construction activities that will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25

years and will also have the potential to damage their historic home, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, and (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang and cast shadows over their home, and in addition, the value of their home will be decreased by reason of the ongoing construction activities over a period as long as 20 years and by the subsequent presence of the Project within a few hundred feet of their home.

31. Petitioner PETER KRASHES, who is a member of PNHDC, resides at 638 Dean Street, Brooklyn, directly across the street from the Project site. He both lives and works in his home and walks past the Project site at least four times every day. Mr. Krashes is directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that he is or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to himself resulting from such increased traffic, (b) subjected to construction activities, which will be staged directly across the street from his residence and which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots, including one directly across from his residence, covering many acres in close proximity to his home, (e) burdened with the size of and activities of the

Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang and cast shadows over his home, and (h) damaged by the relocation of the Vanderbilt Rail Yard closer to his home, without any assurance that the Rail Yard will ever be covered over.

32. Petitioner JUDY MANN resides at 535 Dean Street, Brooklyn, directly across the street from the Project site, which her apartment overlooks. In addition to that proximity, she walks by the Project site whenever she leaves her home. Ms. Mann is directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that she is or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to herself resulting from such increased traffic, (b) subjected to construction activities that will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots, including one across from her apartment, covering many acres in close proximity to his home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang and cast shadows over her home, and (h) otherwise exposed to increased risks to her health and safety.

33. Petitioner JAMES GREENFIELD resides at and owns 636 Dean Street, Brooklyn, directly across the street from the Project site. He is a sculptor and not only lives in his home,

but has his studio on the ground floor, as well as street side gallery viewing space. He overlooks the Project site and walks by it on a regular basis. Mr. Greenfield is directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that he is or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to himself resulting from such increased traffic, (b) subjected to construction activities, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years and will intrude on both his living and his working space, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots, including one directly across from his residence, covering many acres in close proximity to his home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang and cast shadows over his home, and (h) damaged by the injury to his business which construction of the project will cause, and, in addition, the value of his property will be reduced by the long period of construction and the subsequent presence of the Project within a few hundred feet of his home and work place.

34. Petitioner MICHAEL ROGERS resides with his wife Donna Rinni at 535 Dean Street, Brooklyn, directly across the street and less than 100 feet from the Project site. Mr. Rogers lives in Apartment 704 and works there as a writer; Ms. Rinni lives in Apartment 704 and works as an artist in Apartment 610. Mr. Rogers is a member of the Dean Street Block Association and PHNDC. Mr. Rogers and his wife are directly and adversely affected by the

illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to themselves resulting from such increased traffic, (b) subjected to construction activities that will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years and will also impair their abilities to work from their apartments, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots, including one directly across from his residence, covering many acres in close proximity to his home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang and cast shadows over their home, and (h) generally subject to conditions adverse to the conduct their work as artists.

34. Petitioner ANURAG HEDA resides with his wife and three children at 626 Dean Street, Brooklyn, directly across the street from the Project site and approximately 30 feet from one of the surface parking lots proposed to service the Arena. He both lives and works in his home and walks past the Project site regularly. Mr. Heda and his family are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to themselves resulting from such increased traffic, (b) subjected to construction activities that will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air

pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots, including one directly across from their residence, covering many acres in close proximity to their home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang and cast shadows over their home, and (h) otherwise exposed to increased risks to their health and safety and to substantial intrusions into Mr. Heda's working environment.

36. Petitioner ROBERT PUCA resides with his wife and two-year old son at 535 Dean Street, Brooklyn, directly across the street from the Project site. He walks and bikes along the Vanderbilt Rail Yards three or four times a week and his son plays at the Dean Street Playground, which is within a block of the Project site, five times a week. Mr. Puca and his family are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to themselves resulting from such increased traffic, (b) subjected to construction activities across the street from their home, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots covering many acres in close proximity to their home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part

of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang their home, and (h) otherwise exposed to increased risks to their health and safety.

37. Petitioner SALVATORE RAFFONE resides with his family at 521 Dean Street, Brooklyn. His residence is less than a block from the Project site and portions of the Project, including some demolition that has already occurred, are only several doors down from his home. Mr. Raffone walks regularly on the streets adjacent to his home and the Project site. Mr. Raffone and his family are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to themselves resulting from such increased traffic, (b) subjected to construction activities within a few hundred feet of their home, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots covering many acres in close proximity to his home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang their home, and (h) otherwise exposed to increased risks to their health and safety, and in addition, the value of his home is being and will continue to be adversely affecting by Project construction, which could extend over 25 years, and by the subsequent operation of the Arena.

38. Petitioner RHONA HETSTONY lives at 535 Dean Street, Brooklyn, directly

across the street from the Project site, in the Newwalk Building. She regularly walks and bikes on the streets adjacent to the Project site and, as vice president of a major community hospital, frequently returns home past the site at late hours. Ms. Hetstony is directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that she is or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to herself resulting from such increased traffic, (b) subjected to construction activities within a few hundred feet of her residence, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots covering many acres in close proximity to her home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang her home, and (h) otherwise exposed to increased risks to her health and safety.

39. Petitioner ERIC DOERINGER resides with his wife at 521 Dean Street, Brooklyn, New York, across the street from the Project site and at a location surrounded by the Project on the blocks immediately north, east, and west. He walks past the Project site on a daily basis to reach the subway, shops and other destinations, and also uses the Dean Street bicycle lane to commute to and from his studio. He is a self-employed artist and often works from his home. Mr. Doeringer and his wife are directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be

(a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to themselves resulting from such increased traffic, (b) subjected to construction activities within a few hundred feet of their home, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots covering many acres in close proximity to his home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang their home, and (h) otherwise exposed to increased risks to their health and safety, including when Mr. Doeringer is riding his bike.

40. Petitioner JILLIAN MAY resides at 656 Dean Street, Brooklyn, where she rents Apartment #3. Her apartment is approximately 50 feet from the Project site and has a direct view onto the site. She passes the Project site whenever she leaves her apartment, including on her way to work. Since FCRC began demolition of buildings on sites next to where Ms. May lives, she has developed an allergic eye condition, and she is now confronted with a vacant lot that is a breeding ground for rats. Ms. May is directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that she is or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to herself resulting from such increased traffic, (b) subjected to construction activities within a hundred feet of her apartment, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air

pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots, including one directly across from her apartment which is a breeding ground for rats, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang her apartment and block her views, and (h) otherwise exposed to increased risks to her health and safety, including further aggravation of her allergic condition.

41. Petitioner DOUG DERRYBERRY resides with his wife and child at 618 Dean Street, Brooklyn, where they occupy Apartment 1B. This is directly across the street from the Project site. Mr. Derryberry passes the Project site daily going to jobs, taking his child to the playground and doing errands. Mr. Derryberry and his family is directly and adversely affected by the illegal actions herein complained of, in a manner different from the general public, in that they are or will be (a) subjected to and adversely affected by the increased traffic generated by the Project and the dangers to themselves resulting from such increased traffic, (b) subjected to construction activities directly across the street from their home, where construction staging will take place, which will be a constant source of noise, dust, potential accidents and other injury for a period as long as 25 years, (c) subjected to increased air pollution and noise due to the increased traffic, the operation of the Arena and construction activities, (d) forced to live with a wasteland of surface parking lots covering many acres in close proximity to his home, (e) burdened with the size of and activities of the Arena without the mitigating measures previously required of FCRC, (f) deprived for many years of the open space that was to be a part of the

Project, (g) adversely impacted by the high-rise towers that are part of the Project, which will overhang their home, and (h) otherwise exposed to increased risks to their health and safety.

Respondents

42. Respondent EMPIRE STATE DEVELOPMENT CORPORATION is the current operating name of the New York State Urban Development Corporation, a corporate governmental agency of the State of New York constituting a political subdivision and public benefit corporation. ESDC is organized and authorized by the New York State Urban Development Corporation Act [NY Unconsolidated Laws, Chapter 252]; ESDC's principal office is located at 633 Third Avenue, New York, New York. ESDC is the sponsor of the Project and has served as "lead agency" for the SEQRA review of the Project.

43. On information and belief, respondent FOREST CITY RATNER COMPANIES, LLC is a New York limited liability company with its principal place of business at 1 Metrotech Center North, Brooklyn, New York. FCRC is the project developer and is responsible for the planning and implementation of the Project. FCRC includes its affiliated companies, Atlantic Yards Development Co., LLC and Brooklyn Arena, LLC.

Statutory Framework

44. In this proceeding, Petitioners allege that in approving the MGPP, ESDC violated two State statutes: The legislation found in the act that created it and, as amended, sets out its authority – the Urban Development Corporation Act [Unconsolidated Laws, Chapter 252, §1 et seq.], hereinafter referred to as the “UDC Act,” and SEQRA. The SEQRA violation resulted from ESDC’s failure to prepare an SEIS in conjunction with the MGPP, which left it without the guidance regarding environmental impacts that the statute requires. The UDC Act violation

derived from the excessive and improper delegation of ESDC's governmental authority to FCRC.

SEQRA

45. SEQRA, codified in Article 8 of the Environmental Conservation Law ("ECL"), declares a broad public purpose to protect the environment and requires that all state and local agencies conduct their affairs "with an awareness that they are stewards of the air, water, land, and living resources" [ECL §8-0101; ECL §8-0103[8]]. Under the statute, "environment" includes "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character." [ECL §8-0105[6]]

46. Under SEQRA, the principal mechanism for assuring that an agency considers environmental concerns is the EIS, which the agency is required to prepare when an action that it proposes to undertake or approve "may have a significant impact" on the environment. The EIS must identify the potential impacts and assess reasonable alternative courses of action. If it decides to proceed with the action, it must also identify mitigating steps to minimize any adverse environmental impacts and, in the end, must make a finding that "consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process, will be minimized or avoided." [ECL §8-0109[1], [2] and [8]]

47. ESDC prepared a comprehensive EIS before it approved the GPP. However, when FCRC requested significant changes in the Project and the GPP and ESDC agreed to consider them in the MGPP, the agency was taking a new and further action and was thus obligated to comply with SEQRA in connection with the MGPP. At a minimum, this required it

to consider updating the original EIS through an SEIS evaluating the environmental impacts resulting from the changes in the GPP. The regulations issued under SEQRA by the State Department of Environmental Conservation provide for exactly this if changes to an original action or changed circumstances related to it result in adverse environmental impacts not addressed or not adequately addressed in the original EIS. [6 NYCRR §617.9(a)(7)(i)]. It is ESDC's failure to prepare an SEIS in connection its approval of the MGPP that the petitioners challenge in this proceeding.

The UDC Act

48. The UDC Act was enacted by the New York State Legislature in 1968. It created the Urban Development Corporation, which now does business as ESDC, to carry out projects in New York State for what were identified as statewide public purposes. As such, it was given power to override local land use regulations. While ESDC's original focus was on low- and middle-income residential development, its charter was much broader than that, including commercial, civic, industrial and mixed-use projects. In time, at least in the City of New York, ESDC's most visible role became that of sponsoring large-scale projects, such as the 42nd Street Redevelopment project and the failed Jets' stadium on Manhattan's West Side, where the parties in interest, including the City, wished to avoid compliance with the City's own zoning and land use procedures.

49. The UDC Act provides ESDC with broad powers focused over what are defined as "projects" in Section 3(6) of the Act [NY Unconsolidated Laws, Chapter 252, §3(6)]. These powers are set out generally in Section 5 of the Act and include the authority to acquire and sell land and exercise responsibility for the design and implementation of its projects. The powers are

reserved to ESDC. No where in the UDC Act is there authority to delegate to private parties decisions regarding the timing or make up of a project. That, however, is what the petitioners submit, ESDC had done in this case – and done illegally.

Background

50. The project that is formally known as the Atlantic Yards Arena and Redevelopment Project was first announced by FCRC in 2003, the centerpiece of the proposal being the Arena. This was to be the new home to the New Jersey Nets basketball team (presumably to be renamed the New York Nets or the Brooklyn Nets) that had recently been purchased by Bruce Ratner, the principal of FCRC. In the spring of 2005, the plans for the Project were “governmentalized,” when ESDC and the City of New York entered into several memoranda of understanding with FCRC formalizing those plans. Under this arrangement, ESDC become the supposed sponsor of the Project, which allowed it to override local zoning and avoid the City’s much more public land use review process. The plan, however, remained basically the same as the one FCRC had announced a year earlier, with the Arena for the Nets as its centerpiece.

51. At about the same time, the MTA issued an RFP for the sale of certain rights in and above the Vanderbilt Rail Yards, which were a critical part of the plans for the Project, since the included the spot where the Arena was to be located. FCRC was not the high bidder, but in another example of the control it has exercised over the Project from the beginning, the higher bid was rejected and in September 2005, FCRC was granted the purchase rights; for this it agreed to pay \$100 million in upfront cash. Also in September, ESDC, as the supposed sponsor of the Project, declared itself to be the “lead agency” for purposes of SEQRA and initiated environmental review process through a scoping hearing.

52. In July 2006, ESDC adopted a preliminary GPP for the Project and issued a draft EIS evaluating the environmental impacts. Public hearings were held in September, at which speakers were allowed a few minutes each to vent. Among many others, PHNDC, PSCC and AALDC submitted detailed comments on the GPP and the draft EIS, expressing their concerns. Many organizations, including the local community board and the Municipal Art Society of New York opposed the Project in its then current configuration. Notwithstanding the very significant opposition, in November 2006, the ESDC board voted to approve the GPP and accept the findings of the Final EIS. Subsequent legal challenges brought by groups other than the petitioners have so far been unsuccessful.

53. Throughout the review process, the public, including the petitioners, was provided with only the most limited opportunity to participate in the review of the Project, even though the massive development would admittedly change significantly the character of the area and impose on adjacent neighborhoods very significant environmental impacts. This was due significantly to the use of ESDC as the titular sponsor of the Project; under its legislative mandate, all that was required in terms of public involvement was a legislative public hearing on the GPP and the DEIS. And neither ESDC nor FCRC extended themselves beyond the explicit mandate. Indeed, in voting to disapprove the Project, the local community board based its decision on, among other things, “a failure to involve the community board and the community in a meaningful way; misleading and overstating the involvement of the public in the process.”

54. Following ESDC’s 2006 approval of the Project, concerned civic groups and community organizations began calling for more community involvement, increased transparency of decision-making and reform of project governance. This led in August 2006 to the formation of

a group of Brooklyn and citywide civic associations and affordable housing groups, including the petitioners, sponsoring an initiative known as BrooklynSpeaks, which in turn in August 2007 released a proposal for a revised governance structure that would allow for more openness and more meaningful community participation in decisions regarding the shaping of the Project. This proposal was subsequently endorsed by the state and city elected officials from the area and in the spring of 2008, ESDC offered to form a community advisory council. However, it refused to identify any role for the council in future decision-making, and the offer came to naught as local elected officials were unwilling to appoint representatives on these terms. Subsequent efforts by petitioners and others to open up the ESDC process also proved unsuccessful.

55. By the spring of 2008, it had also become clear that economics would not support the build-out of the Project as originally proposed; and the circumstances only grew worse as capital lending dried up. It was suggested that the four towers surrounding the Arena, which had been a key design feature mitigating the placement of the sports facility in a residential neighborhood, would be delayed. Responding to this development, New York Times architectural critic Nicolai Ouroussoff, an early supporter of the Project, wrote: “Postpone the towers and expose the stadium, and it becomes a piece of urban blight – a black hole at a crucial crossroads of the city’s physical history. If this is what we are ultimately left with, it will only confirm our darkest suspicions about the cynical calculations underlying New York real Estate deals.” (NY Times, March 31, 2008). In June 2009, FCRC announced that the original design of the Arena was being abandoned and presented a revised design that critics likened to an airport hanger. The Times critic wrote again of the consequences: “If it is ever built, it will create a black hole in the heart of a vital neighborhood.” (NY Times, June 8, 2009).

56. In June 2009, the MTA and FCRC “renegotiated” their agreement pursuant to which FCRC was to acquire certain parts of the Vanderbilt Rail Yards and the air rights above it. Among other things, the \$100 million upfront cash payment that had been part of the initial deal was reduced to \$20 million; the property that FCRC was required to acquire immediately was sharply cut back; the time FCRC was given to pay for, and acquire, additional parts of the property was extended by 14 years to 2030; and the obligation of FCRC to buy the additional parts of the property was, for all intents and purposes, transformed into an option exercisable or not in FCRC’s discretion. Thus, control over the Project’s development and how it progressed was effectively delegated to FCRC. In the same vein, because it only benefited FCRC, the new agreement, which was approved by the MTA on June 24, 2009, also reduced the size of the replacement rail yard that FCRC was required to provide from nine tracks with a 76 car capacity to seven tracks with a 56 car capacity.

57. On June 23, 2009, ESDC adopted an MGPP for the Project, even though no site plan or design renderings were included. The MGPP paralleled the renegotiated MTA agreement in granting FCRC major concessions as compared to the original GPP, including the extension of time for the build out of the Project and granting much greater flexibility to FCRC in when it was required to construct the buildings that, under the original GPP, were the key elements in buffering the Arena from the adjacent residential neighborhoods. In addition, the MGPP accepted the airport hanger configuration for the Arena in place of the Frank Gehry design that had been identified by FCRC a central element of the Project and had been lauded by ESDC at the time it approved the original GPP, and because the MGPP provided no timetable for the Project build out, it allowed FCRC to continue to utilize surface parking lots for the Arena

for an indeterminate period, whereas the GPP has required that parking be placed underground in the second phase of the Project.

58. Crucially, while the MGPP projected that the entire Project would be completed by 2019, this completely ignored the reality of the revised MTA Agreement, which gave FCRC until 2030 to acquire portions of the Project site and begin construction on those lots. This was irrefutable evidence that the build-out would extend far beyond the 2019 date and that if FCRC decided to complete the Project, it could well be 2033 before that happened – 17 years after the finish date in the original GPP and 14 years after the date identified in the MGPP. Moreover, the MTA Agreement allowed FCRC *not* to purchase the entire property – a clear indication that the Project as presented in MGPP might never be completed; and even if it were, because of the elongated construction schedule, much of the site would lie vacant as an urban wasteland.

59. The deferral of FCRC's purchase obligations under the MTA Agreement, as well as the 80 percent reduction in the upfront cash payment called for under that Agreement was a reflection of the extraordinary power that FCRC was exercising in connection with the Project. It was dictating what government was going to receive, rather than vice versa, and this same pattern was evidenced in the MGPP. The extension of the build-out period identified in the GPP was at the behest, and for the benefit, of FCRC, rather than the public. The flexibility allowed under the MGPP in terms of the components of the project – *whether, for example, there would be 336,000 square feet of commercial development or 1.6 million square feet* – was at the behest and for the benefit of FCRC, and FCRC, rather than government, was effectively empowered to make that kind of choice based on its preferences. To a significant extent, it has also been given control over the pace of development and much else, formalizing what has in fact been the

situation since the Project was first proposed 2003. FCRC invented the Project, and it has been calling tune since then, with government as its vehicle. The willingness of the MTA to give up what it had and cut back sharply on what it will get reflected that reality. The MGPP not only confirmed the situation, it turned over what should have been governmental responsibility in determining, among other things, the pace and components of the Project, as well as the timing of the promised public open space and other project amenities.

60. Despite the changes that the MGPP made and allowed, as described above, described above, the Technical Memorandum provided to the ESDC board prior to the June 23 approval of the MGPP concluded that none of them would have any significant environmental impacts. The Technical Memorandum based this “conclusion” in significant part of the assertion that the entire Project would be completed by 2019, even though the MTA Agreement evidenced a completion date of 2034.

61. ESDC held public hearings on the MGPP on July 29 and 30, 2009, at which speakers were given 3 minutes each to present their concerns, and it accepted written comments until August 31, 2009. At the hearings and subsequently, ESDC received numerous comments critical of the MGPP that included demands and local elected officials that ESDC prepare an SEIS because of substantial changes to the project and the new information relating to its likely completion date. PHNDC submitted detailed comments on the MGPP and the Technical Memorandum spelling out the reasons why an SEIS was required and otherwise detailing the deficiencies of the MGPP. (A copy of the PHNDC Comments is attached as Exhibit D to the Butzel Affirmation.) In short order, however, it became apparent that these comments, and those submitted by other petitioners, fell on deaf ears.

62. On September 17, 2009, the ESDC Board met to give final approval to the MGPP. At that time, the ESDC directors were provided with a document prepared by ESDC staff that purported to summarize and respond to the public comments. Without taking the time to study that document in any depth, and relying on the Technical Memorandum to find that no SEIS was required, the directors approved the MGPP without any significant changes at that meeting.

63. In approving the MGPP, the ESDC board did not take into account of, or identify as a matter of environmental concern, the impact of a build-out extending to 2030 or beyond, although this was the most likely development scenario; it did not take into account, or apparently know about, the MTA Agreement that made that time frame for the Project a near certainty; it did not identify or consider the impacts on adjacent residential communities of large portions of the Project site becoming or remaining desolate for 20 years or longer (including those parts of the site where FCRC had razed existing structures and thus added to the expanse of vacant lots); it did not take a hard look at the consequences of continuing large expanses of surface parking lots for an indeterminate period of time in order to service the Arena; it did not focus on implications of the deferral in the construction of the buildings that under the GPP were critical in providing a buffer between the Arena and the nearby residential neighborhoods; it did not take into account the traffic growth which, under the City's SEQRA regulations, was required to be, but was not included, in the evaluation of impacts contained in the Technical Memorandum; it did not address the change in design of the Arena itself, because this was not even mentioned in the MGPP or the Technical Memorandum; it did not take a hard look at the impacts of an elongated construction period, with all its noise and other indignities, on the

residents of adjoining neighborhoods; and it did not address in any serious way the many other identified impacts that PHNDC presented in the written comments.

64. What the ESDC board did do in approving the MGPP was to delegate down to FCRC governmental duties that it was responsible for exercising itself. To this end, the MGPP is rife with anticipations about how the Project may develop, as distinct from imposing specific obligations on of FCRC as developer; and the MGPP effectively leaves it to FCRC to define its obligations in terms of the project components as well as the timetable for the build out. This reflects the reality that has existed with respect to the Project from the outset; FCRC has defined the Project and has changed it over time to suit its convenience, with government simply going along. But with the approval of the MGPP, the delegation of governmental responsibilities has gone too far. The future of the Project has invalidly been put too much into the hands of the developer, and ESDC has violated its governmental obligations in doing so.

AS AND FOR A FIRST CAUSE OF ACTION

(Failure to Prepare an SEIS)

65. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 64 as if fully set forth herein.

66. ESDC was legally obligated to prepare an SEIS because the changes in the MGPP would result in significant adverse environmental impacts on petitioners beyond those disclosed and evaluated in the original EIS for the Project; and thus, the approval of the MGPP constituted an action that required a further EIS (or SEIS) under SEQRA.

67. In determining not to prepare an SEIS, the ESDC Board relied on the Technical

Memorandum prepared by its staff, which concluded that the changes effected by the MGPP would not have a significant impact on the environment. In reaching this conclusion, the Technical Memorandum (and thus ESDC's approval of the MGPP) failed to identify key areas of environmental concern, failed to take a hard look at those it did identify and failed to provide a reasoned elaboration of its conclusion. Instead, it ignored reality and misrepresented the most likely development scenario in order to avoid the conclusion that an SEIS was required.

68. The legal failings of the Technical Memorandum (and thus ESDC's approval of the MGPP), included, but were not limited to the following:

- A. The failure to address a build-out that would extend at least until 2033 – 14 years beyond the 2019 completion date assumed in the Technical Memorandum and MGPP and by far the most likely development scenario.
- B. The failure to identify or consider the MTA Agreement as irrefutable evidence that the build out would extend to 2033.
- C. The failure to identify or evaluate the adverse impacts on adjoining neighborhoods of acres of vacant lots (including lots created by FCRC's demolition activities) that could remain for 17 years longer than had been identified in the original EIS and 14 years longer than the 2019 date identified in the Technical Memorandum and MGPP.
- D. The failure to identify or evaluate the adverse impacts on adjoining neighborhoods of a construction period that could extend for 17 years longer than had been identified in the original EIS and 14 years longer than the 2019 date identified in the Technical Memorandum and MGPP.
- E. The failure to take a hard look at the consequences of maintaining large new

surface parking lots to service the Arena for an indefinite period of time, when the original GPP had provided that Arena parking would be underground.

- F. The failure to consider the impacts of increasing surface parking by 62 percent as compared to that allowed under the GPP.
- G. The failure to adequately address the consequence of the increased expanse of surface parking on storm water runoff and, due to the use of combined sewers in the area, on sanitary sewer capacity.
- H. The failure to specify dates for, or to take a hard look at the on implications of, the deferral in the construction of the buildings that under the GPP were critical in providing a buffer between the Arena and the nearby residential neighborhoods.
- I. The failure to incorporate into the projections of future traffic growth the annual percentage factor *required* under the City's SEQRA Technical Manual.
- J. The failure to evaluate the change in the design of the Arena.
- K. The failure to consider the impacts to the community character from an abandoned or partially completed Project, including the blighting impacts from abandonment or partial completion.

69. By reason of the failures identified above and others, ESDC's determination that no SEIS was required in connection of with its approval of the MGPP was arbitrary, capricious and an abuse of discretion under SEQRA and requires that the determination be set aside.

70. Because ESDC did not comply with SEQRA in connection with its approval of the MGPP, that approval was also illegal and must be set aside.

71. Petitioners have exhausted their administrative remedies and have no adequate

remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

(Impermissible Delegation of Governmental Authority)

72. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 71 as if fully set forth herein.

73. The MGPP, although approved by ESDC, was in response to the requests of, and dictated by, FCRC, which was unable to comply with the requirements of the GPP.

74. In approving the MGPP, ESDC simply did the bidding of FCRC, rather than acting independently in its governmental capacity, as the UDC Act required it to do.

75. As approved, the MGPP delegated down to FCRC functions and decisions that the law required to be carried out the ESDC, including the timing of development on the Project site and the composition of that development, including, specifically, the decision regarding how much commercial space would be built out, whether or not the Project would include a hotel, and how many residential units and units of affordable housing would be a part of the Project.

76. This delegation of ESDC's governmental authority is a continuation of the process that has been followed in this matter since ESDC first agreed to act as the Project sponsor. However, it represents a new and clearly illegal level of such delegation.

77. By reason of the delegation effected under the MGPP, ESDC exceeded its authority under the UDC Act and otherwise, and acted arbitrarily, capriciously and in violation of law.

78. By reason of the foregoing, ESDC's approval of the MGPP must be set aside and annulled and ESDC enjoined from pursuing the Project further on the basis of the MGPP.

Conclusion

WHEREFORE, Petitioners demand judgment:

- A. Annuling and vacating ESDC's September 17, 2009 determination that no SEIS was required in connection with its approval of the MGPP;
- B. Annuling and vacating ESDC's September 17, 2009 approval of the MGPP;
- C. Declaring the MGPP null and void;
- D. Enjoining ESDC from further pursuing the Project on the basis of the MGPP;
- E. Awarding petitioners their costs and disbursements in this proceeding; and
- F. Granting such other and further relief as this Court deems just and proper.

Dated: November 18, 2009

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