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

In the Matter of the Application of DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., Petitioners, For a Judgment Pursuant to Article 78 of the CPLR – against – EMPIRE STATE DEVELOPMENT CORPORATION, et ano., Respondents.	Index No. 114631/09 IAS Part 57 Justice Marcy S. Friedman
In the Matter of the Application of PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al., Petitioners, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules – against – EMPIRE STATE DEVELOPMENT CORPORATION, et ano., Respondents.	Index No. 116323/09 IAS Part 57 Justice Marcy S. Friedman

MEMORANDUM OF LAW OF RESPONDENT EMPIRE STATE DEVELOPMENT CORPORATION IN OPPOSITION TO THE SUPPLEMENTAL PETITIONS AND THE MOTION FOR AN INJUNCTION

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PRELIMINARY STATEMENT

Empire State Development Corporation ("ESDC") respectfully submits this memorandum in opposition to the supplemental petitions and the motion for a stay.[1]

In a decision, order and judgment issued on March 10, 2010 (the "March 2010 Decision") this Court dismissed these proceedings. In a decision and order issued on November 9, 2010 (the "Remand Order"), upon petitioners' motions to reargue and renew, the Court directed ESDC to make "findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10-year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted." Remand Order at 18. ESDC issued the required findings on December 16, 2010, and petitioners, in their never-ending effort to derail the Atlantic Yards Project (the "Project"), now challenge those findings and prior Project approvals. Their supplemental petitions should be dismissed for four reasons.

First, ESDC made the findings required by Remand Order. ESDC reviewed the terms of the Development Agreement and other business agreements executed on December 23, 2009, and found them to be consistent with the scheduling assumptions that ESDC had made in affirming the 2009 Modified General Project Plan (the "2009 MGPP") because they: (i) require the developer to use "commercially reasonable effort" to construct the Project on a 10-year schedule and (ii) facilitate the Project's construction within that timeframe. In its findings, ESDC concluded that the principal driver of the construction schedule will be real estate market conditions, just as ESDC had assumed and acknowledged in affirming the 2009 MGPP. As also required by the Court, ESDC reconsidered whether a Supplemental Environmental Impact

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[1] Because this memorandum of law responds to three sets of papers in two proceedings, ESDC respectfully requests that the Court waive the 30-page limit in the local rules.

Statement ("SEIS") should be prepared for the Project to study further a delay in the original 10-year construction schedule. In its findings, ESDC confirmed that an SEIS is neither required nor warranted because an extended construction schedule will not result in any significant adverse environmental impacts not previously disclosed – essentially for the same reasons articulated in the Technical Memorandum prepared in June 2009 (the "2009 Technical Memorandum"). Accordingly, ESDC complied with the Remand Order. *See* Point I, *infra.*

Second, ESDC's findings are rational. Petitioners do not bother examining the substance of the thorough analysis that underpins ESDC's findings, as set forth in two documents: (i) "Atlantic Yards Land Use Improvement and Civic Project; ESDC Response to Supreme Court's November 9, 2010 Order" (the "ESDC Response to Remand") and (ii) "Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project" (the "2010 Technical Analysis"). Instead, they merely dispute ESDC's conclusions, presenting a handful of unsubstantiated and superficial reasons why they believe that a different outcome should have been reached. But a difference of opinion is not a basis for a SEQRA challenge. Petitioners also ignore Court of Appeals caselaw that an agency decision to prepare an SEIS is discretionary. Their challenge to ESDC's discretionary decision not to require an SEIS should be rejected. *See* Point II, *infra.*

Third, neither the Urban Development Corporation Act ("UDCA") nor SEQRA required a public hearing for the Court-ordered findings. *See* Point III, *infra.*

Fourth, in addition to challenging ESDC's findings, petitioners (in their first cause of action) seek to re-litigate issues that were adjudicated in the March 2010 Decision as modified by the Remand Order. The law of the case doctrine bars these claims from further consideration. The only issue that remains in these proceedings is whether ESDC abused its discretion in

making the findings required by the Remand Order. All other allegations and claims have been dismissed with prejudice and cannot be relitigated. Moreover, even if the claims were to be considered, they are meritless. *See* Point IV, *infra.*

Finally, no injunction should be issued because these proceedings should be dismissed. Enjoining construction of the Project's principal civic elements – the Arena, subway entrance and rail yard – would also be contrary to the public interest. *See* Point V, *infra.*

POINT I

ESDC MADE THE FINDINGS REQUIRED BY THE REMAND ORDER

ESDC made the two findings required by the Remand Order. In response to the Court's first directive, ESDC found as follows:

> 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. As was the case when the ESDC Directors approved and affirmed the 2009 MGPP, a key factor in the ultimate pace of development of the Project will be the market demand for the Project's buildings. The Development Contracts contemplate that the Project will be constructed on a 10-year schedule, but they do not establish 10 years as the outside date for Project completion. The Development Contracts require that: (i) FCRC use commercially reasonable effort to achieve Project completion by 2019 and, in any event, (ii) the Project be completed not later than a 25-year outside date, subject to certain specified contingencies. The fact that the Development Contracts have outside dates for development that go well beyond 10 years was publicly disclosed by ESDC when it approved the 2009 MGPP.

Supplemental Administrative Record ("SAR") 7631.

Petitioners assert that this finding did not comply with the Remand Order because ESDC should have focused on "why it continued to use a 10-year schedule in determining [in June and September 2009] whether an SEIS was required." Butzel Aff. dated Jan. 17, 2011 ("Butzel Aff.") ¶ 6. Petitioners appear to be implying that instead of addressing how the

complete terms of the agreements executed on December 23, 2009 affect the Project schedule, ESDC should have explained why it made the scheduling assumptions it did in the summer of 2009, before those agreements had been negotiated and executed. But ESDC reasonably interpreted the Remand Order as requiring it to examine the "complete terms" of the agreements, Remand Order at 18, rather than merely to re-explain why the original 13-volume administrative record ("AR") supported its scheduling assumptions.

In response to the Remand Order's second directive, ESDC found as follows:

> 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 and 2009 Technical Memorandum and would not require or warrant an SEIS. The analysis of the potential environmental impacts of a 25-year construction schedule – a delay more lengthy than that considered in the 2009 Technical Memorandum – confirms the conclusion reached by ESDC in 2009 that an SEIS is not required or warranted for the 2009 MGPP. Similarly, the Development Contracts do not require or warrant an SEIS.

SAR 7631.

Petitioners assert that the only finding ESDC was to make was why "it continued to use a 10-year schedule in determining whether an SEIS is required." PHNDC Mem. at 4. This assertion is wrong for two reasons. First, its premise is faulty because in addition to examining the need for an SEIS under a 10-year schedule, the 2009 Technical Memorandum also examined whether a substantial delay in that schedule to an illustrative delayed build year of 2024 would warrant an SEIS. In 2009, ESDC considered each of these analyses in determining not to prepare an SEIS. Second, the Remand Order's second directive was not so narrowly circumscribed and is correctly construed as requiring a finding as to whether an SEIS is warranted in light of the complete terms of the agreements. Given the concerns raised by both

the petitioners and this Court, it was reasonable for ESDC to respond to the Remand Order by investigating whether a delay all the way to 2035, however unlikely, would warrant an SEIS.

POINT II

ESDC'S FINDINGS WERE RATIONAL AND NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION

ESDC's findings should be upheld for the reasons summarized below.

A. The Decision To Prepare An SEIS Is Discretionary And Subject To A Deferential Standard Of Review.

The standard for an agency's determination whether to prepare an SEIS is well established. The agency should identify the relevant areas of environmental concern, take a hard look at them and provide a reasoned elaboration of the basis for its determination. *See* Riverkeeper, Inc. v. Planning Board of Town of Southeast, 9 N.Y.3d 219, 231-32 (2007) ("Riverkeeper"). In deciding whether to prepare an SEIS, the "hard look" is focused on whether the potential environmental impacts associated with project changes or new information have been addressed in the EIS. *See* 6 N.Y.C.R.R. § 617.9(a)(7)(ii) (decision to require an SEIS is to be made in light of the "importance and relevance of the information" and the "state of information in the EIS"). *See*, *e.g.*, Halperin v. City of New Rochelle, 24 A.D.3d 768, 777 (2d Dep't 2005) (there was no evidence of adverse impacts that were not addressed in the FEIS which would warrant, let alone mandate, preparation of an SEIS).

Here, the FEIS presented an exceedingly thorough analysis of the Project and its effects, describing in detail the potentially significant impacts of both the construction and operation of the Project in each and every relevant area of environmental concern, and identifying a wide-ranging program of mitigation measures to ameliorate such impacts. AR 1-3537, 3594-608. This Court and two Appellate Divisions have already held that this FEIS satisfied SEQRA in all respects. *See* Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.,

2008 WL 206942 (Sup. Ct. N.Y. Co. 2008) ("DDDB I"), *aff'd*, 59 A.D.3d 312, 312-19 (1st Dep't), *leave to app. denied*, 13 N.Y.3d 713 (2009), *rearg. denied*, 14 N.Y.3d 748 (2010); Anderson v. N.Y.S. Urb. Dev. Corp., 45 A.D.3d 583, 585 (2d Dep't 2007), *leave to app. denied*, 10 N.Y.3d 710 (2008). It is that document and its conclusions – which disclosed and addressed a number of Project-related significant adverse environmental impacts – that serves as the baseline against which to examine the reasonableness of ESDC's determination not to prepare an SEIS. Yet petitioners ignore entirely the FEIS and its disclosures in pressing their claims and thus do not even begin to establish that an SEIS is required for the Project.

The standard of judicial review is deferential to the agency. "[A]n agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence…. 'While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency….'" Riverkeeper, 9 N.Y.3d at 232 (citations omitted).

Courts are required to follow a rule of reason in determining whether environmental impacts have been adequately addressed. *See* Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d 400, 417 (1986). "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA." Id. Moreover, an EIS (or SEIS) is not required to study speculative impacts. *See* Indus. Liaison Comm. of the Niagara Falls Area Chamber of Commerce v. Williams, 72 N.Y.2d 137, 143 (1988); Neville v. Koch, 79 N.Y.2d 416, 427 (1992); *accord* WEOK Broadcasting Corp. v. Planning Board of Town of Lloyd, 79 N.Y.2d 373, 384 (1992) (annulling agency's determination of significant adverse impacts because it was based on "generalized, speculative comments and opinions of local residents"). Similarly, conclusory allegations will not suffice to support a SEQRA claim. *See* West Vill. Comm. Inc. v. Zagata,

242 A.D.2d 91, 100 (3d Dep't 1998) (deferring to agency where petitioners had not come forward with "evidentiary proof establishing that [the agency's] analysis is founded upon spurious data or is otherwise deficient").

Unlike the mandatory decision to prepare the initial EIS, the determination whether to require an SEIS is a matter that the SEQRA regulations leave to the agency's discretion. Riverkeeper, 9 N.Y.3d at 231. As in Riverkeeper, virtually every case reviewing an agency's determination not to prepare an SEIS has upheld that determination,[2] and petitioners do not cite any case where a court came to a different conclusion. In the instant case, ESDC made that decision after identifying the relevant environmental issues, taking a hard look at them and providing a reasoned elaboration of its conclusions, as documented in the 2009 Technical Memorandum and 2010 Technical Analysis. It would be utterly unprecedented to overturn the agency's discretionary determination not to prepare an SEIS in such circumstances.

B. ESDC's First Finding Rationally Concluded That The Development Contracts Do Not Have A Material Impact On The Continued Use Of A 10-Year Build Out For The Project.

With respect to the first finding, the ESDC Response to Remand begins with a thorough description of the critical provisions of the final transaction documents, and goes on to scrutinize the effect of those provisions (both individually and collectively) on the 10-year build-out schedule. The outcome of that analysis was a finding that the rights, obligations and arrangements put into place by the parties are intended to advance the Project at a commercially

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2 *See, e.g*, Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d at 416; Eadie v. Town Board of Town of North Greenbush, 7 N.Y.3d 306 (2006); Neville v. Koch, 79 N.Y.2d 416; Muir v. Town of Newburgh Planning Board, 49 A.D.3d 742 (2d Dep't 2008); Municipal Art Society of New York, Inc. v. N.Y.S. Convention Center Development Corp., Index No. 106245/06, 2007 WL 1518932 (Sup. Ct. N.Y. Co. May 21, 2007); C/S 12th Avenue LLC v. City of New York, 32 A.D.3d 1 (1st Dep't 2006); Halperin v. City of New Rochelle, 24 A.D.3d at 777; Coalition Against Lincoln West, Inc. v. Weinshall, 21 A.D.3d 215 (1st Dep't 2005); Molly, Inc. v County of Onondaga, 2 A.D.3d 1418 (4th Dep't 2003); Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp., 291 A.D.2d 40, 55-57 (1st Dep't 2001).

reasonable pace, and "do not have a material effect on whether it is reasonable to use a 10-year construction schedule for assessing the environmental impacts of the Project." SAR 7729.

1. ESDC Identified And Described The Key Provisions Of The Agreements.

The ESDC Response to Remand confirmed that the Development Agreement includes an explicit requirement that FCRC[3] "use commercially reasonable effort to cause Substantial Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date)." SAR 7734. The ESDC Response to Remand also pointed out that FCRC is required to "develop and construct" the Project defined in the 2009 MGPP (including its provision requiring commercially reasonable efforts to achieve the 10-year completion date, *see* AR 4692) and to use "prudent and reasonable business practices" in doing so. SAR 7734. ESDC went on to describe specific terms of the Development Agreement, several of which impose outside dates that allow Project construction to go well beyond the 10-year schedule. Among other things, the "Outside Phase I Substantial Completion Date" is May 12, 2022; the outside deadline for commencement of construction of the first building on Block 1129 is May 12, 2020; and the Outside Phase II Substantial Completion Date is May 12, 2035. SAR 7734-36.[4] At the same time, ESDC pointed out that the "requirement that FCRC use commercially reasonable effort to cause the substantial completion of the entire Project by December 31, 2019 is not modified, limited or impaired by the separate and distinct contractual requirements" to meet the specified outside dates. SAR 7736. ESDC also noted that the Development Agreement subjects FCRC to a stipulated penalty of up to $10,000 per day, and

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[3] As used herein, FCRC refers to the affiliates of respondent Forest City Ratner Companies that entered into the various agreements addressed in the ESDC Response to Remand.

[4] As noted in the ESDC Response to Remand (SAR 7746), the outside dates are subject to certain specified contingencies.

allows ESDC to pursue its other equitable and common law remedies for violation of the covenant to use commercially reasonable effort to complete the Project within the 10-year timeframe. SAR 7736-37.

The MTA agreements examined in the ESDC Response to Remand include the "Air Space Parcel Purchase and Sale Agreement for Air Space Over Block 1120, Lot 1 and Block 1121, Lot 1"; the "Air Space Parcel Development Agreement"; the "Declaration of Easements by MTA for LIRR Vanderbilt Yard" (by which MTA subdivided the Vanderbilt Yard into a "Yards Parcel" lying below a specified horizontal plane in the air space above the yard, and an "Air Space Parcel" lying above that plane); the "Yard Relocation and Construction Agreement"; and the "Sale Purchase Agreement between MTA, FCRC and ESDC (Tax Block 1119, Lot 7)." SAR 7737-45. Under these agreements (collectively, the "MTA Agreements"), the parties transferred title to Block 1119, Lot 7 on the Arena Block, allowing work on the Arena to proceed pursuant to the Development Agreement, and created a framework for the: (i) relocation and reconstruction of the Vanderbilt Yard under the supervision of MTA and LIRR (the "MTA Parties"); (ii) parcel-by-parcel sale and purchase of the air space over the Vanderbilt Yard; (iii) modular development of the platform needed to construct the Project within that air space, in accordance with plans and schedules approved by the MTA Parties; and (iv) operation and maintenance of the platform by multiple owners as and after the Project is completed.

The ESDC Response to Remand noted that the Yard Relocation and Construction Agreement imposes specific design and construction requirements with respect to the yard relocation work, and creates a phased process for MTA's review of the design and schedule for that work. SAR 7744-45. Once the yard improvements are made, the MTA Agreements allow FCRC to purchase separately up to six "Air Space Subparcels" over the Vanderbilt Yard at any

time up to the outside date of June 1, 2031. SAR 7738. The purchase price for the air space is to be paid in a combination of annual installments and accelerated lump sum payments due at the closing for each Air Space Subparcel. Id. Among other things, the Air Space Parcel Development Agreement puts into place an iterative process for the MTA Parties' review and approval of the design and schedule for the platform construction work. SAR 7740. ESDC acknowledged that the MTA Agreements establish outside dates for: (i) completion of the New Yard Construction (September 1, 2016); (ii) the purchase of all Air Space Subparcels (June 1, 2031); and (iii) the construction of the entire platform (May 12, 2035). SAR 7745, 7738, 7742.

2. ESDC Carefully Considered The Key Contractual Provisions And Rationally Concluded That They Do Not Materially Affect The Construction Schedule For The Project For The Purpose Of Assessing Its Environmental Impacts.

ESDC reviewed thoroughly the business agreements noted above to assess whether and how they would affect the 10-year timetable that had been assumed as one element of its environmental review of the Project. The analysis began with ESDC noting that outside dates incorporated into heavily negotiated agreements are not to be equated with the parties' reasonable expectations as to a project's actual construction schedule. This observation was grounded in simple common sense, since outside dates serve an entirely different function than a construction schedule, and "reflect the prudent business judgment of the parties and their transactional lawyers seeking to anticipate any and all of the possible risks [that could derail construction], however unlikely." SAR 7746.

However, ESDC's assessment was grounded on considerably more than that reasonable observation. ESDC observed that the interlocking agreements create legally binding arrangements that "(i) require construction to proceed towards completion ... at a commercially reasonable pace, with the goal being completion in 2019; and (ii) in addition, establish deadlines

to define the outer allowable limits for Project completion." SAR 7746. As to the first requirement, ESDC cited FCRC's "commercially reasonable effort" obligation under the Development Agreement and the provision making clear that this obligation is not superseded by the outside dates. SAR 7746. Under ESDC's reasoning, these provisions, combined with the outside deadlines in the Development Agreement, establish "a two-tiered duty with respect to the schedule for the Project. First, FCRC must make commercially reasonable efforts to achieve completion of the Project by 2019, and second, it may not, in any event, go beyond the outside limits established by the agreement (except for specifically defined reasons)." SAR 7746.

The ESDC Response to Remand discerned this two-tiered structure in the MTA Agreements, as well. ESDC noted that the Yard Relocation and Construction Agreement imposes deadlines for the completion of the yard construction work, but also calls for FCRC to prepare a "proposed preliminary schedule," which upon the approval of the MTA Parties becomes mandatory. SAR 8960 (FCRC must "utilize all commercially reasonable efforts to complete construction of the New Yard" in accordance with the approved schedule).[5] As noted by ESDC, nothing in the agreement ties the *actual* schedule for completion of the Yard work under the approved schedule to the *outside* date provided by the agreement. Likewise, ESDC noted that the Air Space Parcel Development Agreement imposes an outside deadline of 2035 for completion of the platform, but at the same time contemplates the development, approval and mandatory implementation of *actual* construction schedules based on FCRC's then "current estimate" of the duration of the work. SAR 7747. Thus, the ESDC Response to Remand noted that the agreement "imposes a dual obligation on FCRC: to (i) Substantially Complete ... the

[5] *See also* SAR 8958-59 ("Construction of the New Yard shall be ... prosecuted by Developer (subject to Force Majeure, Railroad Emergency and Owner's Delay) with all reasonable diligence and without interruption (with the Construction Milestones at various stages each being substantially completed in accordance with the Construction Schedule).").

Platform Work ... in accordance with the approved Baseline Schedule ... and (ii) in any event, to complete all platform work by 2035." SAR 7747 (internal quotations omitted).

ESDC further noted that the agreements do not simply impose an obligation on FCRC to use commercially reasonable effort to complete the Project in 10 years; they are "structured to *facilitate* construction of the Project at a commercially reasonable pace." SAR 7747. From a general perspective, ESDC noted that the phased approach embodied in the agreements was created "to get the Project going in a difficult economic climate." Id. More specifically, it noted that the MTA Agreements set up streamlined design review procedures, whereby LIRR is to provide comments on major design and scheduling submittals within specified deadlines, and to dedicate LIRR staff needed to meet those deadlines, at FCRC's expense. Id. Various Project coordination measures and financial safeguards – designed to assure that construction, once commenced is completed on time – are cited as demonstrating the parties' overarching intention to speed Project construction. SAR 7748.

Finally, the ESDC Response to Remand addressed: (i) the discrepancy in the amount of the liquidated penalty imposed for FCRC's breach of the covenant to use commercially reasonable effort to complete the Project in a 10-year timetable, as compared to the penalties imposed for FCRC's failure to meet the outside dates; and (ii) the complexities ESDC would face in enforcing the covenant to implement the Project with commercially reasonable effort. SAR 7748. ESDC determined, in light of the hundreds of millions of dollars FCRC has poured into the Project to date, that the Developer has a "significant incentive, separate and apart from ESDC remedies, to pursue it to a successful conclusion because undeveloped land, the acquisition cost of which has been borne entirely by FCRC, does not earn any substantial return." Id. Under such circumstances, ESDC found that "more substantial

stipulated penalties or additional enforcement remedies" are not required to "induce FCRC to pursue the Project with commercially reasonable diligence." Id.

In light of the considerations summarized above, ESDC found that the agreements "both require and encourage construction to take place at a commercially reasonable pace" and neither preclude nor are inconsistent with a 10-year schedule for Project construction. Id.

The soundness of that determination is elucidated by an understanding that selection of the 2019 Build Year in the 2009 Technical Memorandum was based on considerably more than FCRC's contractual commitments. With the assistance of its construction and financial consultants, ESDC considered the technical feasibility of a 10-year construction schedule, projections of population growth in Brooklyn over the 10-year period, the extremely low residential vacancy rate in Brooklyn, the urgent and well-recognized need for affordable units, and the Project's convenient, transit-accessible location, in concluding that it was reasonable to assume Project completion in a 10-year horizon. *See* ESDC Answer ¶¶ 29, 37-38 (citing AR 4658-65 (Earth Tech/AECOM Report); AR 7036-38 (Response to Comments at 7-9); AR 7075-122 (KPMG Report)). ESDC's rationale for a 10-year build out thus included the fact that "1) FCRC has made a substantial financial investment to date in acquisition costs and has an incentive to recognize a return on its investment as soon as possible; and 2) it is reasonable to expect that the market will absorb the units called for in the Project." March 2010 Decision at 9-10. At the same time, ESDC recognized explicitly that "market conditions may impact the Project schedule," AR 7036 (Response to Comments at 7), and therefore took a hard look at a substantial delay in the 10-year schedule, with Project completion in 2024. *See* AR 4808-16 (2009 Technical Memorandum at 55-63). ESDC's decisionmaking in 2009 was wholly consistent with the business agreements executed later that year, when read in their entirety.

3. Petitioners' Superficial Arguments Concerning The Effect Of The Business Agreements On The Build Year Have No Merit.

Reading petitioners' papers, one would never guess that in response to the Court's directive to consider the "complete terms" of the business agreements (Remand Order at 18), ESDC had assembled, summarized and presented a detailed analysis of those agreements. Petitioners disregard the details of the agreements, making no mention of the "commercially reasonable effort" provisions of the Development Agreement, the two-tiered obligations of FCRC in building out the Project, the streamlined process for advancing the Project design, or any other aspect of the agreements.

Petitioners characterize ESDC's careful analysis as "clearly an after-the-fact attempt to justify the erroneous 10-year construction schedule ... rather than a rational explanation for its use" and assert that it does not provide the required "reasoned elaboration." PHNDC Mem. of Law at 6-9. But they offer no specific criticism of the analysis, except to deride ESDC for drawing a distinction between the anticipated timetable for Project construction and "drop dead" dates included in heavily negotiated development agreements. Thus, they contend that ESDC's explanation "effectively suggests that the outside dates are abstractions," Butzel Aff. ¶ 12, rendering them "meaningless" and reducing them to "irrelevance." PHNDC Mem. of Law at 7. But petitioners mischaracterize ESDC's analysis: outside dates set contract "breakpoints" of immense importance when projects go awry but they are set beyond the end date of the anticipated construction schedule. Although petitioners equate outside dates with the schedule for construction, the Court need only look to the terms of the agreements, as explained in the ESDC Response to Remand, to see the distinction. *See* Point II.B.2, *supra.*

Petitioners turn the rhetorical heat up another notch with the claim that "ESDC's assertion ... that the [Development Agreement] ... had no material effect on the reasonableness

of using a 10-year construction schedule is arbitrary and irrational, if not dishonest." Supp. Pet. ¶ 26. With nothing to support this charge in the terms of the business agreements (other than the undisputed fact that such agreements have outside dates going beyond 2019), petitioners focus on ESDC's purported failure to consider "market realities" that existed in 2009. Id. ¶ 23. Ignoring that ESDC had assessed *long-term* market conditions at the time it approved the 2009 MGPP, petitioners cite a few news articles that highlight the poor state of the market that existed in 2009. Butzel Aff. ¶ 11. Market conditions were, indeed, down that year, as ESDC acknowledged in determining that it would take a hard look at the environmental impacts of a potentially delayed construction schedule. AR 4808 (2009 Technical Memorandum at 55). But a market downturn *in 2009* does not establish that ESDC erred in its assessment of *long-term* market conditions through 2019, which relied upon such broad demographic factors as the expected increase in Brooklyn's population during that time frame and the Borough's tight housing market. SAR 7732-33, 7749 (ESDC Response to Remand at 5-6, 22); AR 7036-38 (ESDC Response to Comments 7-9).[6] Petitioners do not even discuss ESDC's analysis, much less demonstrate that it was irrational.

4. A 10-Year Construction Schedule Is The Reasonable Worst Case Condition For Analyzing The Project's Environmental Impacts.

Petitioners argue that the use of 2019 as a Build Year in the 2009 Technical Memorandum was inconsistent with the reasonable worst-case development scenario ("RWCDS") methodology called for by New York City's CEQR Technical Manual. *See* PHNDC Mem. of Law at 9-10. In pressing this point, petitioners ignore that ESDC came to a

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[6] Petitioners also cite newspaper accounts of out-of-court statements by Bruce Ratner and Marisa Lago. This Court has already ruled that such news accounts are not admissible in this proceeding. *See* Short-Form Order dated November 8, 2010 (consideration of press accounts of out-of-court statements of Bruce Ratner not proper and the statements will not be considered). Nor do the purported statements at issue address the analytical basis for ESDC's scheduling assumptions as set forth in the administrative record.