

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. 116323/09

Assigned to
Justice Friedman

**VERIFIED
SUPPLEMENTAL
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 17 individuals and 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. The Verified Petition in this proceeding, dated November 18, 2009, was filed on November 19, 2009. The principal claim asserted in the Petition was and remains that in approving the MGPP, ESDC failed to comply with the requirements of the State Environmental Review Act ("SEQRA"), as more fully set forth in the Petition and as reasserted herein by reference.

3. This Supplemental Petition supplements and updates the Verified Petition. It adds to the SEQRA claim set forth in the Petition the further claim that ESDC failed to comply with this Court's Decision and Order of November 9, 2010 (the "November 9 Decision"), a copy of which is submitted as Exhibit A to the Supplemental Exhibit Binder. The Decision directed ESDC to reconsider its approval of the MGPP, and, in particular, its evaluation of environmental impacts, in light of the Master Development Agreement between ESDC and FCRC (a copy of which has previously been filed with the Court) and the potential that the Project would take more than 10 years to complete. The ESDC response to the Court remand was made in the form of findings adopted by its Board of Directors on December 16, 2010 (a copy of which is submitted as Exhibit B in the Supplemental Exhibit Binder), supported by a Technical Analysis and A Response to the Court's Order, copies of which are submitted as Exhibits C and D, respectively, in the Supplemental Exhibit Binder).

4. By their initial Petition and this Supplemental Petition, the Petitioners ask the Court to annul the September 17, 2009 approval of the MGPP and the findings of December 16, 2010; direct ESDC to reconsider whether a supplemental environmental impact statement is required; and stay and enjoin FCRC from proceeding further with some or all of the Project unless and until ESDC has granted a valid approval of the MGPP (or an amended MGPP) following compliance with SEQRA.

Facts/Supplemental Facts

5. The background facts underlying the initial Petition and the Petitioners' continuing SEQRA claims are set forth in paragraphs 2 through 8 and 50 through 63 of the Verified Petition, all of which are incorporated herein by reference.

6. Following submission of the Respondents' answering papers and the Petitioners' reply papers in this matter and oral argument held on January 19, 2010, this Court, by Decision, Order and Judgment dated March 10, 2010 (the "March 10 Decision"), dismissed the Petition.

7. On April 7, 2010, the Petitioners moved for Reargument and Renewal of the Petition, presenting at a primary basis for reconsideration the timetables for construction set forth in the Master Development Agreement between ESDC, FCRC and others (the "MDA"), which had been executed on December 23, 2010. Among other things, the MDA did not require that any part of Phase II of the Project be started for 15 years, included no specific start dates for all but one of the Phase II buildings; allowed 25 years (or more in the case of Unavoidable Delays or lack of Affordable Housing Subsidies) for completion of the Project; and included no substantial penalties for Phase II (and many Phase I) defaults. The Petitioners contended that the MDA

evidenced explicitly what had certainly been the case when the MGPP was approved – namely, that there was no likelihood the Project would be completed in 10 years, which had been the basis of analysis in the Technical Memorandum, and that the resulting adverse environmental impacts had not be identified or properly evaluated by ESDC at the time it approved the MGPP.

8. Following submission of the Respondents’ answering papers and the Petitioners’ reply papers on the motion and oral argument held on June 29, 2010, this Court, by the November 9 Decision, granted the Petitioners’ Motion to Reargue and Renew, concluding that the MDA’s “25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement giving FCRC until 2030 to complete acquisition of the air rights necessary to construct 6 of the 11 Phase II buildings, raise a substantial question as to whether ESDC’s continuing use of the 10 year build-out has a rational basis.” The Court therefore remanded the matter to ESDC with the following observations:

If ESDC concludes, in the face of the Development Agreement and the renegotiated MTA agreement, that a 10 year build-out continues to be reasonable, and that it need not examine environmental impacts of construction over a 25 year period on neighborhood character, air quality, noise, and traffic, among other issues, then it must expressly make such findings and provide a detailed, reasoned basis for the findings.

In sum, the court holds that ESDC did not provide a “reasoned elaboration” for its determination not to require an SEIS, based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project. The matter should accordingly be remanded to ESDC for additional findings on this issue.

9. By order to show cause signed on November 29, 2010, the Petitioners moved for a

Stay of further construction of the Project. Oral argument on the motion was scheduled for December 22, 2010, in advance of which the Respondents' served their papers in opposition, together with cross motions for leave to appeal the November 9 Decision, and the Petitioners filed reply papers.

10. On December 16, 2010, the ESDC Board met and adopted findings allegedly in response to the November 9 Decision (Exhibit B). In summary, the findings (the "December 16 Findings") concluded that (a) the MDA had no material effect on the reasonableness of using a 10-year construction schedule, (b) it appeared unlikely that the Project could be constructed on a 10-year schedule, and (c) an extension of the construction schedule, even up to 25 years, would not result in any new significant adverse environmental impacts, and thus such an extension did not "require or warrant the preparation of an SEIS."

11. The December 16 Findings were supported by two other documents – a Technical Analysis of an Extended Build-Out (the "Technical Analysis") included as Exhibit C in the Supplemental Exhibit Binder and ESDC's Response to Supreme Court's November 9 Decision (the "Response") included as Exhibit D in that Binder. The Findings, the Technical Analysis and the Response were provided to the Petitioners and submitted to the Court on December 17, 2010.

12. On December 22, 2010, the attorneys for the parties met in a conference with the Court, following which they entered into a stipulation governing further proceedings, a copy of which is submitted as Exhibit E to this Supplemental Petition. Pursuant to the stipulation, the Petitioners withdrew their Motion for a Stay without prejudice and were given until January 18, 2011 to file a Supplemental Petition challenging the December 16 Findings and pursuing their

claims that the MGPP was approved in violation of SEQRA. This Supplemental Petition is filed in accordance with that stipulation.

AS AND FOR A FIRST CAUSE OF ACTION

13. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 12 of this Supplemental Petition as if fully set forth herein.

14. ESDC was legally obligated to comply with SEQRA in approving the MGPP, which approval constituted an “action” that “may have a significant impact on the environment” within the meaning of the statute and the implementing regulations.

15. In determining not to prepare a supplemental environmental impact statement (“SEIS”) in connection with its approval of the MGPP, 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.

16. 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 until 2035, if not beyond.
- B. The failure to identify or consider the MTA Agreement and the MDA as clear evidence that the build-out would extend to 2035, if not beyond.
- C. The failure to identify or evaluate the adverse impacts on adjoining neighborhoods of 25 years of construction – far longer than assessed in the 2006 FEIS or

2009 Technical Memorandum.

- D. The failure to identify or evaluate the adverse impacts on adjoining neighborhoods of vacant lots that, due to the extended construction schedule, would be present for far longer periods than had been evaluated in the 2006 FEIS or the 2009 Technical Memorandum.
- 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 after three years, Arena parking would be underground; and consequences of the eight or more years of delay in providing the underground parking, which was presented as a major mitigating measure in buffering the noise and other negative impacts of surface parking. .

17. 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.

18. 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.

19. Petitioners have exhausted their administrative remedies and have no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

20. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 19 of this Supplemental Petition as if fully set forth herein.

21. In its November 9 Decision, the Court found that ESDC had not provided “a reasoned elaboration for its determination not to require an SEIS.” As such, ESDC did not comply with SEQRA when it approved the MGPP and that approval was ineffective and void.

22. Upon remand pursuant to the Court’s November 9 Decision, ESDC concluded that the Project cannot be completed within the 10-year construction period analyzed in the 2006 FEIS and the 2009 Technical Memorandum; and while it did not specifically indicate when it expected construction to be complete, the clear indication is that the Project will continue in construction until 2035.

23. In light of market conditions, the MTA Agreement and the MDA, it is apparent that at the time it approved the MGPP, ESDC recognized that construction of the Project would extend far beyond 10 years, and in all likelihood, for any many as 25 years; and if it did not recognize that to be the case, that was the result of self-willed ignorance and failing to make a reasonable effort to ascertain the realities.

24. Moreover, under SEQRA and its implementing regulations at the State and City level, ESDC was required to analyze environmental impacts in terms of a reasonable worst case; and where, as here, there was a reasonable likelihood that construction would last for more than 10 years and quite possibly for 25 years, that was the “reasonable worst case” that ESDC was required to, but failed to, analyze.

25. By reason of the foregoing, at the time it approved the MGPP, ESDC had not complied with SEQRA and the approval was therefore void. Moreover, that approval could not be corrected after-the-fact, but required (and requires) that the MGPP (or an amended MGPP) be

approved AFTER there has been compliance with SEQRA.

26. ESDC's assertion in its December 16 Findings that the MDA and the timetable it set out had no material effect on the reasonableness of using a 10-year construction schedule is arbitrary and irrational, if not dishonest.

27. ESDC's conclusion in its December 16 Findings that an extension of the construction schedule, even up to 25 years, would not result in any new significant adverse environmental impacts, and thus that such an extension did not "require or warrant the preparation of an SEIS," was arbitrary, capricious and an abuse of discretion, in that that conclusion, and the Technical Analysis upon which it was based, failed to identify or take a hard look at critical areas of negative environmental impacts, including but not limited to the following:

- A. The Findings and the Technical Analysis failed to identify, much less take a hard look at, the most fundamental environmental impact that would result from a 25-year build-out – namely, the long-term impact of such continuous construction on the health and viability of adjoining neighborhoods, such as occurred during the construction of the Cross-Bronx Expressway.
- B. The Technical Analysis dealt with neighborhood impacts on an isolated, localized basis, rather than evaluating the cumulative impacts of such an extended build-out on the broader area surrounding the Project site.
- C. The Technical Analysis was not based on a firm construction plan (in contrast to the 2006 FEIS) and thus could not and did not fairly or adequately present the

impacts of the elongated construction of the Project in the areas of traffic, noise, street blockages, staging sites, construction worker parking and other aspects of the construction process.

- D. The Technical Analysis failed to take a hard look at the impacts (including the visual, traffic and noise impacts) of using Block 1129 as an open parking lot for 12 to 15 years, when the analyses in the 2006 FEIS and 2009 Technical Memorandum only considered the use of the Block as a parking lot for 3 to 4 years. In addition, the Technical Analysis did not evaluate the visual, traffic and noise impacts that will result from adding “stackers” to the open parking facility – something that was identified for the first time in the Analysis and will impact particularly on residents living directly across the street. .
- E.. Neither the 2006 FEIS, nor the 2009 Technical Memorandum, nor the 2010 Technical Analysis identified or evaluated the impact of multiple daily events being held at the Arena, something that has only recently come to light with the booking of the Ringling Brothers Circus. The effects of up to three events per day being held at the Arena were not considered in terms of traffic, air quality, noise or any other areas of environmental concern.
- F. The elongation of the construction schedule has substantially changed, but left in flux, the plans for construction staging, making it likely, if not inevitable, that a significant amount of staging will have to be accommodated on public streets, rather than on the Project site, as had been the plan evaluated in the 2006 FEIS and the 2009 Technical Memorandum. The resulting impacts from lane and sidewalk

closures, including increased vehicle and pedestrian congestion, were not identified or evaluated in the Technical Analysis.

- G. Two interim parking lots on Block 1120 proposed under the original General Project Plan, with 652 spaces between them, have been eliminated due to the new phasing of acquisition. The resulting impacts have not been explained or studied.

28. 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.

29. 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.

30. By reason of the failures identified above and the arbitrary and capricious reasoning that it included in its Response to the Court, ESDC failed to comply with the Court's November 9 Decision.

Conclusion

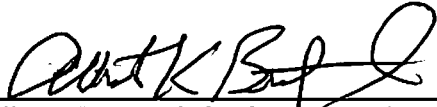
WHEREFORE, Petitioners demand judgment:

- 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. Annuling and vacating ESDC's December 16 Findings;
- D. Declaring the MGPP null and void;
- E. Enjoining ESDC from further pursuing the Project on the basis of the MGPP;

- F. Awarding petitioners their costs and disbursements in this proceeding; and
- G. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 14, 2011

URBAN ENVIRONMENTAL LAW CENTER
Attorneys for Petitioners

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VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

DANAE ORATOWSKI, being duly sworn, deposes and says:

1. I am the Chairman of the PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, one of the Petitioners in this proceeding and am authorized to make this verification on behalf of all the Petitioners herein, who are united in interest.

2. I have read the foregoing Supplemental Petition and, upon information and belief, I believe it to be true and accurate.

3. The basis of my information and belief is my personal knowledge, the record before the Empire State Development Corporation, the record before this Court, statements and releases made on behalf of the parties and materials in my files, the files of our organization and the files of our attorney.


Danae Oratowski

Sworn to before me this
14th day of January, 2011


Notary Public



VERIFICATION

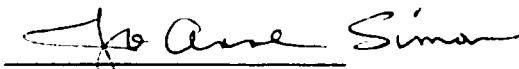
STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

HOWARD KOLINS, being duly sworn, deposes and says:

1. I am the President of the BOERUM HILL ASSOCIATION, INC., one of the Petitioners in this proceeding and am authorized to make this verification on behalf of the Association.
2. I have read the foregoing Supplemental Petition and, upon information and belief, I believe it to be true and accurate.
3. The basis of my information and belief is my personal knowledge, the record before the Empire State Development Corporation, the record before this Court, statements and releases made on behalf of the parties and materials in my files, the files of our organization and the files of our attorney.


Howard Kolins

Sworn to before me this
17th day of January, 2011


Notary Public

Jo Anne Simon
Notary Public, State of New York
No. 24-4389642
Qualified in Kings County
Commission Expires 12/16/2013