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

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DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,	:	Index No. 114631/09 IAS Part 57
	:	Justice Friedman
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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MEMORANDUM OF LAW OF RESPONDENT FOREST CITY RATNER COMPANIES, LLC IN OPPOSITION TO THE PETITION

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Preliminary Statement

Respondent Forest City Ratner Companies, LLC ("FCRC") respectfully submits this memorandum of law in opposition to the petition in this Article 78 proceeding. The petition seeks annulment of the September 17, 2009 resolution of respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), approving modifications to its December 6, 2006 General Project Plan for the Atlantic Yards Land Use Improvement and Civic Project (the "Project"). Two affiliates of FCRC are the Project sponsors designated by ESDC to build the Project.

The Project is an ambitious public-private undertaking to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn into a vibrant, revitalized community. The Project site includes the Vanderbilt Yard, which is owned by the Metropolitan Transportation Authority (the "MTA") and is used by its Long Island Railroad affiliate (the "LIRR") to store and clean cars for its commuter rail service. The Vanderbilt Yard occupies approximately 8.5 acres of the 22-acre Project site and for the most part is an open trench below the grade of the surrounding streets.

The Project is intended, among other things, to eliminate blight from the Project site, bring a multipurpose arena to Brooklyn, remediate environmental contamination, create up to 6,430 units of new housing, including 2,250 units of

affordable (*i.e.*, below-market-rate) housing, as well as Class A commercial office space, neighborhood retail and community facility space (including a health care center and, at the City's option, a public school), eight acres of publicly accessible open space, and possibly a hotel. The Project will reconfigure, upgrade and partially relocate the Vanderbilt Yard to meet current railroad standards, the LIRR's specifications and the LIRR's current and future needs. The Project also will include a new subway station entrance and other enhancements to the Atlantic Avenue/Pacific Street subway station complex of the MTA's New York City Transit affiliate.

The arena, to be known as the Barclays Center, will be the home of the New Jersey Nets N.B.A. basketball team and will bring a top-tier professional sports franchise to Brooklyn for the first time since the Brooklyn Dodgers baseball team left more than 50 years ago. In addition to serving as the home of the Nets, the arena will host amateur athletic events, circuses, graduations and other civic, community-sponsored and entertainment events.

The Project also will be a powerful engine of economic growth. Construction of the Project will be performed *exclusively* by union labor. ESDC estimates that construction will generate 16,427 new direct job years and 25,133 total job years (including direct, indirect and induced job years), resulting in $1.414 billion in total personal income (including direct, indirect and induced).

Construction employment is estimated to generate $57.6 million in City tax revenues and $94.1 million in State tax revenues on a net present value basis. Operations at the arena and other components of the Project will create 4,277 new jobs annually in New York State, including 3,998 new jobs annually in New York City. It also is predicted that the Project will generate $657.6 million in City tax revenues and $794.7 million in State tax revenues.

Just last month, the Court of Appeals reiterated an earlier admonition that "SEQRA litigation 'can generate interminable delay and interference with crucial governmental projects ....'" *Save the Pine Bush, Inc. v. Common Council of City of Albany*, __ N.Y.3d ___, 2009 WL 3425317 (No. 134, Oct. 27, 2009), quoting *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991).[1] The tactics of the lead petitioner in this case, Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), are a textbook example of the use of litigation to attack a worthy project that is intended to advance the public interest and generate substantial public benefits.

Here, ESDC's adoption of the original General Project Plan in 2006 precipitated a spate of litigations challenging the Project, almost all of them brought by DDDB or its principal spokesman, Daniel Goldstein. While the

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[1] "SEQRA" refers to the State Environmental Quality Review Act, codified as Environmental Conservation Law § 8-0101, *et seq.*

appellate process has not been concluded in two cases, to date every state and federal court that has considered the 2006 Project approvals has sustained them. The courts thus have determined that ESDC's use of eminent domain in furtherance of the Project does not violate the federal constitution (*Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S.Ct. 2964 (2008), *aff'g* 488 F.Supp.2d 254 (E.D.N.Y. 2007)), that ESDC's use of eminent domain and its financial contribution to infrastructure costs for the Project do not violate the state constitution (*Goldstein v. N.Y.S. Urban Dev. Corp.*, 64 A.D.3d 168 (2d Dep't 2009), *appeal pending* (heard Oct. 14, 2009)), that ESDC's General Project Plan makes appropriate arrangements for the relocation of the occupants of the approximately 145 residential units situated on the Project site (*Anderson v. N.Y.S. Urban Dev. Corp.*, 45 A.D.3d 583 (2d Dep't 2007), *lv. to app. denied*, 10 N.Y.3d 710 (2008)), and that ESDC and the MTA fulfilled their respective obligations under SEQRA and, in the case of ESDC, the UDC Act (*Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *lv. to app. denied*, ___ A.D.3d ___ (1st Dep't June 30, 2009), *motion for leave to appeal pending* (Motion No. 2009-903)).[2]

[2] The "UDC Act" refers to the Urban Development Corporation Act, codified at McKinney's Unconsolidated Laws § 6251, *et seq.*

The present proceeding is just one more in a long line of attempts by the Project's well-organized opponents to throttle the Project. Here, the petition seizes upon ESDC's recent approval of minor modifications to the 2006 General Project Plan (the "GPP") that refine the Project to address the delays that the multiple litigations have caused and the effects of the current economic downturn. The petition uses ESDC's approval of these modifications to launch three new attacks, claiming (1) that the Project no longer qualifies as a "land use improvement project" under the UDC Act, (2) that ESDC is violating its own modified GPP by improperly conditioning FCRC's obligation to build the affordable housing components of the Project upon the availability of public subsidies, and (3) that ESDC violated SEQRA by failing to prepare a Supplemental Environmental Impact Statement.

The present challenge, like the prior ones, is meritless. Petitioners cannot overcome the voluminous record that shows that the Project constitutes a concrete plan to eliminate blight and thus qualifies as a "land use improvement project" under the UDC Act. Furthermore, the record shows that use of government subsidies to finance the development of affordable housing in the Project has long been contemplated by both FCRC and ESDC, and is fully consistent with the modified GPP. Finally, petitioners have not provided any evidence to support their contention that adverse environmental impacts have been

overlooked. Instead, petitioners base their SEQRA claim exclusively on speculative assertions about the economics of the Project and about the developer's subjective intentions.

It is clear that this petition is merely a last-ditch effort to use still another contrived legal theory to delay the Project by litigation, in the hope that further delay at this crucial juncture will kill the Project by interfering with ESDC's and FCRC's efforts to close $650 million in critical tax-exempt financing for the Barclays Center arena and to commence construction of the arena itself (*see* FCRC Answer ¶¶ 213-14).[3]

Statement of the Case

The relevant facts are set forth in the affirmative statement of the case that appears in FCRC's answer (*see* ¶¶ 166-215) as well as in ESDC's answer and administrative record, to all of which the Court is respectfully referred.[4]

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[3] DDDB and several other petitioners commenced another Article 78 proceeding in this Court almost simultaneously with the present one. Entitled *Montgomery, et al. v. Metropolitan Transportation Authority, et ano.*, Index No. 114304/09, the other proceeding seeks annulment of a June 24, 2009 resolution of the MTA's Board of Directors approving modifications to the business terms approved by the MTA in 2006 for the MTA's conveyance to FCRC of the property and development rights for the MTA's Vanderbilt Yard rail facility.

[4] FCRC hereby incorporates by reference, and adopts as its own, the contentions of ESDC that petitioners' claims in this case are barred by *res judicata* and by the statute of limitation.

Argument

I.

AS MODIFIED IN 2009, THE PROJECT CONTINUES TO COMPLY WITH THE UDC ACT'S REQUIREMENT THAT IT CONSIST OF A PLAN TO ELIMINATE OR ALLEVIATE BLIGHT

The petition's first cause of action (¶¶ 84-126) asserts that ESDC's recent approval of modifications to the GPP violated the UDC Act because, supposedly, the Project no longer consists of a plan for the redevelopment of a blighted area, and therefore does not qualify as a "land use improvement project" under the UDC Act. The petition premises this absurd contention on the assertion that recently approved modifications to the MTA-FCRC business terms for FCRC's acquisition from the MTA of the rights to build over the Vanderbilt Yard – an essential element of the Project – supposedly "allow FCRC to escape from any obligation to complete the project," or "allow FCRC to complete the project far beyond 2030" (Pet'n ¶¶ 123-26), and therefore allow blighted conditions on the Project site to continue or even worsen indefinitely (Pet. Mem. at 17).[5]

There is no merit to this bogus claim. ESDC's determination that the Project is a "land use improvement project" that consists of a plan for the elimination of blight was completely rational and supported by the record, and is

[5] Citations to "Pet'n" refer to the petition in this case; citations to "Pet. Mem." refer to petitioners' memorandum of law; and citations to "AR" refer to the Administrative Record that is being submitted to the Court by ESDC.

entitled to judicial deference. In addition, petitioners' claim is based on a mischaracterization of the modified FCRC-MTA business terms, and a willful disregard of FCRC's enormous existing investment in the Project and its commitment to completing the Project in accordance with the timeframes of the modified GPP (the "MGPP").

The Project plainly constitutes a "land use improvement project" within the meaning of the UDC Act. The statute requires that, to undertake a land use improvement project, ESDC must make the following findings:

> (1) That the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality; (2) That the project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto; and (3) That the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole.

N.Y. Unconsol. Laws § 6260(c). Here, ESDC made these findings when it adopted the original GPP on December 8, 2006. The propriety of those findings was specifically sustained by the Appellate Division, First Department, in the face of a prior attack led by DDDB. *Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep't 2009), *motion for leave to appeal pending* (No. 2009-903).

In adopting the June 23, 2009 MGPP, ESDC again made the requisite findings, including a finding that the Project consists of a plan for the clearance, replanning, reconstruction and rehabilitation of a substandard or insanitary area, and ESDC supported this finding with a discursive elaboration of the basis for the finding (AR 4717-20). ESDC thus found that the Project will redevelop the currently blighted 22-acre Project site with an arena, 5,325 to 6,430 residential units, including at least 2,250 affordable housing units, commercial, retail and community facility space, eight acres of publicly accessible open space, and an upgraded Vanderbilt Yard; that the Project would remediate environmental contamination at the site; and that the Project would make substantial transit and infrastructure improvements (AR 4717-18).

Determinations based on findings of blight and its remediation are entitled to judicial deference and will not be disturbed by the courts unless shown to be without foundation. In a leading case, *Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400, 426 (1986), the Court of Appeals considered challenges to ESDC's plan to remove blight from Times Square. ESDC had adopted a general project plan that included (a) findings that the area was blighted, in that it was, or was in danger of becoming, a substandard or insanitary area and tended to impair or arrest the sound growth and development of the city, and (b) a plan to eradicate blight by acquiring property in the area through voluntary purchase agreements and eminent

domain and transferring those properties to private developers for redevelopment. In rejecting a challenge to ESDC's use of eminent domain for the project, the Court of Appeals concluded that ESDC's blight findings supported a determination that the project served a public purpose, explaining that "where an agency has found a public purpose ... the agency's finding is regarded as 'well-nigh conclusive', not a question of fact for de novo determination." 67 N.Y.2d at 425. *See also West 41st Street Realty LLC v. N.Y.S. Urban Dev. Corp.*, 298 A.D.2d 1 (1st Dep't), *app. dsmssd.*, 98 N.Y.2d 727 (2002), *cert. denied*, 537 U.S. 1191, 123 S.Ct. 1271 (2003) (confirming ESDC's plan to eradicate blight through the redevelopment of Times Square, and rejecting the petitioners' challenge, because ESDC's determination was supported by "substantial evidence").

In reviewing the Atlantic Yards project, the Appellate Division, First Department, already has held that ESDC's "findings within the scope of its legislative authorization are entitled to extraordinary judicial deference." *Develop Don't Destroy*, 59 A.D.3d at 322 (upholding ESDC's blight-related finding in support of its determination that the Project qualifies as a "land use improvement project"). *See also Anderson v. N.Y.S. Urban Dev. Corp.*, 45 A.D.3d 583 (2d Dep't 2007), *lv. to app. denied*, 10 N.Y.3d 710 (2008) (holding that there was a sufficient foundation in the record to support ESDC's finding that, as required by the UDC Act, there was a feasible plan for relocating residents who would be

displaced from the Project site). In *Develop Don't Destroy*, the First Department specifically stated that, when the agencies to which the initial blight determination has been committed "' ... have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts.'" *Id.* at 321-22, quoting *Kaskel v. Impellitteri*, 306 N.Y. 73, 78 (1953). *See also Fisher v. N.Y.S. Urban Dev. Corp.*, 287 A.D.2d 262 (1st Dep't 2001) (holding that "the record adequately sets forth the elements of an effective relocation plan" for persons who would be displaced by ESDC's project for expansion of the New York Stock Exchange).

Here, too, ESDC's determination that the Project consists of a plan to eliminate blight is amply supported by the record, and petitioners cannot show that it did not have a rational basis. Indeed, the prior judicial decisions sustaining ESDC's blight determination in support of the Project bar petitioners from now contending otherwise. *See, e.g., Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984) ("*res judicata* is founded upon the belief that 'it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination ... ,'" quoting *Fish v. Vanderlip*, 218 N.Y.29, 36-37 (1916)); *Buechel v. Bain*, 275 A.D.2d 65, 71 (1st

Dep't 2000) (same); *Sainval v. City of New York*, 57 A.D.3d 508, 509 (2d Dep't 2008) (same).

Petitioners seek to reopen their attack on ESDC's determination that the Project qualifies as a "land use improvement project" under the UDC Act by asserting that the recently revised MTA-FCRC business terms supposedly show that the Project actually will not be built until 2030 or later, and that existing blighted conditions on the Project site therefore will persist indefinitely. According to petitioners, "the structure of the deal assures that the final payment for the air rights over the Yards will not be made until June 2030," and until then "FCRC will not have title to permit construction of the last towers to even begin" (Pet'n ¶ 99), so that, supposedly, "the deal is structured" to allow FCRC to "decide to abandon the project at virtually any time" (Pet'n ¶ 100).

Petitioners' new contention is similar to claims by the petitioners in *West 41st Street Realty*, who asserted, among other things, that ESDC had "itself created any 'blight'" in Times Square by making "it impossible for the owners to reap the value of their land during the last 20 years." 298 A.D.2d at 3-4. The Appellate Division rejected this claim, holding that ESDC's determination that the Project would eliminate blight "must be affirmed if there exists 'substantial evidence' in the hearing record" to support the determination. *Id.* at 6.

Here, petitioners' assertions about the supposed implications of the revised MTA-FCRC business terms are simply misplaced and do not undermine the rationality of ESDC's conclusion that the Project consists of a plan to eliminate blight. More specifically, petitioners focus exclusively on particular terms that would allow FCRC to defer the acquisition of much of the development rights indefinitely, while paying the $80 million purchase price attributable to those rights in installments, with interest, under a payment schedule that extends to 2030. However, petitioners completely ignore the express understanding of FCRC and ESDC, clearly stated in the MGPP, that Phase I of the Project is expected to be completed in 2014 and that Phase II of the Project is expected to be completed in 2019 (AR 4687). The modified MTA-FCRC business terms alter the timing of FCRC's payments to the MTA and allow FCRC to acquire the Vanderbilt Yard development rights in stages, as each constituent component of the Project is built, rather than all at once. As it acquires those rights, FCRC must pay the purchase price allocable to the rights that it purchases, and those payments are credited to the $80 million in installment payments that otherwise would be due pursuant to the alternative payment schedule on which petitioners' fallacious argument is premised.

Therefore, the timetable for installment payments to the MTA is an alternative payment schedule if the Project stalls, not a schedule for

implementation of the Project. To the contrary, FCRC expects and intends to begin to purchase the separate Vanderbilt Yard development parcels from the MTA promptly upon its substantial completion of the new rail yard. Since the Project is anticipated to be completed by 2019, FCRC expects and intends to purchase all of the development parcels before 2019 (FCRC Answer ¶ 197) – and not wait until 2030 as allowed by its business terms with the MTA.[6]

The fallacy of petitioners' assertion that the deal structure indicates an intention to allow FCRC to abandon the Project is further demonstrated by FCRC's own conduct. FCRC has consistently demonstrated its commitment to the Project, and it intends to complete the Project in accordance with the schedule in the MGPP. FCRC already has invested $277 million in acquiring properties on the Project site from willing sellers and carrying those properties. It has spent an additional $83 million in the demolition of vacant buildings on the Project site, the relocation of publicly and privately owned utility infrastructure within the Project site (water, sewer, electricity, gas, telephone and cable transmission lines), and the construction of a the first phase of the new LIRR rail yard for the MTA, which will allow the existing rail yard to be dismantled and the arena to be built at that

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6 The fact that FCRC will lease the development parcels during construction on those parcels, with each lease terminating upon completion of the parcel's building (but in no event and later than 25 years after ESDC obtains vacant possession of the arena block), is similarly irrelevant, because contrary to petitioners' contention, it does not mean that FCRC will not develop those parcels until after 2035 (Pet'n ¶¶ 112-18).

location, and which ultimately will be part of the LIRR's permanent new rail yard. Furthermore, if FCRC were to fail to complete the permanent new rail yard or abandon the Project, it would lose not only its huge existing investment in the Project and the ability to realize a return on that investment, but FCRC also would lose an $86 million letter of credit and the valuable rights to develop over the rail yard. It also would be subject to claims for monetary damages by the MTA and its contractors. Therefore, FCRC has an enormous financial incentive to complete the Project expeditiously.

Petitioners' selective reliance on isolated aspects of the MTA-FCRC business terms does not controvert the ample evidence in the record that supports ESDC's determination that the Project represents a *bona fide* plan to eliminate blight from the 22-acre Project site. Given this evidence, the courts may not second-guess ESDC's determination or substitute their judgment for that of ESDC. Instead, the evidence in the record compels the conclusion that ESDC's determination should be sustained and petitioners' claim should be rejected.

II.

THE TERMS OF THE CONTEMPLATED ESDC-MTA DEVELOPMENT AGREEMENT ARE CONSISTENT WITH THE MGPP

The petition's second cause of action (¶¶ 128-33) claims that the terms of a development agreement that is being negotiated by ESDC and FCRC, an abstract of which was provided to ESDC's Board of Directors on September 17,

2009, is inconsistent with the MGPP, and that the ESDC Board's resolution authorizing ESDC to enter into the development agreement is therefore illegal. There is no merit to this claim either.

The abstract of the development agreement states that FCRC or an affiliate will be obligated to construct at least 2,250 "affordable housing units, subject to governmental authorities making available to [the FCRC affiliate] or its applicable successor or assign, after good faith review by the applicable administering agency, affordable housing subsidies consistent with then applicable programs rules and standards then generally available to developers of affordable housing units" (AR 7070). Petitioners claim that this provision is inconsistent with the MGPP, which, according to the petition, "provides *no conditions precedent to the requirement that the Project include affordable housing*" (Pet'n ¶ 132) (emphasis in original). The record demonstrates that petitioners' contention is wrong.

It is and always was contemplated that the affordable housing component of the Project would be built with the benefit of some form of government incentive program. The MGPP thus explicitly states that "[t]he affordable units are expected to be built as part of the Mayor's New Housing Marketplace Plan and are expected to be financed through tax-exempt bonds provided under existing and proposed City and State housing programs such as the

City's 50-30-20 program" (AR 4699). The same sentence appears in the original GPP that was adopted by ESDC in 2006 (AR 3647). The MGPP also states that "[a]ffordable housing is expected to be financed through tax-exempt bonds provided under existing and proposed City and State housing programs, such as the City's 50-30-20 program" (AR 4714). The same sentence also appears in the 2006 GPP (AR 3661).

The principle that FCRC will use affordable housing incentives to finance the affordable housing component of the Project is thus consistent with the express language of the MGPP. Furthermore, the terms of the development agreement are not only consistent with the MGPP, but they represent no change from what was contemplated in the December 2006 GPP. Petitioners' contrary assertion is pure fantasy.

It is reasonable, moreover, to expect a developer to construct affordable housing by taking advantage of existing affordable housing subsidy programs to finance the construction. The City and State maintain numerous affordable housing subsidy programs that provide incentives to developers to construct affordable housing to offset the lesser return from this housing. For example, as stated in the MGPP, the New York City Housing Development Corporation ("HDC") has a 50-30-20 program for new or rehabilitated rental developments of 100 units or more. This program provides tax-exempt financing

and low-cost second mortgages to developers of buildings containing 50% market-rate housing, 30% middle-income units and 20% low-income units (*i.e.*, units available to households whose income is below 50% of "Areawide Median Income" or "AMI").[7] *See* http://www.nychdc.com/pdf/developers/mixed-income.termsheet_april_2008.pdf. HDC also has an 80-20 program for new or rehabilitated rental developments containing 100 or more units. This program provides construction loans or permanent mortgages with proceeds of bonds sold by HDC and low-cost second mortgages for the development of buildings with 20% of their units affordable to families earning from 80% to 100% of AMI, with the remaining 80% of the units being market-rate housing. *See* http://www.nyc.gov/html/hpd/html/ apartment/ faqs-for-apt-seekers.shtml. Similarly, the New York City Department of Housing Preservation and Development administers a program that provides a partial tax exemption under § 421-a of the Real Property Tax Law for new construction of multiple dwelling units within designated areas of the City, where 20% of the units are built as affordable housing for households earning up to 60% of AMI, or where the

7 Contemporary usage generally differentiates between "low-income," "moderate-income" and "middle-income." The definitions are based on Areawide Median Income ("AMI") as determined annually by the United States Department of Housing and Urban Development ("HUD"), which is the standard reference. For 2009, the New York AMI as set by HUD is $61,600. *See* http://www.huduser.org/datasets/il/il2009/2009summary.odn?INPUTNAME=METRO35620MM5600*3606199999%2BNew+York+County&selection_type=county&stname=New+York&statefp=36&year=2009. "Low income" is defined as less than 80% of AMI (*see* 42 U.S.C. § 1437a(b)(2)). HDC defines "middle-income" as earning a maximum income equal to 175% of AMI.

developer purchases negotiable certificates from the developer of offsite affordable housing. *See* http://www.nyc.gov/ html/dof/html/property/ property _tax_reduc_421_a.shtml.

These are just a few examples of the numerous affordable housing subsidy programs that exist and would be available to FCRC when the construction of housing commences. The MGPP, like the GPP before it, plainly envisioned that FCRC would take advantage of one or more of these programs for the Project's affordable housing component.

III.

ESDC'S ADOPTION OF THE MGPP DID NOT REQUIRE PREPARATION OF A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

The petition's third cause of action (¶¶ 135-60) asserts that ESDC violated SEQRA by adopting modifications to the GPP without preparing a Supplemental Environmental Impact Statement. Like the petition's other claims, this one is completely devoid of merit.

Major projects almost inevitably are refined and modified over time. However, "[t]he mere fact that a project has changed does not necessarily give rise to the need for preparation of a supplemental EIS (SEIS)." *C/S 12th Avenue LLC v. City of New York*, 32 A.D.3d 1, 7 (1st Dep't 2006). The Court of Appeals has recognized that "[t]he EIS process necessarily ages data," and that "a requirement

of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives." *Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400, 425 (1986). Therefore, a supplemental EIS is required "only if environmentally significant modifications are made after the issuance of an EIS." *C/S 12th Avenue*, 32 A.D.3d at 7. Furthermore, the determination of "whether or not a modification is 'significant' is for the agency to decide after identifying the relevant areas of concern, again taking a 'hard look' at the potential impacts, and making a reasoned elaboration for the basis for its determination." *Id.* at 7. *See also* 6 NYCRR § 617.9(a)(7)(i) (the "lead agency *may* require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project") (emphasis added).

Judicial review of an agency's decision as to whether to prepare an SEIS is limited in scope and very deferential. In its most recent case reviewing an agency decision to *not* require a supplemental EIS, *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219 (2007), the Court of Appeals reiterated its classic formulation that "[j]udicial review of an agency determination under SEQRA is limited to 'whether the agency identified the relevant areas of

environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination' ...." *Id.* at 231-32, quoting *Jackson*, 67 N.Y.2d at 417. The Court then applied this standard to the issue before it:

> This standard of review applies to a lead agency's determination regarding the necessity for a SEIS. It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by evidence. The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. As we have repeatedly stated, "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" (*Akpan v. Koch*, 75 N.Y.2d 561, 570 [1990], quoting *Jackson*, 67 N.Y.2d at 416; *see also Matter of Merson v. McNally*, 90 N.Y.2d 742, 752 [1997]).

9 N.Y.3d at 232. *See also, e.g., Eadie v. Town Board of Town of North Greenbush*, 7 N.Y.3d 306, 319 (2006); *Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215, 222 (1st Dep't), *lv. to app. denied*, 5 N.Y.3d 715 (2005).

Here, ESDC considered the changes in the anticipated completion dates or "build year" for the Project from 2016 to 2019, as well as changes in the design of some Project buildings and the elimination of some Project elements resulting from refinement and further development of the Project's design. All of the design changes were within the scope of the Design Criteria that had been

approved by ESDC in 2006. None of the changes eliminated any major components of the Project.

ESDC prepared a Technical Memorandum that meticulously analyzed these timing and design modifications and concluded that the changes would not result in any significant adverse environmental impacts that had not previously been addressed in the FEIS. ESDC acted reasonably in adopting this conclusion and, on that basis, properly determined that no SEIS was required. ESDC thus satisfied its obligations under SEQRA.

Petitioners have not identified any changes to the Project, newly discovered information or a change in circumstances that has any bearing on matters of *environmental* concern. Petitioners have offered no evidence that the Technical Memorandum's analysis of any particular environmental issue was erroneous, and they have not identified any specific potential environmental impact that allegedly was overlooked. Instead, petitioners claim that ESDC's determination not to require a supplemental EIS should be overturned because petitioners maintain that the "build year" of 2019 that is a premise of the Technical Memorandum's environmental analysis is not realistic. This claim is based on petitioners' mischaracterization of the modified MTA-FCRC business terms, petitioners' disagreement with the conclusions of an expert report prepared for ESDC by KPMG and preference for the alternative analysis of their own

consultant, and petitioners' speculative assertions regarding the economy, its possible future effect on the Project, and FCRC's subjective intentions regarding the completion of the Project.

Essentially, petitioners' claim is that the environmental analysis in ESDC's Technical Memorandum is skewed because it is based, for the most part, on the assumption that the Project will be completed in 2019, representing a delay of only about three years from the anticipated completion dates that were used in 2006 for the FEIS's environmental analysis. According to petitioners, these new anticipated completion dates – typically referred to as "build years" in the parlance of SEQRA environmental analysis – are inconsistent with the revised MTA-FCRC business terms and their consultant's opinion as to what is feasible under extant and foreseeable economic conditions.

In SEQRA methodology, "a 'build year' ... is only a nonstatutory baseline used by ... agencies as a device to provide assumptions" on which environmental studies may be premised. *Committee to Preserve Brighton Beach and Manhattan Beach, Inc., v. Council of City of New York*, 214 A.D.2d 335, 337 (1st Dep't), *lv. to app. denied*, 87 N.Y.2d 802 (1995). In a prior case involving the Project, the Appellate Division sustained the build years used in the FEIS against an attack similar to the present one, explaining that, while "[i]t is, of course, possible that the lengths of the projected build-out periods ... were

underestimated," nevertheless "the ultimate accuracy of the estimates is neither within our competence to judge nor dispositive of the issue properly before us, which is simply whether the lead agency's selection of build dates based on its independent review of the ... data obtained from the project contractor may be deemed irrational or arbitrary and capricious ...." *Develop Don't Destroy*, 59 A.D.3d at 318. The Appellate Division concluded its discussion of build years by stating that, "[t]he build dates having been rationally selected, there can be no viable legal claim that the [environmental analysis] was vitiated simply by their use," because "reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized" in an environmental study. *Id.* at 318.

Petitioners' reliance on the revised MTA-FCRC business terms to attack the rationality of the Technical Memorandum's build year assumptions is misplaced. As discussed above, FCRC expects and intends to build the Project in accordance with the dates in the MGPP so as to vindicate its enormous existing investment in the Project. The fact that the revised MTA-FCRC business terms would allow FCRC to defer the acquisition of development parcels does not in any way alter FCRC's intention to build in accordance with the MGPP's schedule.

A contention similar to petitioners' claim at bar was rejected by the Appellate Division in *Wilder v. N.Y.S. Urban Dev. Corp.*, 154 A.D.2d 261 (1st Dep't 1989). There, opponents of the Times Square redevelopment project

asserted that a change that substituted "the phased acquisition and construction of building sites" for "simultaneous acquisition and construction" necessitated the preparation of a new EIS. The Appellate Division rejected this contention with an analysis that resonates forcefully in this case, where a plethora of litigations has failed on the merits but nonetheless has delayed the Project's implementation:

> As to the sequential acquisition of building sites and the likelihood of staggered construction as sites are acquired, it is reasonably clear that the simultaneous construction contemplated in the original plan (adopted Oct. 4, 1984) was rendered impractical by events which took place during the period that various legal challenges wound their way through the courts, culminating in the project's approval in *Matter of Jackson v. New York State Urban Dev. Corp.* (67 NY2d 400 [1986]). * * * ... [I]t would be most inappropriate to permit an unsuccessful challenge to a public benefit project to nevertheless thwart its completion by requiring the condemning authority to review the project de novo because of circumstances resulting from delay attendant on the litigation. Such a result renders a baseless challenge as effective as a meritorious one in defeating public development projects and cannot be tolerated.

154 A.D.2d at 262-63. The Appellate Division concluded its analysis with the admonition of the Court of Appeals in *Jackson* (67 N.Y.2d at 425) against "render[ing] the administrative process perpetual," which would "subvert its legitimate objectives." 154 A.D.2d at 263.

Here, moreover, ESDC did not blindly rely on FCRC's expectations as to when it would complete construction of the Project's components. To the contrary, it included in the Technical Memorandum an analysis of the potential

environmental impacts of further unanticipated delays of up to five years in the Project's completion resulting from adverse economic conditions, and it concluded that such additional delays would not have significant adverse environmental impacts that had not already been addressed in the FEIS.

In addition, ESDC's outside counsel at Skadden, Arps, Slate, Meagher & Flom LLP engaged KPMG LLP, a leading accounting and consulting firm, to review and report on the bases for FCRC's estimation that it could complete the Project by 2019 (*see* Pet'n Ex. G). The resulting KPMG report describes KPMG's model and the review that KPMG conducted for ESDC in connection with the preparation and adoption of the MGPP. KPMG reviewed projections of residential absorption in the Project and related estimates that had been supplied by FCRC; it considered background information and detailed market analyses for the market-rate residential, middle-income residential, affordable residential and condominium components of the Project; and it also reviewed other components of the Project, including gross retail sale prices and absorption rates (Pet'n Ex. G, at 2). Based on this information as well as KPMG's own assessment of the New York City housing market, housing demand and housing supply, and vacancy and absorption factors, KPMG concluded that FCRC's absorption estimates for the Project were within the range of market data and not unreasonable (*id.*, at 36-39).

Petitioners contend that the KPMG report "primarily" found that there would be a demand for the affordable housing elements of the Project (Pet. Mem. at 9). This characterization of the report is incorrect. In fact, with respect to affordable housing, the KPMG report observed that, "[g]iven the lack of affordable housing in New York City, and its waiting list, it is reasonable to assume that low income units at each building will be absorbed as soon as they are brought to the market" (Pet'n Ex. G, at p. 36). However, the report went on to state that, "[t]o really test the absorption levels of each building, one has to look at the absorption level of the market rate and middle income units" (*id.*). Therefore, the report focused on FCRC's absorption assumptions relating to all of the proposed condominium, cooperative and market-rate rental units in the Project (*id.*, at 37-39), and concluded that FCRC's estimates of future demand are reasonable.

Petitioners also assert that the KPMG report "did not do a realistic projection of the market's ability to absorb 4,000 units of market and luxury housing in an area that already has a surplus of such housing" (Pet. Mem. at 9). They base this contention on the opinions of their own consultant, Joshua Kahr, who questions assumptions in the KPMG report.[8] On that basis, petitioners dispute the position of ESDC and FCRC that the Project can be completed by 2019.

[8] For present purposes, FCRC accepts the assumption that Mr. Kahr is an expert, but it reserves the right to contend otherwise in any subsequent proceedings in this case or elsewhere.

However, the disagreement of petitioners' consultant with the conclusions of the KPMG report does not provide a basis for overturning ESDC's determination not to require a supplemental EIS. It was within ESDC's discretion to accept and rely upon the KPMG report over the opinions expressed by petitioners' consultant. It is well settled that, "in reviewing a determination made pursuant to SEQRA, 'it is not the role of the court to ... resolve disagreements among experts, or substitute its judgment for that of the agency.'" *Coalition Against Lincoln West, Inc.*, 21 A.D.3d at 222, quoting *Fisher v. Giuliani*, 280 A.D.2d 13, 19-20 (1st Dep't 2001).

To the extent, moreover, that petitioners' attack on the 2019 build year is based on economic theories about the Project's financial feasibility, the attack is completely misplaced. Petitioners thus speculate about FCRC's ability to finance the Project, asserting, for example, that "[p]rivate financing would not be available for the development of those [mixed use] buildings at the anticipated rate if the market rate units were not being absorbed" (Pet. Mem. at 9-10), that "the overly optimistic 2006 projections were materially affected by the current recession resulting in a significant drop in sales prices and rents which made it even more unlikely that the project could be built" by the dates in the MGPP (*id.* at 10), and that "capital will be much more available to the smaller projects as investors will be concerned about the heightened [financial] risks associated with Atlantic Yards" (*id.* at 12-13).

ESDC was not required to consider petitioners' speculative theories about the economy and their possible effect on the Project in determining whether or not a supplemental EIS was necessary. SEQRA requires consideration of the "effect which a proposed action is likely to have on the environment." ECL § 8-0109(2). SEQRA does not require analysis of speculative scenarios. *See Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 143 (1988) ("it is not arbitrary or capricious or a violation of existing law for the agency, when it takes its 'hard look' and makes its 'reasoned determination' under SEQRA, to ignore speculative environmental consequences"). *See also, e.g.*, *Neville v. Koch*, 79 N.Y.2d 416, 427 (1992) ("only environmental impacts that can *reasonably* be anticipated must be considered") (emphasis in original).

Given these basic principles, SEQRA does not require analysis of what might happen if a project is *not* implemented, or is implemented more slowly than anticipated. Petitioners' economic theories as to why the 2019 completion date supposedly is unrealistic are not relevant to the question of whether ESDC identified the relevant areas of *environmental* concern, took a "hard look" at them and made a reasoned elaboration of the basis for its determination. Courts have rejected attempts to require "what is, in effect, an economic impact analysis as a new overlay of the environmental impact analysis" based on a challenge to a

project sponsor's economic data and projections. *Nixbot Realty Associates v. N.Y.S. Urban Dev. Corp.*, 193 A.D.2d 381 (1st Dep't 1993). In *Nixbot*, the Appellate Division held that "[n]othing in" SEQRA "makes such data and projections proper subjects of consideration," and that "[t]he proper inquiry, rather, is whether relevant areas of environmental concern were targeted, the requisite hard look taken, and the adverse environmental impacts mitigated to the extent practicable." 193 A.D.2d at 381-82. *See also Coalition Against Lincoln West, Inc. v. City of New York*, 208 A.D.2d 472, 473 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 123 (1995) ("we reject petitioners' attempt to graft onto SEQRA an economic analysis, absent compelling evidence of a sham transaction or that financial sponsors are unwilling or unable to fulfill their obligations"); *Tudor City Ass'n, Inc. v. City of New York*, 225 A.D.2d 367, 368 (1st Dep't 1996) (the "financial feasibility of a project, particularly when public funding is involved, is not an appropriate subject of review in an environmental impact statement, absent a demonstration ... that that financial mechanism is a sham").

Here, petitioners cannot demonstrate that the anticipated completion dates for the Project are a "sham." Therefore, there is no merit to their attack on the Technical Memorandum and ESDC's determination that the modifications to the Project would not reasonably be anticipated to have significantly adverse environmental impacts that had not already been addressed in the FEIS.

Conclusion

For these reasons and those set forth in the ESDC's papers, the Court should deny the petition and dismiss this proceeding.

Dated: New York, NY
November 12, 2009

Respectfully submitted,

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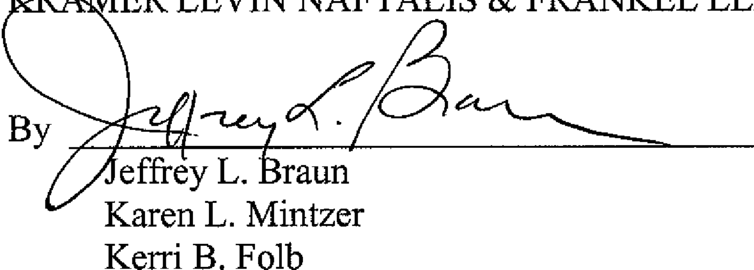

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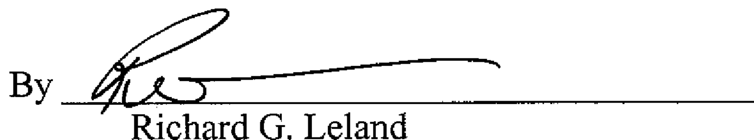

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