

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

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In the Matter of the Application of	:	
DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,	:	Index No. 114631/09
Petitioners,	:	IAS Part 57
	:	Justice Marcy S. Friedman
For a Judgment Pursuant to Article 78 of the CPLR	:	
– against –	:	
EMPIRE STATE DEVELOPMENT CORPORATION, et al.,	:	
Respondents.	:	

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In the Matter of the Application of	:	
PROSPECT HEIGHTS NEIGHBORHOOD	:	Index No. 116323/09
DEVELOPMENT COUNCIL, INC., et al.,	:	IAS Part 57
Petitioners,	:	Justice Marcy S. Friedman
	:	
For a Judgment Pursuant to Article 78 of the Civil Practice	:	
Law and Rules	:	
– against –	:	
EMPIRE STATE DEVELOPMENT CORPORATION, et al.,	:	
Respondents.	:	

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**MEMORANDUM OF LAW OF RESPONDENT  
EMPIRE STATE DEVELOPMENT CORPORATION  
IN OPPOSITION TO THE MOTIONS TO REARGUE AND TO RENEW**

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## PRELIMINARY STATEMENT

This memorandum is respectfully submitted on behalf of respondent Empire State Development Corporation (“ESDC”) in opposition to the motions to reargue and renew submitted by petitioners Develop Don’t Destroy (Brooklyn), Inc., et al. (the “DDDB Petitioners”) in Index No. 114631/2009 and Prospect Heights Neighborhood Development Council, Inc., et al. (the “Prospect Heights Petitioners”) in Index No. 116323/2009. This Court properly dismissed both Article 78 proceedings in its Decision and Order dated March 10, 2010 (the “Decision”) because ESDC did not abuse its discretion in determining that a Supplemental Environmental Impact Statement (“SEIS”) would not be prepared prior to its affirmation of the Modified General Project Plan on September 17, 2009 (the “2009 MGPP”). The motions before this Court are further manifestations of petitioners’ coordinated scorched-earth litigation strategy of filing multiple motions and litigations against the Atlantic Yards Project (the “Project”), and are utterly meritless. They rehash arguments that this Court rejected after careful consideration, and fail to demonstrate that this Court misunderstood the relevant legal principles or overlooked the relevant facts in its Decision. Nor do they demonstrate any basis for this Court to consider the Development Agreement executed on or about December 23, 2009 (the “Development Agreement”) and other Master Closing Documents petitioners reviewed and obtained in late January and early February 2010 and now proffer to this Court for the first time in their motion papers. Even if this Court were to consider the belated proffer of the Development Agreement, its terms are consistent in all respects with the documents that were before this Court at the time of the Decision and would not have warranted a different conclusion than the one reached in the Decision.

Petitioners rely upon the Development Agreement, which was not submitted to the Court before its Decision, for both their motions to reargue and their motions to renew. But

new documents that were not before the Court when it rendered its Decision are not an appropriate basis for a motion to reargue. *See* CPLR 2221(d)(2). Accordingly, petitioners' contentions with respect to the Development Agreement are addressed below in ESDC's opposition to their motions to renew. *See* Point II, *infra*.

## POINT I

### **THIS COURT'S DECISION CORRECTLY DISMISSED THE PETITIONS BECAUSE ESDC PROPERLY EXERCISED ITS DISCRETION NOT TO PREPARE AN SEIS FOR THE 2009 MGPP**

The Decision was correct, and its detailed review of the law and record was thorough and exacting. In arguing otherwise, petitioners ignore the record evidence that defeats their arguments. Petitioners' pretense that ESDC must "guarantee" or "prove" that the Project will be constructed in a 10-year period in order to satisfy its obligations under the State Environmental Quality Review Act ("SEQRA") is preposterous. Nothing in SEQRA or its implementing regulations requires a guaranteed construction schedule. Rather, SEQRA requires that an agency take a hard look at environmental impacts, which ESDC did here, principally in the Final Environmental Impact Statement prepared in 2006 (the "FEIS"). The caselaw is clear that an FEIS need not be supplemented simply because a project falls behind the schedule assumed in its impacts analysis. *See Jackson v. N.Y.S. Urb. Dev. Corp.*, 67 N.Y.2d 400, 425-26 (1986); *Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Council of the City of New York*, 214 A.D.2d 335, 337 (1<sup>st</sup> Dep't 1995); *Wilder v. N.Y.S. Urb. Dev. Corp.*, 154 A.D.2d 261, 262-63 (1<sup>st</sup> Dep't 1989); *Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d 312, 318 (1<sup>st</sup> Dep't), *leave to app. denied*, 13 N.Y.3d 713 (2009), *motion for reconsideration denied*, 14 N.Y.3d 748 (2010).

This Court correctly held that ESDC had a rational basis for analyzing the Project's construction-related impacts assuming a 10 year schedule, and petitioners' recycled

arguments with respect to outside dates in the various Project agreements do nothing to disturb the rationale of the Decision. Petitioners' motions for reargument should be denied.

**A. The Court Applied the Correct Legal Principles in Its Review of ESDC's Determination Not to Prepare an SEIS.**

The legal standards for a lead agency's determination whether to prepare an SEIS and for the judicial review of the agency's determination are well established and were correctly stated by the Court in its Decision. *See* Decision at 6. Petitioners make no argument to the contrary. Instead, they merely reiterate their contentions that ESDC should have prepared an SEIS for the Project. Yet, as with their initial litigation papers to this Court, petitioners have once again failed to cite a single case in which a court overturned a lead agency's decision not to prepare an SEIS under SEQRA. And, once again, petitioners fail to acknowledge that there is no mandate in the SEQRA regulations that an SEIS be prepared. The determination whether to prepare an SEIS is a matter left to the discretion of the lead agency. *See Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219, 231-32 (2007).

**B. The 2009 MGPP and 2006 MGPP Are Virtually Identical, and Their Impacts Were Thoroughly Reviewed in the FEIS.**

ESDC prepared a comprehensive FEIS prior to affirming its earlier Modified General Project Plan for the Project on December 8, 2006 (the "2006 MGPP"), and the multiple litigation challenges to the adequacy of that document have been rejected by the courts. *See Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d at 315-19; *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).

Moreover, ESDC took careful account of the relevant environmental concerns before determining that an SEIS would not be prepared in connection with the affirmation of the 2009 MGPP on September 17, 2009. ESDC prepared a thorough 74-page Technical

Memorandum, released the Technical Memorandum for public comment, considered the public comments received on the document, and prepared a detailed 36-page response to those comments reflecting a further evaluation of the relevant environmental issues.

The petitions and motion papers now before the Court ignore the indisputable fact that the 2009 MGPP and 2006 MGPP are virtually identical, as they both involve:

- the same project site (2006 MGPP at 2; 2006 MGPP at Exh. A-2; 2009 MGPP at 2; 2009 MGPP at Exh. A-2; AR 3633, 3677, 4685, 4732<sup>1</sup>);
- the same 17 buildings at the same locations (2006 MGPP at Exh. A-1; 2009 Site Plan; AR 3676, 7072);
- the same uses in these 17 buildings (*id.*; 2006 MGPP at 3-16; 2009 MGPP at 3-17; AR 3634-47, 4686-700);
- the same eight acres of publicly accessible open space (2006 MGPP at 16-17; 2009 MGPP at 17-18; AR 3647-48, 4700-01);
- compliance with the same set of comprehensive Design Guidelines for the 17 Project buildings and eight acres of open space (2006 MGPP at 6-7; 2006 MGPP at Exh. B; 2009 MGPP at 6-7; 2009 MGPP at Exh. B; AR 3637-38, 3678-786, 4689-90, 4733);
- a new LIRR yard with a new, direct portal to the Atlantic Terminal (2006 MGPP at 12-14; 2009 MGPP at 13-14; AR 3643-45, 4696-97);
- a new subway entrance at the southeast corner of Atlantic and Flatbush Avenues, on the Arena Block (2006 MGPP at 10-11, 35-37; 2009 MGPP at 10-12, 30, 37-38; AR 3641-42, 3666-68, 4693-95, 4718-20); and
- the same private developer (2006 MGPP at 1; 2009 MGPP at 1; AR 3632, 4684).

The principal change to the General Project Plan effected by the 2009 MGPP is that the project site properties will be acquired in phases, instead of being acquired in their entirety at one time. (2009 MGPP at 22; AR 4705.) Such a change in the phasing of property acquisition does not warrant preparation of an SEIS, as this Court and the Appellate Division

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<sup>1</sup> “AR” refers to the Administrative Record that was before the Court in these Article 78 proceedings.

held in rejecting a SEQRA challenge to a similar modification to ESDC's general project plan for the 42<sup>nd</sup> Street Land Use Improvement Project. *See Wilder v. N.Y.S. Urb. Dev. Corp.*, 154 A.D.2d 261 (1<sup>st</sup> Dep't 1989) (changes wrought by "the phased acquisition and construction of building sites rather than simultaneous acquisition and construction" are "minimal, and appellants' attempt to augment their significance is unconvincing").

**C. ESDC Took a Hard Look at the Construction Schedule for the Project.**

In their attempt to renew their challenge to ESDC's determination not to prepare an SEIS in connection with the 2009 MGPP, petitioners now allege only one error in ESDC's assessment of the relevant environmental issues: that ESDC purportedly failed to properly account for the potential that the 10-year construction schedule would be delayed. But ESDC did take a hard look at this issue and provided a reasoned basis for its decision-making, thereby discharging its obligation under SEQRA. *See Jackson v. N.Y.S. Urb. Dev. Corp.*, 67 N.Y.2d at 417.

In making their construction-schedule allegation, petitioners distort the role that the schedule played in the SEQRA review of the Project. Instead of one of the many assumptions to be factored into that review, petitioners portray the construction schedule as some sort of mandate to be enforced strictly in subsequent Project documentation. Petitioners thereby distort ESDC's obligations with respect to the schedule under SEQRA. Instead of ascertaining whether the timetable proposed provides a reasonable basis for an environmental analysis, petitioners would have ESDC be obligated to "guarantee" or "prove" that the Project will be completed "on time." As noted above (*supra* at 2), nothing in the SEQRA caselaw or regulations imposes such an obligation. Rather, ESDC had the responsibility to determine whether the proposed schedule was reasonable for purposes of conducting the requisite assessment of environmental impacts.

ESDC took a hard look at the proposed 10-year construction schedule from both a constructability and a financial perspective, and reasonably concluded that the schedule had a solid foundation. ESDC's construction consultant (AECOM/Earthtech) reviewed the new activity-specific construction schedule prepared by Turner Construction Company that set forth in detail how the Project would be completed by 2019. (AR 4658-65.) AECOM/Earthtech analyzed the new schedule and found it to be reasonable from a construction standpoint. (AR 4660.) Moreover, recognizing that financial constraints associated with the economic downturn could affect the progress of the Project, ESDC commissioned an additional study by KPMG, a highly experienced accounting and real estate consulting firm, to determine whether the market could absorb the residential units that would be constructed within a 10-year period. (AR 7075-122.) KPMG advised ESDC that it was not unreasonable to expect that the market could do so. (AR 7115-18.)

In assessing the effect of the economic downturn on the Project schedule, ESDC – in addition to relying upon the KPMG report – considered several fundamental facts about the New York City and Brooklyn real estate markets, as reflected in its Summary of Comments and Responses (the “ESDC Response to Comments”). ESDC considered the fact that Brooklyn’s population is expected to grow from 2.56 million in 2008 to 2.63 million in 2020 – an increase of approximately 70,000 people. (AR 7036, 101-03.) Accommodating this substantial population increase will require the construction of tens of thousands of new housing units. (AR 7037.) Unlike many other areas of the country, which suffer from an oversupply of vacant housing and high vacancy rates, in 2009 Brooklyn had the lowest housing vacancy of the five Boroughs at 2.3% – far below the national vacancy rate of 8.0%. (AR 7037.) A residential vacancy rate of 5% or less is considered a housing emergency under New York State’s rent stabilization law

(Unconsol. L. § 8623). (AR 7037.) Another indication of the general housing shortage in New York City noted by ESDC is the high cost of housing in the City. (AR 7037.) ESDC concluded that the severe shortage of housing in New York City – and Brooklyn in particular – implies a significant demand for housing. (AR 7037.)

ESDC also considered the fact that the Project includes 2,250 affordable units, which can be expected to be snapped up immediately, given the substantial waiting lists for affordable housing. (AR 7037, 7115.) The Project's remaining units – consisting of approximately 4,000 market-rate dwelling units – are a relatively small percentage of the approximately 900,000 housing units in Brooklyn. (AR 7037.) Moreover, more than 26,000 units were built in the Borough over the seven-year period from 2002 to 2008. (AR 7037.) Against this backdrop, it was hardly unreasonable for ESDC to conclude that the Brooklyn real estate market could absorb the Project's 4,000 market-rate housing units over the next 10 years. (AR 7037.)

Finally, ESDC also took into account the location of the project site. The Atlantic Yards Project is situated at a transit-accessible location. (AR 7037.) The subway station on the Arena Block directly connects to 10 subway lines providing access to almost any corner of the City, including major employment centers in downtown Brooklyn and Manhattan. (FEIS at 1-14; 2009 MGPP at 3; AR 108, 4686.) This location makes it ideal for intensive transit-oriented development that will capture the significant demand for new housing in Brooklyn discussed above. (FEIS at 1-3, 1-6 to 1-9; AR 96, 99-103.)

With these considerations in mind, ESDC concluded that it would be a mistake to assume that the recent downturn in the real estate market will materially affect the long-term trends that point to increased population and associated housing demand in Brooklyn, which the

