

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.

PART 57

Index Number : 114631/2009  
DEVELOP DON'T DESTROY  
VS.  
EMPIRE STATE DEVELOPMENT CORP  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. 114631/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

*Petition*  
in this motion to/for Article 78

PAPERS NUMBERED

1, pt 59  
23  
4-5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

*Memo of Law M1 - M4*

Upon the foregoing papers, it is ordered that this motion *Petition 15*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1403).

Dated: 3-10-10

  
MARCY S. FRIEDMAN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DEVELOP DON'T DESTROY (BROOKLYN),  
INC., et al.,

Index No.: 114631/09

*Petitioners,*

DECISION/ORDER

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules,

- against -

EMPIRE STATE DEVELOPMENT CORPORA-  
TION and FOREST CITY RATNER  
COMPANIES, LLC,

*Respondents.*

PROSPECT HEIGHTS NEIGHBORHOOD  
DEVELOPMENT COUNCIL, INC., et al.,

Index No.: 116323/09

*Petitioners,*

DECISION/ORDER

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules,

- against -

EMPIRE STATE DEVELOPMENT CORPORA-  
TION and FOREST CITY RATNER  
COMPANIES, LLC,

*Respondents.*

**UNFILED JUDGMENT**  
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and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
3010).

In these Article 78 proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc.

(DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenge the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of a modified general project plan (MGPP) for the Atlantic Yards Project in Brooklyn, which is to be constructed by respondent Forest City Ratner Companies (FCRC). The Atlantic Yards Project is a massive, publicly subsidized, mixed-use development project, extending eastward over 22 acres from the junction of Atlantic and Flatbush Avenues. The Project is to be built in two phases: Phase I will include an 18,000 seat sports arena that is intended to serve as the new home of the New Jersey Nets, a professional basketball team, and construction of a new rail yard on the site of a rail yard that is owned by the Metropolitan Transportation Authority (MTA). The Project also calls for 16 high rise buildings that will contain commercial space as well as between 5,325 and 6,430 residential units, of which 2,250 will be affordable to low, moderate, and middle income persons. Four to five of these buildings in the vicinity of the arena are proposed for Phase I, with the remainder to be constructed in Phase II.

ESDC approved the first plan for the Atlantic Yards Project on July 18, 2006 and first modified the plan on December 8, 2006. The Project has been the subject of extensive litigation. The court refers to prior opinions for a detailed discussion of the scope of the Project and of petitioners' challenges to the prior regulatory findings and approvals. (See e.g. Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312 [1st Dept 2009] [DDDB I], lv denied 13 NY3d 713, rearg denied 2010 WL 520599 [2010] [holding, among other things, that the Project qualified as a Land Use Improvement Project pursuant to the Urban Development Corporation Act, based on ESDC's findings of blight at the site, and rejecting petitioners' challenges to

ESDC's environmental review under the State Environmental Quality Review Act]; Matter of Goldstein v New York State Urban Dev. Corp., 13 NY3d 511 [2009], rearg denied 2010 NY Slip Op 63486 [2010] [upholding the use of the eminent domain power under the State Constitution for takings of private property to be used for the Project]; Goldstein v Pataki, 516 F3d 50 [2d Cir 2008], cert denied 128 S Ct 2964 [same under the U.S. Constitution].)

On June 23, 2009, ESDC adopted a Modified General Project Plan (Record at 4684 et seq.) which ESDC affirmed by resolution on September 17, 2009 (Record at 7236). In the present proceedings, petitioners challenge ESDC's September 17, 2009 resolution on two main grounds: First, they argue that ESDC violated the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 et seq.) by not preparing a Supplemental Environmental Impact Statement (SEIS) as a result of changes to the Project. Second, they argue that ESDC violated the New York Urban Development Corporation Act (UDCA) (L 1968, ch 174, § 1, as amended) (McKinney's Uncons Laws of NY § 6260[c]) by not assuring that a plan is in place to alleviate the blight that ESDC previously found to exist at the Project site.

Petitioners' challenge, in turn, rests on the MTA's renegotiation in June 2009 of its agreement with FCRC to sell FCRC the air rights to the rail yards that the MTA currently owns.<sup>1</sup> It is undisputed that these air rights are necessary to develop six of the eleven buildings that are to be constructed in Phase II. Under the agreement between the MTA and FCRC that was in effect at the time of ESDC's 2006 approval of the Project plan, FCRC was required to pay \$100 million to the MTA, at the inception of the Project, for the air rights and related real property

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<sup>1</sup> The 2009 MGPP abandons the design for the arena facade by prominent architect Frank Gehry, which was described in the FEIS, and replaces it with "a more traditional design." (Technical Memorandum at 4 [Record at 4749].) This design change is not the subject of challenge in the DDDB proceeding and is mentioned only in passing in the PHND proceeding.

interests necessary to construct the arena as well as six Phase II buildings to be located above the rail yard platform. Under the 2009 MGPP, FCRC will pay the sum of \$20 million for acquisition of the property interests necessary for the development of the arena block, will provide the MTA with an \$86 million letter of credit to secure the obligation to build the upgraded rail yard, and will pay the balance of the \$100 million on an installment schedule. (See Memo. of Marisa Lago to ESDC Board of Directors, dated June 23, 2009, at 4 [Record at 4678] [June 23, 2009 Memo.].) According to the MTA's summary of the renegotiated agreement, the remaining \$80 million, discounted to present value, will be paid in installments of \$2 million each in the years 2012 through 2015, and installments of \$11 million per year for 15 years beginning in 2016. MTA will convey the parcel necessary for construction of the arena at the closing for the \$20 million purchase price, while the air rights parcel will "be conveyed only after substantial completion of the new permanent rail yard and only upon payment in full of the price of a development parcel." (MTA Staff Summary, dated June 22, 2009, at 2-3 [Record at 4667-4668].) The air rights parcel consists of six development sites, and the installment payments for the air rights parcel are "allocated proportionally to each Development Parcel." (MTA Staff Summary, Attachment at 2 [Record at 4671].) A Development Parcel is "conveyable (to ESDC or FCR) only upon payment to MTA of the full Development Parcel Purchase Price." (Id.)

Based on the renegotiated MTA agreement, petitioners argue that FCRC does not have the financial incentive to complete the project in a timely manner, that it has until 2030 to complete acquisition of the air rights necessary for construction of six of the Phase II buildings, and that it could "abandon" the project completely. (See DDDDB Memo. of Law in Support at 14-

15 [DDDB Memo.].) Petitioners also claim that ESDC ignored the MTA agreement and its impact on the expected time frame for the project (*id.* at 10) and improperly used a 10 year build-out for the project, with a 2019 completion date. (*Id.* at 12-13.) Respondents deny that ESDC staff did not make the ESDC Board aware of the MTA agreement. (ESDC Memo. of Law in Opp. to DDDDB Pet. at 22.) They also counter that there is no inconsistency between the renegotiated MTA agreement and the 2009 MGPP, that the dates for FCRC's acquisition of the air rights necessary for construction are "outside dates," and that the Phase II buildings will be constructed on a parcel-by-parcel basis. (*Id.* at 18-20.) Respondents emphasize that a separate agreement between ESDC and FCRC will require FCRC to use "commercially reasonable efforts" to complete the entire Project by 2019. (*Id.* at 22.)

Petitioner DDDDB's argument that ESDC violated the UDCA by not assuring that a plan is in place to eliminate blight reduces, in effect, to the argument that the 2009 MGPP is not a "plan" because it lacks guarantees that the Project will be completed. Governing legal authority does not support this contention. (See generally *Neville v Koch*, 79 NY2d 416 [1992].) Authority is similarly lacking for petitioner PHND's claim that ESDC unlawfully delegated control to FCRC over the schedule for the Project. The court is also unpersuaded by petitioners' contention that the development agreement with FCRC illegally conditions the development of affordable housing on the availability of public subsidies. The remainder of this opinion accordingly addresses petitioners' SEQRA claim.

The standard for SEQRA review of an ESDC determination is well settled. The regulations which implement SEQRA provide: "The lead agency [here, ESDC] 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; or [b] newly discovered information; or [c] a change in circumstances related to the project.” (6 NYCRR 617.9[a][7][i][a]-[c].) A lead agency’s determination whether to require an SEIS is “discretionary.” (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231 [2007].) The court’s review is limited to whether the lead agency “took the requisite hard look at project and regulatory changes that arose after the filing of a SEQRA findings statement, and made a reasoned elaboration that [an SEIS] was not necessary to address those changes.” (Id. at 228-229, 231-232, citing Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986].) As the Court of Appeals has emphasized: The courts may not “second-guess” agency decision making. “[A]ccordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency [in this case, ESDC] . . . 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. . . . While 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.” (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].)

Applying this limited or deferential standard of review, the court must deny petitioners’ challenge to ESDC’s determination not to require an SEIS. Contrary to petitioners’ contention, ESDC did not ignore the renegotiated MTA agreement. There is no question that ESDC knew that the MTA agreement extended FCRC’s time to acquire the air rights needed for development of the six Phase II sites. Each agency was aware of the other’s proceedings. It appears that the

MTA's own approval of its agreement with FCRC was conditioned on ESDC's approval of the 2009 MGPP. (See MTA Staff Summary, Recommendation at 3 [Record at 4668].) ESDC staff noted the existence of the MTA agreement in the memoranda that were submitted to the ESDC Board prior to its June 23, 2009 adoption of the MGPP and its September 17, 2009 resolution affirming the MGPP and determining that an SEIS was not "warranted" in connection with the modified plan. The June 23, 2009 Memorandum categorized the "MTA Site Acquisition" as a "major change" to the 2006 plan. It noted that the air rights for the development of the non-arena stages of the Project would be acquired by FCRC on an installment schedule and that "[t]he conveyance of MTA air rights is essential for the development of the [railway] platform and improvements thereon." (June 23, 2009 Memo. at 3-4 [Record at 4677-4678].) The September 17, 2009 Memorandum included, among its description of the changes to the 2006 plan, "a phased acquisition of the MTA air rights necessary to complete development of the Project site." (Memo. of Dennis Mullen to ESDC Board of Directors at 2 [Record at 7022].)

In connection with its initial review and approval of the MGPP in June 2009, ESDC worked with consultants to prepare a Technical Memorandum, dated June 2009 (Record at 4744 et seq.), which was used to determine whether an SEIS was necessary. As set forth in both the June 23, 2009 Memorandum and the Technical Memorandum, the purpose of the Technical Memorandum was to assess whether the proposed modifications to the 2006 plan, design development, changes to the Project schedule, changes in background conditions and analysis methodologies since the FEIS [Final Environmental Impact Statement], and the potential for delay due to prolonged adverse economic conditions would result in "any new or substantially different significant adverse impacts than those addressed in the FEIS" that was prepared in



connection with ESDC's approval of the 2006 plan. (See June 23, 2009 Memo. at 6 [Record at 4680]; Technical Memorandum at 9 [Record at 4759].) The Technical Memorandum discussed each of these changes, and concluded that the changes "would not, considered either individually or together, result in any significant adverse environmental impacts not previously addressed in the FEIS." (Technical Memorandum at 55 [Record at 4808].)

The Technical Memorandum and the ESDC staff memoranda recommending approval of the 2009 MGPP without an SEIS, assumed a 10 year build-out for the Project with an expected completion date of 2019. The FEIS had also used a 10 year build-out, with an expected completion date of 2016. In extending the FEIS build-out for three years from 2016 to 2019, the Technical Memorandum stated: "The anticipated year of completion for Phase I of the project has been extended from 2010 to 2014 due to delays in the commencement of construction on the arena block. The anticipated date of the full build-out of the project -- Phase II -- has been extended from 2016 to 2019 for the same reason." (Technical Memorandum at 5-6 [Record at 4752, 4755].) The Technical Memorandum also undertook an analysis of the potential for a delayed build-out based on "prolonged adverse economic conditions," and recognized that such conditions could cause delays of some of the buildings on the arena block and on Phase II sites. It concluded that the delay would not result in significant adverse environmental impacts that had not previously been considered in the FEIS. (Technical Memorandum at 55, 63 [Record at 4808, 4816].) The Technical Memorandum analyzed environmental impacts on traffic and parking as well as transit and pedestrian conditions over an additional five year period until 2024. While it did not provide a specific number of years for its analysis of other environmental impacts, including delays in the development of open space and extensions of time during which above

ground parking lots would remain in existence, it anticipated that the Phase II buildings would be constructed on a parcel-by-parcel basis and that, as each of the buildings was completed, these impacts would be lessened or eliminated. (See id. at 58, 62 [Record at 4811, 4815].)

ESDC's staff's September 17, 2009 Memorandum concluded that the Project remained "viable" and that the Project schedule was "achievable based on existing and projected economic conditions" and on the report of KPMG, a real estate consulting firm that ESDC retained to perform an analysis of whether, taking into account the severe recession, the market can absorb the residential units called for by the Project over the 10 year period. (See Sept. 17, 2009 Memo. at 5 [Record at 7025].) KPMG concluded that FCRC's residential absorption rate estimates were supported by current market data for condominiums and were "not unreasonable" for market rate rental units, and that, given the need for low income housing in New York City, low income units would be absorbed as soon as they were brought onto the market. (KPMG Analysis, dated Aug. 31, 2009, at 38, 36 [Record at 7117, 7115].)

As petitioners acknowledge, public comments were made about the potential delays that the MTA agreement would cause and the 2030 date for FCRC to complete the acquisition of all of the air rights necessary to complete the construction of the Phase II buildings. (See Summary of Comments and Responses, dated Sept. 2009, esp. Comments 10, 13, 14, 16, 24-31 [Record at 7030 et seq.]. See Testimony of Daniel Goldstein at Sept. 17, 2009 ESDC Board Meeting [Record at 7179-7180].) In responding to the public's questions about the feasibility of completing the Project by 2019, ESDC's staff stated that the assumption of the 10 year schedule in the Technical Memorandum was reasonable because 1) FCRC has made a substantial 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 by the Project. (Comment 10 [Record at 7036].) ESDC's staff also noted that "[t]he Project documentation will obligate the developer to complete the entire Project in accordance with the MGPP." (Comment 26 [Record at 7043].) This reference was to a provision in the 2009 MGPP which states that "[t]he Project documentation to be negotiated between ESDC and the Project Sponsor [FCRC] will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule [for Phase I construction] and to complete the entire Project by 2019. The failure to commence construction of each building would result in, inter alia, monetary penalties being imposed on the Project Sponsors." (2009 MGPP [Record at 4692-4693].) In addition, ESDC's staff summarized a number of public comments about the environmental impacts that would occur – e.g., on open space, air quality, and traffic – as a result of prolonged delays in completing the Project, and noted requests from the public that an SEIS be prepared to study such impacts. ESDC's staff responded that it "anticipated that the full build-out of the Project would be completed by 2019." (Comment 29 [Record at 7044]. See e.g. Comments 30, 37, 39 [Record at 7044, 7047-7048].) The response also noted that the Technical Memorandum had considered the potential for delay of the build-out due to prolonged adverse economic conditions. (See e.g. Comments 25, 27 [Record at 7042-7043].)

The ESDC Board's September 17, 2009 Resolution did not contain any independent analysis of the MGPP, and stated that the Board had "considered the Technical Memorandum, the comments received during the public comment period for the Modified General Project Plan and the view of the Corporation's staff that the preparation of a Supplemental Environmental

Impact Statement would not provide information useful to the determination whether to affirm the Modified General Project Plan.” (Resolution [Record at 7236].)

Petitioners’ challenge in these proceedings focuses on the ESDC’s continuing use of the assumption of a 10 year build-out, or 2019 completion date for the Project, in the face of the MTA agreement under which FCRC is not required to acquire all of the air rights needed to complete the construction of six of the Phase II buildings until 2030. ESDC contends that it has a rational basis for its use of the 10 year build-out and its consequent finding that adverse environmental impacts were adequately addressed in the FEIS that had also used a 10 year build-out. ESDC grounds the rationality of its determination in the opinion of its consultant that the market can absorb the planned units over a 10 year build-out; its intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC’s financial incentive to do so – all factors that were articulated and relied on by ESDC in the documents discussed above. (See ESDC Memo. of Law in Opp. to DDDB Pet. at 22-27.)

Under the limited standard for SEQRA review, the court is constrained to hold that ESDC’s elaboration of its reasons for using the 10 year build-out and for not requiring an SEIS was not irrational as a matter of law. ESDC’s continuing use of the 10 year build-out was supported – albeit, in this court’s opinion, only minimally – by the factors articulated by ESDC. ESDC did not, for reasons that are unexplained to this date, expressly state, in the documentation prepared in connection with its review of the 2009 plan, that the MTA agreement permitted FCRC to defer acquisition until 2030 of air rights necessary to complete construction of various buildings called for in Phase II of the Project. Contrary to petitioners’ contention, however, the documentation of ESDC’s review unquestionably demonstrates, as found above, that ESDC

categorized the MTA agreement as a “major change” to the Project (June 23, 2009 Memo. at 3-4 [Record at 4677-4678]), and was aware of the MTA installment through 2030. ESDC determined, however, to continue to use the 10 year build-out, based on its intent to require FCRC to commit to use commercially reasonable efforts to build-out the Project within 10 years, and based on its real estate consultant’s opinion that, notwithstanding the economic downturn, the market could reasonably be expected to absorb the units over the 10 year period. In analyzing the environmental impacts of the delayed Project, ESDC also assumed that Phase II buildings would be constructed on a parcel-by-parcel basis, with attendant mitigating effects on the environmental impacts.

ESDC’s assumptions were consistent with the MTA agreement. In approving the agreement, the MTA noted that changes in the acquisition of the air rights were made due to the tightening of financial and credit markets, and “[i]n recognition of the impact that the financial and real estate downturn has had upon the economics of the original FCR proposal.” (MTA Staff Summary at 2 [Record 4667].) Although the MTA agreement permits FCRC to acquire the development rights for construction of the arena up front, and to defer until 2030 acquisition of air rights necessary to complete construction of certain Phase II buildings, the MTA agreement also permits FCRC to acquire the necessary air rights for these Phase II buildings on a parcel-by-parcel basis. (See MTA Staff Summary Attachment at 2 [Record at 4671].) Thus, the MTA agreement is not inconsistent with the development scenario posited by ESDC in which the Project would proceed incrementally within the 10 year period rather than stall until all of the air rights were acquired in 2030.

Significantly, petitioners do not make any showing, or indeed, even claim that it is not

financially feasible for FCRC to acquire the Phase II parcels on an incremental basis. Petitioners also do not submit any financial analysis to show that ESDC lacked a rational basis for its finding that FCRC has the financial incentive, based on the investment it has made in the Project to date, to acquire the Phase II sites on a parcel-by-parcel basis. Under these circumstances, petitioners do not demonstrate that ESDC lacked a rational basis for its intent to require FCRC to make a separate commitment, notwithstanding the MTA agreement, to use commercially reasonable efforts to complete the Project within 10 years.<sup>2</sup>

SEQRA review of the financial feasibility of a Project may be appropriate where there is a showing that the financial feasibility is a “sham.” (See Matter of Tudor City Assn., Inc. v City of New York, 225 AD2d 367 [1<sup>st</sup> Dept 1996]; Matter of Nixbot Realty Assocs. v New York State Urban Dev. Corp., 193 AD2d 381 [1<sup>st</sup> Dept 1993], lv denied 82 NY2d 659.) Here, petitioners stop far short of leveling the serious charge that FCRC’s financial ability to construct the Project is a sham. At most, petitioners submit a report from their real estate consultant, Joshua Kahr, opining generally that the Project is not financially feasible within the 10 year period. However, petitioners’ expert’s opinion is highly qualified and does not question the feasibility of FCRC’s acquisition of the air rights for the Phase II buildings on a parcel-by-parcel basis.<sup>3</sup> In any event,

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<sup>2</sup> Documentation of this commitment was not in existence at the time of ESDC’s June 23, 2009 approval of, and September 17, 2009 resolution affirming, the 2009 MGPP. To the extent that petitioners now claim that the documentation that was subsequently negotiated does not provide adequate guarantees that the Project will be built within the 10 year period, that issue is not before this court. Under long settled authority, a court reviewing an agency’s determination is confined to the facts and record adduced before the agency. (See generally Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000].)

<sup>3</sup> The Kahr report summarizes its conclusion as follows: “Based on our analysis, we do not feel that the project is financially feasible within a ten year development period. We feel that it is much more likely that the development will take 20 or more years to complete.” The report summarizes the bases for this conclusion as follows:

“– The current state of the capital markets will make it extremely difficult to obtain financing for a project of this size within the next 36 months.

in a SEQRA review, it is not the province of the court to resolve disagreements between petitioners' and ESDC's experts. (See Matter of Fisher v Giuliani, 280 AD2d 13, 19-20 [1<sup>st</sup> Dept 2001].)

ESDC's use of the 10 year build-out meets the minimal threshold for rationality of a build year articulated in DDDB I. In DDDB I, petitioner argued that the 10 year build-out in the FEIS and the 2006 plan was intentionally underestimated and skewed the FEIS' findings as to the environmental impacts of the Project. The Appellate Division of this Department explained the standard for judicial review of the rationality of the build year as follows: "[T]he ultimate accuracy of the estimates [of the build-out periods] 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 extensive construction scheduling data obtained from the project contractor may be deemed irrational or arbitrary and capricious. . . . The build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use." (DDDB I, 59 AD3d at 318.) In reviewing the 2009 MGPP, ESDC did not take the position, nor could it have reasonably done so given the changes to the

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- The projected residential market rate rental and condominium prices that the developer relied on when they originally underwrote the deal are substantially above the current market. . .
  - The demand for housing units is most likely not sufficient to support a project of this scale over the next ten years.
  - The developer recently restructured its original agreement with the MTA to enable it to exit the purchase of the Phase II properties for a minimal or no breakup fee depending on timing. Based on the timing of the payments, we believe that the developer is concerned about its ability to complete the project within the stated 10 year frame."

(Kahr Report, dated Aug. 31, 2009 [Ex. D to Baker Aff. In Support of DDDB Pet.].)

As this summary shows, although the report cites the difficulty in obtaining financing as a basis for the conclusion that the 10 year build-out is not financially feasible, the report projects such difficulty only over a 36 month period. The report also cites the MTA agreement as evidence of FCRC's concern about its ability to complete the project within the 10 years, but does not engage in any analysis of the FCRC's ability to acquire Phase II air rights on an incremental basis.

2006 plan, that it was required only to look at construction scheduling data to determine the continuing feasibility of the 10 year build-out. Rather, it looked at additional factors including, as discussed above, the report of its real estate expert and its expectation that the buildings would be completed on a parcel-by-parcel basis. For the reasons also discussed above, these bases for ESDC's use of the 10 year build-out may not be deemed irrational under the governing legal standard.

In conducting a SEQRA review, a court is precluded from making substantive judgments on the evidence or "evaluat[ing] de novo the data presented to the agency." (Akpan v Koch, 75 NY2d 561, 571 1990.) This court may not make any independent findings of fact or any independent determination on the impact of the changes in the plan for the Project and therefore may not, and does not, make its own evaluation of the effect of the MTA agreement on the build-out of the Project, the likelihood of the potential for delay as a result of the agreement, or the need for an SEIS; its role is restricted to determining whether ESDC had a rational basis for its determination.

While the court cannot find that ESDC lacked any rational basis for its use of the 10 year build-out for the Project, the court cannot ignore the deplorable lack of transparency that characterized ESDC's review of the 2009 MGPP. Although the MTA agreement was identified as a major change in ESDC's staff's June 23, 2009 and September 17, 2009 memoranda, these memoranda did not contain any explicit discussion of the impact of the installment schedule on the build-out of the Project. Neither ESDC's Technical Memorandum nor its Summary and Responses to the public comments mentioned the MTA agreement by name. The MTA agreement was the elephant in the room. Although ESDC articulated reasons for its continued use of



the 10 year build-out that are marginally sufficient to survive judicial scrutiny under the limited SEQRA standard of review, ESDC's consideration of the modification of the plan lacked the candor that the public was entitled to expect, particularly in light of the scale of the Project and its impact on the community.

This court is not the first to criticize the process by which ESDC has made environmental findings for the Atlantic Yards Project. In DDDB I, Justice Catterson concurred with the majority, based on his finding that ESDC had sufficient evidence of blight, but only "by the barest minimum," to satisfy the limited review standard. (59 AD3d 333.) However, he sharply criticized the "less than admirable sleight of hand" with which ESDC's blight study had been prepared (id. at 331), as well as ESDC's rush through the review process (id. at 327-328), and concluded by "deplor[ing] the destruction of the neighborhood in this fashion." (Id. at 333.) The Court of Appeals upheld the use of the power of eminent domain to take property for the Project, but observed that "[i]t is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight." While reiterating that the remedy must come from the legislature, the Court noted that "[i]t may be that the bar has now been set too low -- that what will now pass as 'blight' . . . should not be permitted to constitute a predicate for the invasion of property rights." (Goldstein, 13 NY3d at 526.)

Here, too, it is quite possible, as petitioners have done, to dispute ESDC's assumption of a 10 year build-out for the Project, to disapprove its failure to address more directly the impact of the MTA agreement on the completion of the Project, and to disagree strongly with ESDC's decision, as a quasi-public agency, to permit construction to proceed on the arena without greater certainty that the surrounding Brooklyn neighborhoods will not be subjected to the

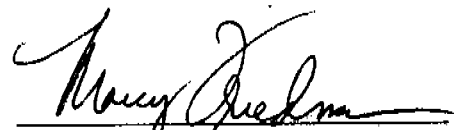
deleterious, if not blighting, effects of significantly prolonged construction. As of the date petitioners filed this current environmental challenge, however, the Project was already well underway: The Appellate Division of this Department had affirmed ESDC's 2006 approval of the Project plan, and the Court of Appeals has recently declined to review the case. During this litigation, ESDC has expended or approved disbursements of \$75 million of the \$100 million State-appropriated monies for the Project, and has received \$85 million of \$100 million that the City has committed to the Project. (Sept. 17, 2009 Memo. at 4 [Record at 7024].) FCRC has expended over \$350 million in acquiring properties for the Project and in demolishing over 30 vacant buildings on the site. FCRC has also already performed extensive work on the infrastructure of the Project (e.g., relocation of sewers and utilities) and on construction of a temporary rail yard. At this late juncture, petitioners' redress is a matter for the political will, and not for this court which is constrained, under the limited standard for SEQRA review, to reject petitioners' challenge.

It is accordingly hereby ORDERED that the petitions of Develop Don't Destroy (Brooklyn), Inc. and of Prospect Heights Neighborhood Development Council, Inc. are denied; and it is further

ORDERED that petitioner Develop Don't Destroy (Brooklyn), Inc.'s motion for a preliminary injunction is denied.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York  
March 10, 2010

  
MARCY S. FRIEDMAN, J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 147B).**