

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

**MEMORANDUM OF LAW OF RESPONDENT FOREST CITY
RATNER COMPANIES, LLC IN OPPOSITION TO
PETITIONERS' MOTIONS FOR LEAVE TO REARGUE AND RENEW**

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Preliminary Statement

Respondent Forest City Ratner Companies, LLC (“FCRC”) respectfully submits this memorandum in opposition to the motions by petitioners for leave to reargue and renew their petitions and for reconsideration of this Court’s March 10, 2010 decision (the “Decision”) denying the petitions.

In *Prospect Heights*, petitioners’ motion is limited to the petition’s first cause of action, which claimed that respondent Empire State Development Corporation (“ESDC”) violated the State Environmental Quality Review Act (Environmental Conservation Law § 8-0101, *et seq.*) (“SEQRA”) by deciding not to prepare a supplemental environmental impact statement (“EIS”) in connection with its adoption of a modified general project plan (the “MGPP”) for the Atlantic Yards project on September 17, 2009 (*see* Butzel Aff. at ¶ 2). In *Develop Don’t Destroy (Brooklyn)* (“DDDB”), petitioners’ motion is addressed to both of their claims – *i.e.*, that ESDC allegedly did not fulfill its obligations under SEQRA, and that the MGPP allegedly does not constitute a “plan” for the alleviation of blight under the UDC Act.

In the Decision, this Court denied all of these claims, concluding that ESDC’s determination not to require a supplemental EIS was not irrational or arbitrary and capricious, and that the MGPP is a “plan” that satisfies the requirements of the UDC Act.

The Decision is correct. Petitioners point to no matter of fact or law that was overlooked or misapprehended by the Court when it denied petitioners' claims. Nor have petitioners presented new facts that warrant changing the Decision, because the Development Agreement entered into by ESDC and the FCRC affiliates that are responsible for building the Atlantic Yards project is completely consistent with the Decision. Therefore, their motions should be denied.

Argument

I.

REARGUMENT SHOULD BE DENIED

CPLR 2221(d) provides that motions for leave to reargue must be based upon "matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion." A motion to reargue cannot include "any matters of fact not offered on the prior motion." CPLR 2221(d)(2). It is within the "sound discretion of the court" to grant leave to reargue, which may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992). Reargument is not "designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally

asserted.” *Id.* (internal citation omitted). *See also Schneider v. Solowey*, 141 A.D.2d 813 (2d Dep’t 1988).

No material fact and no applicable legal principle was overlooked or misapprehended when the Court rendered the Decision.

The *Prospect Heights* petitioners assert that the Court “accorded an excessive amount of discretion to ESDC” when it sustained as reasonable ESDC’s use of 2019 as the build year in its analysis of whether a supplemental EIS would be appropriate (Butzel Aff. ¶ 6). These petitioners ask this Court to require ESDC to take what they call a “realistic” look at the likely timing of the build-out, make an assessment of the resulting environmental impacts as compared to the 2006 EIS, and then decide whether a supplemental EIS is necessary (Butzel Aff. ¶ 9).¹ This

¹ The *Prospect Heights* petitioners make the disingenuous assertion that their petition did not seek a judgment requiring the preparation of a supplemental EIS (Butzel Aff. ¶ 9). This new assertion is inconsistent with the language of the petition, which asserted that “ESDC was legally obligated to prepare an SEIS” (Petition ¶ 66), and with the petition’s prayer for relief, which requested, *inter alia*, a judgment “[a]nnulling and vacating ESDC’s September 17, 2009 determination that no SEIS was required,” and “[a]nnulling and vacating ESDC’s ... approval of the MGPP.” (Petition ¶ 42). Petitioners’ new contention – that all that they seek is an order directing ESDC to take another “hard look” – is inconsistent with their own petition and a misleading attempt to portray their motion as one having only a minimal impact on the Atlantic Yards project. Petitioners’ effort to force further environmental review, which unquestionably would then be the predicate for still more litigation, is contrary to the law as articulated by the Court of Appeals in *Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400, 425 (1986) (“The EIS process necessarily ages data,” and “[a] requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives”). *See also Riverkeeper, Inc. v.*

is exactly what ESDC did prior to affirming the MGPP on September 17, 2009. This Court explicitly found that ESDC's decision to use a 10-year build-out as the basis for most of its environmental analysis was the result of the requisite "hard look," and was grounded on "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". (Decision at 11).² This Court held that, based on these articulated factors, "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." *Id.*

The *DDDB* petitioners are actually insulting in their characterization of the Decision, asserting that "it is clear that the Court was not properly informed of the actual facts governing when ESDC expected the project to be completed," and that "the issues concerning the violation of SEQRA and the UDCA must be reconsidered" in view of a "change of facts" (Baker Aff. ¶ 25). However, a

Planning Board of Town of Southeast, 9 N.Y.3d 219, 232 (2007) (a lead agency's decision not to require a supplemental EIS "should be annulled only if it is arbitrary, capricious or unsupported by the evidence").

² As discussed in more detail in Point II below with respect to petitioners' requests for renewal, ESDC in fact has entered into a Development Agreement with FCRC affiliates. The Development Agreement expressly and unequivocally obligates the FCRC affiliates to use commercially reasonable efforts to complete the project within 10 years, by December 31, 2019.

purported “change of facts,” premised on new evidence not previously offered to the court, is not a proper basis for reargument. *See* CPLR 2221(d)(2) (a motion to reargue cannot be based upon “any matters of fact not offered on the prior motion”). And even if the Court were to consider the Development Agreement, there is nothing in that agreement that undermines the Decision or is inconsistent with it in any way.

The supposedly “new” basis for petitioners’ claims that the use of a 2019 build year was not “realistic” is petitioners’ contention that FCRC’s contractual obligation to use “commercially reasonable efforts” to complete the project by 2019, in accordance with the MGPP, is too “abstract” and devoid of “clear meaning” to be capable of enforcement (Butzel Aff. ¶¶ 6-7; *see also* Baker Aff. ¶ 23 (“‘Commercially reasonable efforts’ is in itself a largely meaningless term”). To the contrary, this contention is plainly without merit. In common law jurisdictions, concepts of what is “reasonable” or what a “reasonable” person would do are applied by the courts on a daily basis.

Courts frequently interpret the term “commercially reasonable efforts” in the context of contractual disputes. For example, in *Morgenroth v. Toll Bros., Inc.*, 60 A.D.3d 596 (1st Dep’t 2009), *affirming* 2008 WL 909666 (N.Y. Sup. Ct. N.Y. Co. Mar. 14, 2008), the court examined whether a party to a contract to purchase one parcel (“Parcel 1”) for use as part of a larger development project had

exercised “commercially reasonable efforts” to secure the best price for an adjoining parcel where the contract provided that, if the purchase price for the adjoining parcel was below \$7.5 million, the purchaser would have to make an additional payment to the seller of Parcel 1. Both this Court and the Appellate Division determined that the purchaser’s payment of exactly \$7.5 million to acquire the adjoining parcel free of tenants, resulting in no payment to the seller of Parcel 1, was reasonable under the circumstances. *See also Town House Stock LLC v. Coby Housing Court*, 2007 WL 726839 (N.Y. Sup. Ct. N.Y. Co. Mar. 12, 2007) (where seller of real property was obligated to use “commercially reasonable efforts” to maintain the property between the contract date and the closing date, the court held that the purchaser was not relieved of its obligation to close, because the seller’s maintenance of the property was reasonable given the nature of the property and its use), *aff’d*, 49 A.D.3d 456 (1st Dep’t 2008). Implicit in these cases is the understanding that courts can readily analyze whether the actions of a party charged with making commercially reasonable efforts have met that standard.

In addition, Article 9 of the New York Uniform Commercial Code employs the standard “commercially reasonable” in describing the obligations of a secured creditor in selling collateral to satisfy the secured debt. UCC § 9-610(b) provides that “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.” Further

language in the statute and the courts' interpretation of this standard are instructive, and demonstrate that it is a standard well within the capabilities of courts to measure based on the facts before them. In elaboration of what constitutes "commercially reasonable" conduct by a secured lender, UCC § 9-627(b)(3) requires that dispositions of collateral must be made "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." The UCC does not particularize the requirements for commercial reasonableness but, rather, "invites consideration of accepted business practices as a guide to what is most likely to protect both debtor and creditor." *Bankers Trust Co. v. J.V. Dowler & Co.*, 47 N.Y.2d 128, 134 (1979). "Customs and usages that actually govern the members of a business calling day-in and day-out not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience." *Id.*

These considerations comfortably apply to contracts outside the scope of UCC Article 9, because it is well within the competence of courts to determine whether the activities of a party constitute "commercially reasonable efforts" (or, for that matter, just about any other standard of conduct set forth in a written contract) by looking to the commercial realities of the situation that is presented. *See, e.g., Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 341 (1998) (the "reasonable expectation and purpose of the ordinary business person when making

an ordinary business contract serve as the guideposts to determine the intent of the parties” to an agreement).

This Court thus was eminently correct in concluding that the language in the MGPP that FCRC would be contractually obligated to use commercially reasonable efforts to complete the project by December 31, 2019 provided a rational basis for ESDC’s determination that 2019 was an appropriate build year (see Decision at 11, 13). Petitioners’ assertions that the term is somehow incapable of interpretation must be rejected.

The *Prospect Heights* petitioners also contend that ESDC was required to look at a 25-year build out for the project because, in their view, this schedule represents the reasonable worst case scenario based on construction impacts that would occur over that period of time (Butzel Aff. ¶ 8). Their petition asserted that ESDC should have evaluated adverse impacts that they argued would result from a construction period that would extend “14 years longer” than the 2019 build year used by ESDC (Petition ¶ 68(D)). Although these petitioners now argue that this claim was not addressed in the Decision (Butzel Aff. ¶ 8), the issue in fact was addressed on pages 14-15 of the Decision. There, the Court recognized petitioners’ argument that ESDC should have looked at a longer build-out for what it was: a challenge to the lead agency’s selection of the build year for the project.

There is no legal requirement that an agency predict with accuracy the year in which a project will be completed. Instead, a “build year” is simply an estimate that is used as an analytical tool to create a base line to be used in measuring the environmental impacts that reasonably can be anticipated to result from the project. *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) (“a ‘build year’ ... is only a non statutory baseline used by ... agencies as a device to provide assumptions” on which environmental studies may be premised). New York City’s *CEQR Technical Manual* is to the same effect (Manual, at p. 2-4). A build year thus is not a hard deadline by which an action or project must be completed. In its Decision, the Court recognized that there is a limited standard for judicial review of a build year, as also previously recognized by the Appellate Division with respect to the Atlantic Yards project itself in *Develop Don’t Destroy Brooklyn v. Urban Dev. Corp.*, 59 A.D.3d 312 (1st Dep’t 2009). There, the Appellate Division stated that “the ultimate accuracy of the estimates [of the build-out period] is neither within our competence to judge nor dispositive of the issue properly before us,” which is whether the lead agency’s selection of anticipated build-dates “may be deemed irrational or arbitrary and capricious . . .” *Id.* at 318. *See also* Decision at 14. Applying this standard, this Court observed that, in addition to looking at construction scheduling data to

determine the feasibility of the 2019 build year, ESDC looked at “additional factors, including the report of its real estate expert and its expectation that the buildings would be completed on a parcel-by-parcel basis,” and concluded that “ESDC’s use of the 10 year build-out may not be deemed irrational under the governing legal standard” (Decision at 15).

This Court recognized that it is possible to disagree with ESDC’s decision to allow construction to proceed without “greater certainty that the surrounding Brooklyn neighborhoods will not be subjected to the deleterious, if not blighting, effects of significantly prolonged construction” (Decision at 16-17). However, the Court concluded that it was “constrained, under the limited standard for SEQRA review, to reject petitioners’ challenge.” *Id.* at 17. Thus, this Court has already considered petitioners’ allegations that construction impacts from the Project will last beyond 2019 and has held that ESDC’s choice of 2019 as the build year should not be disturbed. Petitioners’ reiterated claims that the build year used by ESDC was improper are no basis for reargument.

There are two other points that should be made in response to petitioners’ motions insofar as they are addressed to ESDC’s compliance with SEQRA:

First, ESDC in fact did not limit its environmental analysis of the MGPP to an assumption that the project would be completed in ten years, but in

addition considered – and explicitly discussed in the Technical Memorandum embodying its analysis – the possibility that the build-out would extend substantially longer than ten years due to adverse economic conditions.

Second, while the *Prospect Heights* petitioners complain that ESDC was obligated to “address the ‘reasonable worst case’ scenario” for the project (Butzel Aff. ¶ 8), they make no showing that a longer and slower build-out would worsen adverse environmental impacts. The only adverse impacts about which these petitioners complain are those that would be expected from actual construction activities. Petitioners thus complain that “[t]he extended construction schedule ... would subject the adjoining residential neighborhoods to construction noise, dust, air pollution, traffic blockages and empty lots for 20 years or more” (Butzel Aff. ¶ 2). However, no evidence is presented to support petitioners’ unsupported and conclusory assumption that a slower build-out would increase – rather than attenuate or ameliorate – these impacts. Instead, it is reasonable to believe that a 10-year build-out is the worst-case scenario when it comes to the adverse impacts of construction activity – in other words, that the intense construction activity that can be expected from concentrated construction of all of the buildings and extensive other project elements on this 22-acre project site within a compact 10-year period will have a greater adverse impact on nearby residential neighborhoods than a more leisurely program in which the various

buildings and improvements are built one-by-one over a longer period, with the construction activities that are ongoing at any particular time being focused on isolated individual building sites rather than throughout the 22-acre project site.

Finally, the *DDDB* petitioners ask the Court to reconsider their claim that the MGPP is not a plan for eliminating blight (Baker Aff. ¶ 28). This Court already has rejected this contention insofar as it was based on the complaint that the MGPP lacked guaranties that the project would be completed (Decision at 5). To the extent that these petitioners' attempt to revive this claim is premised on the Development Agreement, which supposedly "proves" that "the plan is illusory and will not be completed until at least 2035 if ever" (Baker Aff. ¶ 33), it is both improper on a motion for reargument and fundamentally incorrect in its characterization of the Development Agreement and its import, as discussed in further detail in Point II below. To the extent, however, that these petitioners' contention is based on the idea that this Court somehow was wrong on the law, their claim is equally without merit. Petitioners complain that the Court's conclusion is not supported by the case that it cited, *Neville v. Koch*, 79 N.Y.2d 416 (1992), but while *Neville* was a SEQRA case rather than a UDC Act case, the Court's decision in *Neville* stands for the proposition that government agencies are held to a rule of reason when they analyze the likely effects of future actions. See also *West 41st Street Realty LLC v. N.Y.S. Urban Dev. Corp.*, 298 A.D.2d 1, 6 (1st

Dep't 2002) (ESDC's determination that a project will eliminate blight "must be affirmed if there exists 'substantial evidence' in the hearing record" to support the determination). Here, the applicable standard easily was satisfied.

Petitioners, in short, have not shown any basis for reargument of their petitions or reconsideration of the Decision.

II.

RENEWAL SHOULD BE DENIED

A party seeking leave to renew must identify "new facts not presented in the prior motion that would change the prior determination," and provide "reasonable justification for the failure to present such facts on the prior motion." See CPLR 2221(e). See also *Beiny v. Wynyard (In re Beiny)*, 132 A.D.2d 190, 208-210 (1st Dep't 1987) (denying renewal where the allegedly new facts were available for inclusion on the original motion); *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dep't), *lv. to app. denied*, 80 N.Y.2d 1005 (1992) (same). Thus, a motion to renew is intended to draw the court's attention to new or additional facts that were in existence at the time of the original motion, but unavailable to the party seeking renewal. *In re Beiny*, 132 A.D.2d at 208-210. In addition, of course, a motion to renew should be denied where the new evidence would not warrant changing the prior determination. See, e.g., *Mountain Realty Corp., v. Gelbelman*, 29 A.D.3d 874, 875 (2d Dep't 2006); *Galgano v. Galgano*,

287 A.D.2d 687 (2d Dep't 2001); *Briggs v 2244 Morris L.P.*, 30 A.D.3d 216, 217 (1st Dep't 2006); *Taft Partners Dev. Group v. Drizin*, 283 A.D.2d 218 (1st Dep't 2001).

Petitioners' motions to renew are based on the Development Agreement that FCRC affiliates and ESDC entered into after the petition was submitted to this Court. According to petitioners, the Development Agreement exposes as arbitrary and capricious ESDC's use of a 2019 build year to support its decision not to prepare a supplemental EIS.³

There is no merit to this claim, because the Development Agreement changes nothing. Its terms are completely consistent with the information that was provided to this Court by ESDC and FCRC in their prior papers in opposition to the petitions.

Petitioners' skewed reading of the Development Agreement is that it contains "one exception after another as to what Petitioners regard as the fictional commitment to complete the Project by the end of 2019" (Butzel Aff. ¶ 11). Petitioners therefore ask the Court "to take into account the realities so clearly

³ Originally, petitioners requested that the Court annul ESDC's determination that a supplemental EIS was not necessary based on the revised terms of the MTA agreement, which, according to petitioners, supposedly showed that FCRC would not complete the project well after 2019. The Court upheld ESDC's determination not to require a supplemental EIS and further held that ESDC's use of the 2019 build year was not irrational or arbitrary and capricious. Decision at 15.

reflected in the [Development Agreement] and to order ESDC to reevaluate” its decision not to require preparation of a supplemental EIS. *Id.* However, the *Prospect Heights* petitioners’ assertion that the terms of the Development Agreement “clearly evidence a construction schedule extending far beyond 2019” (Butzel Aff. ¶ 12) is based on a misleading and selective reading of the terms of the Development Agreement. The same is true of the *DDDB* petitioners’ contention that the Development Agreement extends the project’s completion date to “at least 2035” (Baker Aff. ¶ 6). In fact, the Development Agreement is completely consistent with the MGPP’s explanation of the obligations that would be imposed on FCRC. The terms of the Development Agreement on which petitioners focus set forth remedies available to ESDC, and penalties imposed on FCRC, if FCRC fails to comply with the terms of the MGPP.

Consistent with the MGPP, the Development Agreement obligates FCRC to use “commercially reasonable effort” to complete the project by December 31, 2019. Specifically, the last sentence of § 2.2 of the Development Agreement explicitly provides that the contracting FCRC affiliates “agree to use commercially reasonable effort to cause the Substantial Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date), in each case as extended on a day-for-day basis for any Unavoidable Delays.” This provision is not a hollow statement, but an

affirmative covenant by the FCRC affiliates, the breach of which constitutes an event of default that entitles ESDC to liquidated damages of up to \$10,000 per day, in addition to other remedies available at equity and law. Development Agreement §§ 17.1(r), 17.2(a)(x).

Aside from asserting that the term “commercially reasonable efforts” is without meaning, the *Prospect Heights* petitioners claim that the FCRC obligation to use commercially reasonable efforts to complete the project by 2019 is somehow weakened because the obligation is contained in “a single sentence” of the Development Agreement (Butzel Aff. ¶ 13). Similarly, the *DDDB* petitioners offer the misleading observation that § 2.2 of the Development Agreement “is the only provision where the phrase ‘commercially reasonable effort’ appears in the agreement” (Baker ¶ 10) without mentioning other provisions in the agreement that explicitly refer back to § 2.2.

These contentions are without merit. First, there is no legal requirement to repeat this obligation over and over again. Second, § 8.1(d) of the Development Agreement specifically provides that none of the other provisions in the Development Agreement trump the FCRC obligation to use commercially reasonable efforts to complete the project by December 31, 2019. Specifically, § 8.1(d) provides:

For the avoidance of doubt, any deadlines or periods set forth in this Article VIII [Construction Activities] for the performance

of work under any Project Lease shall not modify, limit or otherwise impair the obligations of BALLC, AYDC or Interim Developer under the last sentence of Section 2.2 hereof.⁴

Thus, the Development Agreement is clear: there is an unequivocal obligation to use commercially reasonable efforts to substantially complete the project by 2019, and no other provision of the Development Agreement modifies this obligation. That is completely consistent with the MGPP, which this Court found to support the rationality of ESDC's decision to use 2019 as the expected build year for purposes of its environmental analysis.

Petitioners completely ignore Development Agreement § 8.1(d) and the fact that it fully reinforces and reiterates FCRC's obligation under § 2.2 to use commercially reasonable efforts to substantially complete the Project by 2019. Instead, petitioners argue that, contrary to the explicit language of Development Agreement § 8.1(d), the outside date and periods set forth in Article VIII will automatically extend the schedule for the project beyond 2019. This is just not the case. The other deadlines and periods set forth in the Development Agreement are not project "start and completion dates," but dates after which ESDC is entitled to additional damages and remedies, on top of the remedies provided for in § 17.1(r),

⁴ "BALLC," "AYDC" and "Interim Developer" are the defined short-hand names in the Development Agreement for the three FCRC affiliates that are parties to the Development Agreement – *i.e.*, Brooklyn Arena, LLC ("BALLC"), Atlantic Yards Development Company, LLC ("AYDC") and AYDC Interim Developer, LLC ("Interim Developer").

if the Project is not completed by December 31, 2019. For example, pursuant to § 8.6(d), if the FCRC affiliates fail to complete three Phase I buildings at years 3, 5 and 10, they can be subjected to additional penalties of up to \$5 million for failure to commence each building on time. Development Agreement § 17.1(i) and Schedule 3.

Petitioners' citation to this and other dates set forth in various sections of Article VIII of the Development Agreement as evidence that the project completion date will inevitably extend beyond 2019 constitutes unfounded speculation and completely misses the point of the Development Agreement. The Development Agreement unambiguously states that none of the dates appearing in Article VIII of the Development Agreement "modify, limit or otherwise impair the obligation of BALLC, AYDC or Interim Developer under the last sentence of Section 2.2 hereof."⁵

The December 31, 2019 deadline is also unaffected by the Development Agreement's definition of "Project Effective Date." *See* Development Agreement at Appendix A-15. This definition does not relieve the FCRC affiliates of their fixed obligation to use commercially reasonable efforts to cause the substantial completion of the Project to occur by December 31, 2019

⁵ As shown in note 4 above, "BALLC," "AYDC" and "Interim Developer" are the defined terms in the Development Agreement for the three FCRC affiliates that are parties to the agreement.

under Development Agreement §§ 2.2 and 8.1(d). Under Development Agreement § 2.2, the only way in which the project's completion date can be extended is in the event that it is extended by ESDC on a day-for-day basis for an "Unavoidable Delay." An "Unavoidable Delay" includes only those events that are beyond FCRC's control, such as acts of God or war, earthquake, flood, "unknown physical conditions which differ materially from those ordinarily found to exist and generally recognized as inherent in the construction of large mixed use projects in Brooklyn," strikes, or litigation resulting in an injunction or restraining order prohibiting construction, provided such litigation was not instituted the developer or its affiliates. Development Agreement App. A-18. In an event of Unavoidable Delay, FCRC must notify ESDC, substantiate the delay, describe the measures being used to address the delay, and keep ESDC informed as to the status of those measures. Contrary to petitioners' assertions, moreover, an inability to obtain financing, including affordable housing subsidies or other market financing, do not affect the December 31, 2019 target date under the Development Agreement.

In short, there is nothing new in the Development Agreement that contradicts or modifies FCRC's obligations as described in the MGPP. Thus, the Development Agreement provides no "new" basis for the Court to change its Decision.

The *Prospect Heights* petitioners also assert that the Development Agreement has a “gaping hole” because it provides no security to ensure that FCRC honors its obligations and that FCRC has nothing to lose once the Barclays Center arena has been completed should it decide to slow the pace of development or “give up on” the rest of the project (Butzel Aff. ¶ 20). The *DDDB* petitioners similarly assert that, “while ESDC could terminate the agreement” in the event of a default by the FCRC parties, “there is no penalty to FCRC in that event,” and “there is nothing precluding ESDC from renegotiating the terms at that time” (Baker Aff. ¶ 20). Significantly, petitioners cite no provision of SEQRA and no case law that suggests that the lead agency’s selection of a build year for purposes of determining whether a supplemental EIS should be prepared is contingent upon the agency having obtained security to ensure that a developer honors its legal obligations, or that precludes an agency from changing its prior determination if changed circumstances warrant it. Moreover, as pointed out in FCRC’s prior memorandum in opposition to the petition, there are enormous financial incentives for FCRC to complete the project in a timely manner, including the loss of its enormous investment in the project and the loss of the opportunity to derive profit from the project’s completion. *See* Memorandum of Law of Respondent Forest City Ratner Companies, LLC in Opposition to the Petition (pp. 15-16). These incentives are only increased by the terms of the Development Agreement. *See*

Development Agreement §§ 17.1 and 17.2 and Schedule 3 (specifying amounts of liquidated damages payable to ESDC upon events of default). This Court has already recognized that “FCRC has expended over \$350 million in acquiring properties for the Project and in demolishing over 30 vacant buildings on the site. FCRC has 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.” Decision at 17.

Petitioners have provided no reason to justify reconsideration or modification of this Court’s prior Decision holding that ESDC’s decision not to require preparation of a supplemental EIS was not irrational or arbitrary and capricious. Therefore, the motions to renew should be denied.

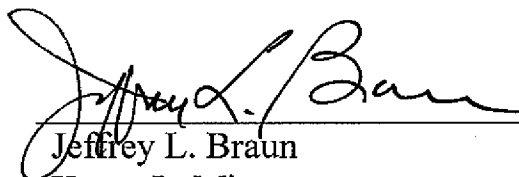
Conclusion

For the foregoing reasons and those set forth in ESDC’s opposition papers, FCRC respectfully submits that petitioners’ motions should be denied in their entirety.

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New York, NY

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