

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

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.	:	

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.	:	

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

Bryan Cave LLP
1290 Avenue of the Americas
New York, New York 10104-3300
*Attorneys for Respondent
Empire State Development Corporation*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
POINT I THIS COURT’S DECISION CORRECTLY DISMISSED THE PETITIONS	2
A. The Court Applied the Correct Legal Principles in Its Review of ESDC’s Determination Not to Prepare an SEIS	3
B. The 2009 MGPP and 2006 MGPP Are Virtually Identical, and Their Impacts Were Thoroughly Reviewed in the FEIS.	3
C. ESDC Took a Hard Look at the Construction Schedule for the Project	5
D. ESDC Took a Hard Look at the Potential Impacts of a Delay in the Project Schedule.....	8
E. Reargument Is Unwarranted Because this Court Did Not Overlook or Misapprehend the Facts or the Law.....	9
1. Petitioners’ Critique of the KPMG Report Does Not Warrant Reargument	10
2. Petitioners’ Critique of the “Commercially Reasonable” Efforts Language of the 2009 MGPP Does Not Warrant Reargument.....	11
3. Petitioners’ “Reasonable Worst Case Scenario” Contention Does Not Warrant Reargument.....	14
4. Petitioners’ Claims That They Are Seeking Only Limited Relief Provide No Basis for Reargument	17

POINT II THE MOTIONS TO RENEW SHOULD BE DENIED BECAUSE PETITIONERS HAVE NO REASONABLE JUSTIFICATION FOR HAVING FAILED TO PRESENT THE DEVELOPMENT AGREEMENT TO THE COURT PRIOR TO THE DECISION AND BECAUSE ITS TERMS WOULD NOT CHANGE THE COURT’S DETERMINATION.....17

A. The Motions to Renew Should Be Denied Because Petitioners Have No Reasonable Justification for Their Failure to Present the Development Agreement to this Court18

B. This Court Properly Limited Its Review of the ESDC Directors’ Determination Not to Require an SEIS for the 2009 MGPP to the Administrative Record18

C. The Terms of the Development Agreement Are Consistent with the Information that Was Before the Court and Would Not Change the Result19

POINT III THE DDDDB PETITIONERS’ MOTIONS TO REARGUE AND RENEW THEIR CLAIM THAT THE 2009 MGPP IS NOT THE TYPE OF “PLAN” THAT THE UDCA REQUIRES SHOULD ALSO BE DENIED23

CONCLUSION.....25

TABLE OF AUTHORITIES

	Page
<i>Anderson v. N.Y.S. Urb. Dev. Corp.</i> , 45 A.D.3d 583, 585 (2d Dep't 2007)	3
<i>Matter of Beiny</i> , 132 A.D.2d 190 (1st Dep't 1987).....	17
<i>Beyl v. Franchini</i> , 37 A.D.3d 505, 506 (2d Dep't 2007).....	17
<i>Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Council of the City of New York</i> , 214 A.D.2d 335 (1st Dep't 1995).....	2, 22
<i>Cooke Center for Learning & Dev. v. Mills</i> , 19 A.D.3d 834, 837 (3d Dep't 2005)	18
<i>Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.</i> , 59 A.D.3d 312, 318 (1st Dep't).....	2, 3, 8, 23
<i>Fanelli v. N.Y.C. Conciliation & Appeals Board</i> , 90 A.D.2d 756 (1st Dep't 1982), <i>aff'd</i> , 58 N.Y.2d 952 (1983).....	19
<i>Featherstone v. Franco</i> , 95 N.Y.2d 550 (2000)	19
<i>Foley v. Roche</i> , 68 A.D.2d 558 (1st Dep't 1979).....	13
<i>Jackson v. N.Y.S. Urb. Development Corp.</i> , 67 N.Y.2d 400 (1986).....	2, 5
<i>Levine v. N.Y.S. Liquor Authority</i> , 23 N.Y.2d 863 (1969).....	19
<i>McGovern v. Tatten</i> , 213 A.D.2d 778 (3d Dep't 1995)	18
<i>Neville v. Koch</i> , 79 N.Y.2d 416 (1992).....	24
<i>Riverkeeper, Inc. v. Planning Board of Town of Southeast</i> , 9 N.Y.3d 219, 231-32 (2007).....	3
<i>Wilder v. N.Y.S. Urb. Development Corp.</i> , 154 A.D.2d 261 (1st Dep't 1989).....	2, 5
<i>William P. Pahl Equipment Corp. v. Kassis</i> , 182 A.D.2d 22 (1st Dep't 1992)	9, 13

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 (1st Dep't 1995); *Wilder v. N.Y.S. Urb. Dev. Corp.*, 154 A.D.2d 261, 262-63 (1st Dep't 1989); *Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d 312, 318 (1st 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, 4732¹);
- 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

¹ “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 42nd Street Land Use Improvement Project. *See Wilder v. N.Y.S. Urb. Dev. Corp.*, 154 A.D.2d 261 (1st 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

Project is well positioned to serve. (AR 7036-38.) ESDC therefore acted within its discretion in determining that the downturn in the business cycle is not likely to materially affect the 10-year construction schedule established for the Project in the 2006 FEIS, which this Court and the Appellate Division upheld in prior litigation challenges. See Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d at 318.

D. ESDC Took a Hard Look at the Potential Impacts of a Delay in the Project Schedule.

In determining that an SEIS was not warranted under the circumstances presented here, ESDC acknowledged that a delay in the 10-year construction schedule could occur, and looked carefully at whether such a delay would result in significant new environmental impacts that would warrant an SEIS. (AR 4808-26.) The result of that inquiry was a determination that a delay would not result in significant environmental impacts not previously considered in the FEIS, and did not warrant preparation of an SEIS. (AR 4816, 4827.) Petitioners have presented nothing to this Court that would warrant nullification of this finding. While their motion papers seek to denigrate, with vague and conclusory assertions, ESDC's hard look at the consequences of a delay, they fail to identify any specific flaws in ESDC's reasoning or conclusion. Indeed, what is remarkable about petitioners' litigation papers is that petitioners – in both their initial litigation papers and their new motion papers – have consistently failed to specify so much as one significant environmental impact of a prolonged construction schedule that they allege to differ from the impacts disclosed in the FEIS and Technical Memorandum. ESDC acted within its discretion in deciding not to prepare an SEIS to study impacts that the FEIS had already studied, disclosed and mitigated.

E. Reargument Is Unwarranted Because this Court Did Not Overlook or Misapprehend the Facts or the Law.

The purpose of a motion for leave to reargue “is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” Foley v. Roche, 68 A.D.2d 558, 567 (1st Dep’t 1979). Rather, a “motion for leave to reargue ... 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 Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dep’t 1992) (citation omitted).

Petitioners’ motion papers do not allege any legal errors by this Court in its judicial review of ESDC’s determination not to prepare an SEIS. To the contrary, they concede that this Court “correctly identified the tenets of law that were to be applied to [the SEQRA] cause of action.” Butzel Aff. ¶ 5. Since petitioners do not allege legal error, it can be inferred that their contention is that this Court made factual errors. If that is so, petitioners are exceedingly vague as to exactly what factual mistake this Court supposedly made. To the extent that petitioners make any specific allegations of error, those issues are addressed below.

1. Petitioners’ Critique of the KPMG Report Does Not Warrant Reargument.

The Prospect Heights Petitioners make two criticisms of the KPMG Report. First, they allege that the report says “nothing about the feasibility of completing construction within 10 years.” Butzel Aff. ¶ 6 n.1. Second, they assert that while the KPMG report indicated that “a new development known as the Oro was 75% sold out at the time of the report,” a press release dated March 30, 2010, says that the Oro project reached the 50% milestone only as of March 2010. Id. Neither criticism is a basis for reargument.

The first criticism – that the KPMG Report never addressed the “feasibility” of the 10-year schedule – is vague and, depending on what it is intended to signify, misleading.

The KPMG Report first considered the 2,250 affordable housing units that comprise a significant element of the Project and concluded that, given the demand for affordable housing, these units would be quickly absorbed by the marketplace. (AR 7115.) The KPMG Report then considered the market-rate condominium and rental residential units, undertook a careful analysis of market data and fundamental market trends, and concluded that the units could be absorbed by the marketplace at a rate that would allow the last residential building to be constructed by 2019 (which would imply full occupancy of that building by the end of 2020). (AR 7112-13, 7115-18.) If and to the extent petitioners are suggesting that the KPMG report failed to consider the constructability of the 10-year construction schedule, their criticism is off-base because the feasibility of the construction logistics was scrutinized by a different ESDC consultant, AECOM/Earthtech. (AR 4658-65.) *See supra* at 6.

The second criticism – the alleged inaccuracy as to the “Oro Condos” that appears in one row of a table at page 29 of the KPMG Report (AR 7108) – is far too trivial to warrant reargument. Petitioners make no effort to demonstrate that the sales datum as to the Oro Condos was in any respect material either to KPMG’s conclusions or ESDC’s determination not to prepare an SEIS. Assuming the accuracy of the internet press release cited by petitioners, the recent surge in condominium sales at this 303-unit luxury building in downtown Brooklyn well illustrates the robust demand for market-rate units in the area, even in today’s tough economic climate.

2. Petitioners’ Critique of the “Commercially Reasonable” Efforts Language of the 2009 MGPP Does Not Warrant Reargument.

The 2009 MGPP requires that Forest City Ratner Companies (“FCRC”) “use commercially reasonable efforts ... to complete the entire Project by 2019.” (2009 MGPP at 9; AR 4692.) The Prospect Heights Petitioners allege that reargument should be granted because

this provision of the 2009 MGPP was given undue weight in the Decision so as to render this Court's judicial review meaningless. *Butzel Aff.* ¶ 6. They also suggest that ESDC relied on this provision of the 2009 MGPP in lieu of taking a "hard look" at the relevant environmental issues. *Id.* There is no substance to either allegation.

A review of the documents that were before the ESDC Directors at the time of their affirmation of the 2009 MGPP establishes that: (i) the 2009 MGPP required FCRC to use commercially reasonable efforts to complete the Project by 2019; and (ii) ESDC acknowledged that even with such efforts the Project's construction may be delayed. For example, the 2009 MGPP stated that it was expected that FCRC would commence construction of the first non-Arena building within six months of vacant possession of the Arena Block, but established an outside date requiring that construction of this building begin within three years of that date. (2009 MGPP at 9; AR 4692.) Similarly, the 2009 MGPP stated that it was expected that FCRC would commence construction of the second non-Arena building within six months of the commencement of construction of the first non-Arena building, but established an outside date requiring that the second building's construction commence no later than the 5th anniversary of the date that vacant possession of the Arena Block is achieved. (*Id.*) The 2009 MGPP also provides that if FCRC does not commence construction on a particular portion of the project site, and if this area is not needed for construction staging or interim surface parking, then the area will be used as temporary public open space. (*Id.* at 10; AR 4693.)

Other documents before ESDC at the time of its decision similarly reflect the proposed 10-year construction schedule, but acknowledge that construction may be delayed. (*See, e.g.*, 2009 MGPP at 18 n.2; Technical Memorandum at 55-63; ESDC Response to Comments at 7; AR 4701, 4808-16, 7036). Similarly, the abstract of lease terms before the

ESDC Directors stated that the non-Arena “development leases” – the leases that govern each development parcel prior to the completion of the improvements on that parcel – were expected to extend until the 25th anniversary of vacant possession of the Arena Block and the other first-phase condemnation properties, and that even this deadline could be extended by “force majeure.” (AR 7069.)

Contrary to petitioners’ allegations, ESDC’s determination that an SEIS was not warranted under the circumstances did not rest solely or even principally on the “commercially reasonable efforts” clause of the 2009 MGPP. As noted above, ESDC also considered: (i) the feasibility of the proposed 10-year construction schedule from a logistical standpoint; (ii) the compatibility of the proposed 10-year construction schedule with the available information about the Brooklyn real estate market; and (iii) whether a delay in the 10-year construction schedule would result in new environmental impacts that were not disclosed in the FEIS. *See supra* at 5-8. It is this considered analysis that constitutes ESDC’s “hard look” at the environmental impacts associated with the Project’s construction schedule, and it is this considered analysis that this Court reviewed to determine whether ESDC abused its discretion in deciding that the potential for delay did not warrant an SEIS. Contrary to petitioners’ allegations, neither ESDC’s assessment of these issues nor this Court’s review in any way suggests that ESDC failed to take the requisite “hard look,” or that this Court’s judicial review was not “meaningful.”

Petitioners provide no basis for their inflammatory allegation that the “commercially reasonable efforts” provision of the 2009 MGPP “constituted an improper effort by ESDC and FCRC to conceal from the public and this Court the reality of the far more lengthy construction schedule.” *Butzel Aff.* ¶ 11. Nothing was concealed from either the public or this Court, as all the relevant documents were provided to the public and were included in the

administrative record. The publicly available and judicially scrutinized 2009 MGPP (AR 4684-740), Technical Memorandum (AR 4744-827), Project Leases and Disposition Abstract (AR 7068-70) and revised MTA Business Terms (AR 4666-74) each acknowledged that the Project may take longer than 10 years to construct, and ESDC considered this in its assessment of whether an SEIS was warranted.

In sum, it was eminently reasonable for ESDC to require FCRC to use commercially reasonable efforts to complete the Project within a 10-year period, and the inclusion of this provision in the 2009 MGPP – which this Court considered in its Decision – does not warrant reargument.

3. Petitioners’ “Reasonable Worst Case Scenario” Contention Does Not Warrant Reargument.

The Prospect Heights Petitioners now contend that ESDC erred in failing to address the “reasonable worst case scenario” because, according to petitioners, the delay in Project construction would be the “reasonable worst case scenario.” Butzel Aff. ¶ 8. As a threshold matter, since they did not present this argument in their initial litigation papers, petitioners should not be permitted to raise it on a motion for reargument.² But even if their failure to have raised the argument earlier is excused, it should be rejected because it ignores the analyses that ESDC undertook in connection with the Project, is not supported by the record and casts aside the exercise of the lead agency’s discretion in assessing environmental impacts.

² Petitioners claim that this Court “overlooked” the issue of the “reasonable worst case scenario,” Butzel Aff. ¶ 8, but they fail to mention that they never made this argument to the Court in their initial litigation papers. Since they provide no justification for having not made this argument earlier, this Court should not even consider the issue on a motion for reargument. *See Foley v. Roche*, 68 A.D.2d at 567-68 (motion to reargue does not “provide a party an opportunity to advance arguments different from those tendered on the original application”); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d at 27 (“Reargument is not designed to afford the unsuccessful party successive opportunities ... to present arguments different from those originally asserted” (citations omitted)).

ESDC concluded that spreading out construction over a longer time period would not result in different or more severe environmental impacts than those disclosed in the FEIS (AR 4816), and petitioners do not identify any errors in ESDC's assessment of that issue. Accordingly, there is no factual basis for petitioners' contention that a longer construction period would be the reasonable worst case scenario.

The project site is quite large – 7½ City blocks. If construction were to be delayed so that, for example, only one building at a time is to be erected across the project site, then the intensity of the construction activity would be greatly reduced, compared to the construction impacts analysis presented in the FEIS. With a delayed construction schedule, there would be far lower levels of construction noise, vibrations, diesel emissions and construction traffic at any one time, as compared to the construction scenario analyzed in the FEIS. A delay scenario *reduces* the intensity of these construction impacts and would not be considered a reasonable worst case scenario with respect to the detailed *quantitative* analysis of these impacts presented in the FEIS. These quantitative analyses were based on the intense construction activity occurring during peak periods when several buildings are projected to be under construction simultaneously. (See, e.g., FEIS at 17-7 to 17-10, 17-39, 17-56, 17-64, 17-80; AR 1094-95, 1098-99, 1130, 1155, 1164, 1191; Technical Memorandum at 50-53; AR 4800, 4802-04.) Accordingly, petitioners' suggestion that an assumed 10-year construction schedule was not the "reasonable worst case scenario" for construction impacts is clearly wrong with respect to the quantitative analysis of construction impacts presented in the FEIS.

The construction chapter of the FEIS employed a *qualitative* analysis to assess impacts with respect to other environmental issues, such as the impact of the construction work on neighborhood character. The FEIS determined that the construction activity over a prolonged

period would create significant amounts of noise, construction traffic and other disruptions to the neighborhood and therefore would have a significant adverse impact on neighborhood character in the area near the project site. (FEIS at 17-29 to 17-30; AR 1120-21.) In its Technical Memorandum prepared in 2009, ESDC reasonably found that a stretched-out construction schedule would prolong the construction activities at the Project site but would not result in new significant impacts. (Technical Memorandum at 62-63; AR 4815-16.) Petitioners fail to identify what significant impact ESDC missed in its analysis.

Petitioners' essential contention – that decades of construction would overwhelm the local area – ignores the fact that construction of the 17-building Project on an extended schedule would be episodic rather than continuous, with each building being built on a modular basis. (Technical Memorandum at 55-56; AR 4808-09.) Battery Park City in Manhattan has seen buildings constructed over many decades, as part of a master development plan, but it is generally thought to be a desirable place to live, work, recreate and go to school.

Petitioners raise the specter of the entire Project site being under construction for decades, but this would not occur in a delay scenario. Construction will proceed on a building-by-building basis. (Technical Memorandum at 56, 63; AR 4809, 4816.) In the event of construction delays, major construction equipment will not be left on site in any interim period between the construction of individual buildings (Technical Memorandum at 63; AR 4816), temporary open space on unused parcels will be provided where feasible (2009 MGPP at 10, 18; Technical Memorandum at 55-56, 58, A-2 to A-3; ESDC Response to Comments at 15, 19-20; AR 4693, 4701, 4808-09, 4811, 4818-21, 7044, 7048-49) and permanent open space adjacent to each Project building will be installed as each building is constructed (AR 3775-85).

ESDC took a hard look at the impacts of delayed construction and concluded that a delay would not result in significant impacts not already disclosed in the FEIS. (Technical Memorandum at 55-63; AR 4808-16.) Since petitioners identify no flaws in ESDC's assessment, there is no basis for their contention that ESDC failed to take a hard look at the reasonable worst case scenario.

4. Petitioners' Claims That They Are Seeking Only Limited Relief Provide No Basis for Reargument.

Both sets of petitioners assert that they are not asking that this Court require an SEIS. They claim that, instead, they are "only" asking that this Court nullify the 2009 MGPP until such time as ESDC undertakes a second look at whether an SEIS should be prepared in connection with its affirmation. But if, as the Decision held, ESDC had a rational basis for not requiring an SEIS, then there is no need for a remand for ESDC to consider this issue again. Nor is the relief sought by petitioners in any respect limited. If granted, the nullification of the 2009 MGPP would severely disrupt the Project, which has made substantial progress since the affirmation of the 2009 MGPP. *See Karmel Aff.* ¶¶ 13-14. Although petitioners claim to have concerns with respect to the environmental consequences of a delay in the construction schedule, their actual litigation strategy since 2006 has been to seek to delay its construction for as long as possible. Their instant motions are merely another delaying tactic in that effort.

POINT II

THE MOTIONS TO RENEW SHOULD BE DENIED BECAUSE PETITIONERS HAVE NO REASONABLE JUSTIFICATION FOR HAVING FAILED TO PRESENT THE DEVELOPMENT AGREEMENT TO THE COURT PRIOR TO THE DECISION AND BECAUSE ITS TERMS WOULD NOT CHANGE THE COURT'S DETERMINATION

Petitioners' motions to renew are based on the Development Agreement executed on or about December 23, 2009. The motions should be denied because: (i) petitioners present no reasonable justification for having failed to present this document to the Court prior to the

Decision; (ii) the document is not relevant to this Court's review of the ESDC Directors' determination not to prepare an SEIS in connection with their affirmation of the 2009 MGPP on September 17, 2009; and (iii) the terms of the document would not have changed the result reached by this Court in its Decision.

A. The Motions to Renew Should Be Denied Because Petitioners Have No Reasonable Justification for Their Failure to Present the Development Agreement to this Court.

ESDC made the Development Agreement (and other Master Closing Documents) available to the public on or about January 25, 2010. *See* Karmel Aff. ¶ 15. Counsel for the DDDDB Petitioners reviewed the documents on January 28, 2010, and on February 4, 2010, ESDC sent him (by overnight delivery) hard copies of the documents he requested. *Id.* ¶¶ 16-17. This Court's Decision was issued on March 12, 2010. Petitioners provide no reasonable justification for waiting until *after* the Decision was rendered to make a motion that this Court consider the Development Agreement in connection with these proceedings. Their motions to renew should be denied for this reason alone.

A motion to renew must "be based upon new facts not offered on the prior motion that would change the prior determination" and must "contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (3). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application." Matter of Beiny, 132 A.D.2d 190, 210 (1st Dep't 1987).

Where allegedly pertinent new facts become known to a party while a motion is pending, the party cannot stay silent until the motion is decided and then later seek leave to renew based upon such facts. *See* Beyl v. Franchini, 37 A.D.3d 505, 506 (2d Dep't 2007) (where plaintiffs sought leave to renew based in part on a medical examination conducted after defendants' initial motion was submitted but before the court's decision on the motion, and where there was no

“explanation as to why the plaintiffs did not seek an adjournment of the defendants’ motion until an examination could be scheduled,” court held that plaintiffs failed to provide a reasonable justification for the failure to present facts); Cooke Center for Learning & Dev. v. Mills, 19 A.D.3d 834, 837 (3d Dep’t 2005) (“If the allegedly new facts were available while the initial motion was pending but were not presented because of the movant’s lack of diligence, renewal will not be granted”); McGovern v. Tatten, 213 A.D.2d 778, 779 (3d Dep’t 1995) (Article 78 petitioners “failed to show ... a justifiable excuse for not placing [new] facts before Supreme Court, which were known when the motion was pending.”).

Petitioners present no reasonable justification for waiting until *after* the Decision before making their motions to have this Court consider the Development Agreement. Petitioners cannot hold the Development Agreement back as a “strategic reserve,” to be sprung on the Court only after its Decision, since a motion to renew requires a reasonable justification for not having made a motion to present the new evidence to the Court before the Decision.

B. This Court Properly Limited Its Review of the ESDC Directors’ Determination Not to Require an SEIS for the 2009 MGPP to the Administrative Record.

The claims pleaded in the petitions all challenge the 2009 MGPP as having been unlawfully affirmed by the ESDC Directors on September 17, 2009 in contravention of one or more State statutes (principally, SEQRA and the Urban Development Corporation Act (“UDCA”)). In conformance with CPLR § 7804(e), ESDC filed, together with its Answer in each proceeding, the 13-volume Administrative Record for the affirmation of the 2009 MGPP. The Development Agreement, which was executed on or about December 23, 2009, could not have been included in the Administrative Record because it did not exist at the time of the administrative agency determination challenged in these proceedings. Since this Court’s review of ESDC’s determination is properly limited to the administrative record before the agency on

September 17, 2009, the Development Agreement has no relevance to the claims pleaded in this proceeding and cannot form the basis for a motion to renew.

Judicial review of agency action is limited to the record before the agency. *See Levine v. N.Y.S. Liquor Auth.*, 23 N.Y.2d 863, 864 (1969). Since the Development Agreement post-dated the agency decision challenged here, it is not part of the administrative record and should not be considered by the Court. *Id.*; *see also Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000) (“for a court to consider evidentiary submissions as to circumstances after the Authority made its determination would violate [the] fundamental tenet ... that ‘[j]udicial review of administrative determinations is confined to the “facts and record adduced before the agency”’” (citations omitted)); *Fanelli v. N.Y.C. Conciliation & Appeals Bd.*, 90 A.D.2d 756, 757 (1st Dep’t 1982) (“Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered ...”), *aff’d*, 58 N.Y.2d 952 (1983).

C. The Terms of the Development Agreement Are Consistent with the Information that Was Before the Court and Would Not Change the Result.

As noted above, petitioners have no justification for having withheld the Development Agreement from the Court until after its Decision and, in addition, it would be improper to consider the Development Agreement in connection with this Court’s review of the ESDC Directors’ September 17, 2009 affirmation of the 2009 MGPP. Even in the absence of these dispositive points, the Development Agreement provides no basis for a motion to renew, because its terms are consistent with the information that was in the administrative record reviewed by this Court. Petitioners’ contentions to the contrary are unfounded.

The Development Agreement (“DA”) states that ESDC is engaging FCRC³ to “develop and construct” the “Project.” DA § 2.1. The term “Project” is defined by reference to the 2009 MGPP. *See* DA § 2.3; DA at 1 (first Whereas clause). As required by the 2009 MGPP, the Project must be developed in conformance with the comprehensive Design Guidelines that were approved by ESDC in 2006 and which have not changed since that time. *See* DA § 2.2. FCRC is required to use “prudent and reasonable business practices in the performance of [its] obligations ... under this Agreement ... and shall devote sufficient time to cause the development and construction of the Project to proceed in accordance with the terms of this Agreement, [and] the [2009] MGPP ... subject ... to Unavoidable Delays.” DA § 2.1. The term “Unavoidable Delays” is a *force majeure* concept that is narrowly defined. *See* DA Appendix A at 18. FCRC’s inability to obtain construction financing or pay the monies required to perform its obligations under the Agreement is not considered an Unavoidable Delay. *Id.*

As required by the 2009 MGPP, FCRC must “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-by-day basis for any Unavoidable Delays.” DA § 2.2. Consistent with the Project Leases and Disposition Abstract that was before the ESDC Directors on September 17, 2009 (AR 7069), the “Outside Phase II Substantial Completion Date” is defined as the 25th anniversary of the date that ESDC has acquired and delivered to FCRC vacant possession of the Phase I condemnation properties, subject to Unavoidable Delays. DA § 8.7 & DA Appendix A at 15 (definition of “Project Effective Date”).

³ For the sake of simplicity, each of the FCRC affiliates referenced in the Development Agreement is referred to simply as “FCRC” in the discussion presented in this memorandum.

Each of these provisions – the definition of “Project,” the requirement that it be constructed in conformance with the 2009 MGPP and Design Guidelines, the requirement to use commercially reasonable effort to complete the Project by 2019, and the outside date for the completion of the entire Project (25 years + force majeure, measured from vacant possession of the Phase I condemnation properties) – is consistent in all respects with the documents that are in the administrative record and that were before the Court when it rendered its Decision. (2009 MGPP at 6, 9; Project Leases and Disposition Abstract; ESDC September 17, 2009 Resolution; AR 4689, 4692, 7068-70, 7236-37.)

Petitioners’ contentions that the Development Agreement contains startling new disclosures about the likely construction schedule for the Project are baseless. Their basic argument boils down to an assertion that because the outside date for completion is 25 years, then it is to be expected that FCRC will drag its heels and defer completion of the Project in which it has invested so heavily until the last allowable date in 2035. But the 25-year outside date is nothing new and does not give rise to a motion to renew. As ESDC explained in its Answers and Memoranda of Law filed with the Court before the Decision, ESDC based its assessment of the construction schedule not on the *outside* dates permitted by its agreements with FCRC – which are not intended to and do not function as construction schedules – but on ESDC’s independent assessment of (i) the reasonableness of the 10-year construction schedule proposed for the Project and analyzed in the FEIS (*see supra* at 5-8) and (ii) whether a delay in that schedule would result in significant new environmental impacts that were not disclosed in the FEIS (*see supra* at 8). The Development Agreement does not contain new information bearing on these issues.

The DDDDB Petitioners assert that the outside dates set forth in Article VIII of the Development Agreement trump the requirement imposed by the last sentence of Section 2.2 that FCRC use commercially reasonable effort to complete the Project by 2019. *See Baker Aff.* ¶ 22. This contention is flatly contradicted by the plain language of the Development Agreement, which states that “[f]or the avoidance of doubt, any deadlines or periods set forth in this Article VIII for the performance of the work ... shall not modify, limit or otherwise impair the obligation of [FCRC] under the last sentence of Section 2.2 hereof.” DA § 8.2.

Both sets of petitioners allege that the “commercially reasonable effort” provision is not subject to sufficient penalties in the event of FCRC’s breach of this contractual covenant. But the Development Agreement provides for stipulated penalties of \$10,000 per day for violations of this covenant (DA § 17.2(a)(x)) and expressly states that these stipulated penalties are not exclusive. *See* DA § 17.2(d) (“In addition to the remedies set forth in Section 17.2(a), ESDC shall be entitled to any and all remedies available to ESDC at law or in equity under or in connection with this Agreement ... , including without limitation, specific performance, injunctive relief, and the recovery by ESDC from [FCRC] of any and all damages, sums, costs, and expenses incurred by ESDC as a result of or connection with [FCRC’s] respective Default under this Agreement.”).

It must also be remembered, in assessing the merits of petitioners’ arguments, that SEQRA does not require any contract with a developer as a prerequisite for selecting a Build Year to be assumed in an EIS. *See generally* Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Council of the City of New York, 214 A.D.2d at 337. Clearly, a detailed contract imposing stipulated penalties if commercially reasonable effort is not made to complete the project by the specified Build Year is more than enough to support the conclusion

that ESDC's assumptions concerning the Project schedule were rational. Nothing in the Development Agreement provides a basis for the claim that ESDC abused its discretion when it determined that an SEIS would not be prepared in connection with the affirmation of the 2009 MGPP on September 17, 2009.

POINT III

THE DDDDB PETITIONERS' MOTION TO REARGUE AND RENEW THEIR CLAIM THAT THE 2009 MGPP IS NOT THE TYPE OF "PLAN" THAT THE UDCA REQUIRES SHOULD ALSO BE DENIED

The DDDDB Petitioners continue to press their claim that the 2009 MGPP is not a "plan" for the elimination of the substandard and insanitary conditions at the project site, as required by Section 10(c)(2) of the UDCA, Unconsol. L. § 6260(c)(2), and therefore should not have been approved as a "land use improvement project" under the statute. In making this argument, they continue to ignore the fact that the 2009 MGPP is virtually identical to the 2006 MGPP (*see supra* at 3-5), which this Court and the Appellate Division, in their prior litigation, held to be a proper "land use improvement project" under the UDCA. *See Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d at 319-25. In pressing their claim, they again cite absolutely no authority for their contention that there must be some guarantee of a plan's success for it to be a "plan" within the meaning of UDCA § 10(c)(2). Their claim is not consistent with the plain meaning of the statute and fails to state a cause of action for that reason alone.

Petitioners' UDCA claim is also at odds with the record, which includes a thorough report from a respected consulting firm (KPMG) concluding that the residential units that comprise the principal use of most of the non-Arena buildings can be absorbed by the Brooklyn housing market over the next decade. *See supra* at 6. The fact that neither the 2009 MGPP nor the Development Agreement guarantee that this will occur is not surprising (large,

complex projects costing billions of dollars cannot be financed years in advance of the construction of the project buildings) and hardly renders the 2009 MGPP an unlawful land use improvement project.

Petitioners criticize this Court's citation of Neville v. Koch, 79 N.Y.2d 416 (1992), but that case held, in the context of a re-zoning, that "actual development in accordance with a well-considered plan may not proceed for years." 79 N.Y.2d at 425. The discussion makes clear that a re-zoning may be "a well-considered plan" even if there are no guarantee that development will proceed in accordance with the "plan." Similarly, a general project plan for a land use improvement project, such as the 2009 MGPP, may be a valid "plan" within the meaning of the UDCA irrespective of whether it is guaranteed to succeed. Contrary to petitioners' assertions, this Court's citation to Neville v. Koch does not warrant granting their motion to reargue or renew their fundamentally defective UDCA claim, which this Court summarily and correctly dismissed in the Decision.

CONCLUSION

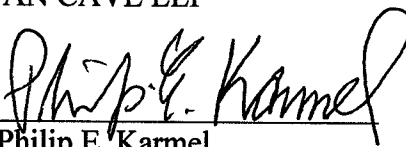
For the foregoing reasons, ESDC respectfully requests that petitioners' motions to reargue and renew be denied; but, if the Court grants either motion, that it re-affirm its decision, order and judgment dismissing each of the proceedings with prejudice; and that ESDC be granted its costs and disbursements in these proceedings and such other and further relief as the Court may deem just and proper.

DATED: New York, New York
April 27, 2010

Respectfully submitted,

BRYAN CAVE LLP

By:



Philip E. Karmel

J. Kevin Healy

L. Margaret Barry

1290 Avenue of the Americas

New York, New York 10104

Telephone: (212) 541-2000

Attorneys for Respondent

Empire State Development Corporation