

Atlantic Yards Land Use Improvement and Civic Project
ESDC Response to Supreme Court's November 9, 2010 Order

This document has been prepared to comply with an Order of the Supreme Court for New York County dated November 9, 2010 (the “Remand Order”), which directed Empire State Development Corporation (“ESDC”) to make “findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted.” ESDC executed the Development Agreement referenced in the Remand Order on December 23, 2009; in general, it requires affiliates of Forest City Ratner Companies (collectively, “FCRC”) to construct the Atlantic Yards Land Use Improvement and Civic Project (the “Project”) pursuant to ESDC’s modified general project plan affirmed on September 17, 2009 (the “2009 MGPP”). The “renegotiated MTA agreement” referenced in the Remand Order is comprised of several contracts (collectively, the “MTA Agreements”) also executed on December 23, 2009; in general, the parties to the MTA Agreements are FCRC, the Metropolitan Transportation Authority (“MTA”), the Long Island Rail Road (“LIRR”) and with respect to certain matters, ESDC.

ESDC acknowledged in 2009 that: (i) a key factor in the pace of Project development at the site will be the market demand for the residential units that comprise most of the square footage of the 16 non-Arena buildings and (ii) the market demand will be influenced by general economic and financial conditions. Based on its assessment of market demand, ESDC concluded in 2009 that it was reasonable to assume that the demand for the Project’s residential units will be sufficiently robust to allow the Project to be constructed on FCRC’s 10-year construction schedule, which the Final Environmental Impact Statement (“FEIS”) had used in 2006 to assess the environmental impacts of the Project under the State Environmental Quality Review Act (“SEQRA”). At the same time, in 2009, ESDC acknowledged that the 10-year construction schedule could be delayed for years in the event of prolonged poor market or general economic conditions. ESDC assessed the effect of such a potential delay in the 2009 Technical Memorandum prepared in connection with the 2009 MGPP and concluded that the potential for a delay in the Project would not require or warrant the preparation of a Supplemental Environmental Impact Statement (“SEIS”). Project opponents challenged this conclusion in the litigations that led to the Remand Order, asserting that ESDC lacked a rational basis for the 10-year construction schedule and did not adequately assess the potential environmental impacts of a delay in that schedule. ESDC believes that its decision making in 2009 was rational (based on the information available at that time) and that there is no factual or legal basis for the litigation claims brought against it, and for this reason it has sought leave to appeal the Remand Order. Nevertheless, in

compliance with the Remand Order, this document sets forth the ESDC findings required by the Court and provides an explanation of the basis for the findings.¹

ESDC Findings

ESDC finds that:

1. The Development Agreement and MTA Agreement (collectively, the “Development Contracts”) do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project. As was the case when the ESDC Directors approved and affirmed the 2009 MGPP, a key factor in the ultimate pace of development of the Project will be the market demand for the Project’s buildings. The Development Contracts contemplate that the Project will be constructed on a 10-year schedule, but they do not establish 10 years as the outside date for Project completion. The Development Contracts require that: (i) FCRC use commercially reasonable effort to achieve Project completion by 2019 and, in any event, (ii) the Project be completed not later than a 25-year outside date, subject to certain specified contingencies. The fact that the Development Contracts have outside dates for development that go well beyond 10 years was publicly disclosed by ESDC when it approved the 2009 MGPP.

2. As of the date of these findings, it appears unlikely that the Project will be constructed on a 10-year schedule, because the construction of the Project’s residential buildings has lagged behind the 10-year schedule provided by FCRC to ESDC in 2009, and because of continuing weak general economic and financial conditions.

3. A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS and 2009 Technical Memorandum and would not require or warrant an SEIS. The analysis of the potential environmental impacts of a 25-year construction schedule – a delay more lengthy than that considered in the 2009 Technical Memorandum – confirms the conclusion reached by ESDC in 2009 that an SEIS is not required or warranted for the 2009 MGPP. Similarly, the Development Contracts do not require or warrant an SEIS.

¹ In making these Court-ordered findings, ESDC does not intend to waive its legal rights to appeal the Remand Order or contest the Remand Order in collateral proceedings and does not intend to establish any general practice under SEQRA that it is appropriate to analyze the environmental impacts of a proposed project by assuming that the selected developer will seek to delay the project’s construction to the outside date of any relevant commercial agreement pertaining to the project.

Explanation for ESDC's Findings

The discussion below begins with the background information needed to understand the context of the issues raised by the Remand Order and then summarizes the basis for the ESDC findings stated above.

A. Background Information

The ESDC Directors affirmed a Modified General Project Plan for the Project on December 8, 2006 (the "2006 MGPP"). As outlined in the 2006 MGPP, the Project will consist of 17 buildings and 8 acres of open space, constructed upon an approximately 22-acre site in Brooklyn. The site encompasses all or portions of eight blocks, as well as some adjoining street segments. The 2006 MGPP divides construction of the 17-building development into two phases. Phase I of the Project is comprised of the Arena and four other buildings constructed on Blocks 1118, 1119 and 1127 and the adjoining segments of Fifth Avenue and Pacific Street (collectively, the "Arena Block"). Phase I also includes construction of a fifth building on a portion of Block 927 ("Site 5"), a new subway station entrance on the Arena Block, a new rail yard on Blocks 1120 and 1121 and the eastern portion of Block 1119 (the "New Yard"), permanent below-grade parking facilities on the Arena Block and Site 5, and an interim surface parking lot on Block 1129. The five non-Arena buildings in Phase I are to contain commercial office and retail, residential, community facility and potentially hotel uses. Phase II consists of development of the remainder of the Project, including 11 buildings with residential, local retail and community facility uses, and eight acres of publicly accessible open space. Six of the Phase II buildings (Buildings 5, 6, 7, 8, 9 and 10) and the open space adjacent to those buildings will be built on a platform constructed over the New Yard, using air rights acquired from MTA.

MTA is participating in the Project principally through the sale of the MTA property and air rights associated with the Vanderbilt Yard, and its authorization and supervision of the New Yard and new subway entrance adjacent to the Arena. On December 13, 2006, the Board of the MTA approved its participation in the Project.

On November 27, 2006, ESDC issued the FEIS, which analyzed the Project's potential environmental impacts, described mitigation measures and evaluated a range of reasonable alternatives. The FEIS assumed a 10-year construction schedule for the Project. It examined the environmental impacts of construction during the 10-year period and used the 10-year schedule to arrive at the "Build Year" for the Project, thereby facilitating the assessment of its operational impacts upon completion in the Build Year.

The SEQRA Findings Statement approved by the ESDC Directors on December 8, 2006 concluded that the Project would have significant adverse impacts with respect to the following analysis areas: public schools (due to Project-created demand for school seats); open space (due to Project-created demand for additional open space resources in the non-residential study area); cultural resources (due to the demolition of two historic buildings on the Project Site, the loss of views of the Williamsburgh Savings Bank

Building from certain public vantage points, and the morning shadows cast by the one of the Project buildings on the Church of the Redeemer's stained glass windows); visual resources (due to the loss of views of the Williamsburgh Savings Bank Building from certain vantage points); shadows (due to shadows cast by certain Project buildings on the Atlantic Terminal Houses open space in certain winter hours and the shadows cast by one building on the Church of the Redeemer's stained glass windows in the morning); traffic (due to unmitigated significant adverse impacts at numerous intersections); noise (due to noise impacts at the Dean Playground and at the Project's on-site open space areas); and construction (due to the effects of construction activities on noise, traffic, two historic buildings, and the character of the local neighborhood over a prolonged construction period). The findings also identified the measures to be taken to avoid or minimize these significant adverse impacts. They further determined, with respect to those areas where the Project would result in unmitigated adverse impacts, that measures would be implemented to avoid or minimize such impacts to the maximum extent practicable.

Despite litigation-related delays in acquisition of the project site, the Project advanced significantly after its approval in 2006. FCRC demolished numerous buildings on the Arena Block and Block 1129 to begin clearing the site for construction. FCRC also performed extensive utility work to re-route in-street utilities on the Arena Block in preparation for the excavation required to build the Arena and new subway entrance.

In addition, pursuant to a license agreement with MTA, FCRC built a temporary rail yard adjacent to the existing LIRR facilities in Vanderbilt Yard. This temporary facility is needed to accommodate LIRR trains while the New Yard is constructed. The temporary rail yard was placed in service on November 23, 2009, allowing FCRC to dismantle a portion of the original rail yard on the Arena Block, as needed to make way for the Arena construction.

In 2009, ESDC, MTA and FCRC negotiated certain changes to the general business plan for the Project to allow construction to proceed, notwithstanding the downturn in the real estate market. The principal change to the business arrangements was that instead of requiring FCRC to pay for the acquisition of the entire 22-acre Project site up front, ESDC and MTA agreed to allow the property (including the MTA air rights over the rail yard) to be acquired in phases.

On June 23, 2009, the ESDC Directors adopted a new Modified General Project Plan for the Project (the "2009 MGPP"). The Project itself remained virtually the same. The site plan calling for 17 buildings and eight acres of open space, as described in the 2006 MGPP, was left in place without material modification.

The 2009 MGPP also updated the anticipated construction schedule for the Project. As noted above, the 2006 MGPP and FEIS had provided for a 10-year construction schedule, with full build-out expected to occur in 2016. The 2009 MGPP shifted the schedule forward by three years to account for the delay in acquisition of the Project site, so that the new anticipated schedule was also 10 years, with full build-out expected in 2019.

The 2009 MGPP required FCRC to use commercially reasonable efforts to complete the Project by 2019. The 2009 MGPP nevertheless acknowledged that the Project's construction could be delayed, and so also established outside dates for certain of the Phase I buildings.

Prior to the Directors' adoption of the 2009 MGPP, ESDC prepared a Technical Memorandum dated June 2009 (the "2009 Technical Memorandum") under SEQRA. The 2009 Technical Memorandum analyzed whether the modifications to the 2006 MGPP, the schedule shift outlined above (and, as discussed in more detail below, potential further delays) and certain design changes within the parameters of the Design Guidelines annexed to the 2006 MGPP would result in any significant adverse environmental impacts that were not disclosed in the FEIS prepared in 2006. The Technical Memorandum also assessed changes in background conditions and analysis methodologies. It examined each area of potential impact that had been addressed in the FEIS. The Technical Memorandum concluded that neither the proposed modifications to the 2006 MGPP nor any of the other changes would result in significant adverse impacts that had not been previously disclosed in the FEIS.

On June 24, 2009, the MTA Board approved new business terms with FCRC. These new business terms, which are incorporated into the several separate but interrelated MTA Agreements, allow FCRC to purchase the property rights and air rights needed for the Project on the Arena Block first (this transaction was consummated on March 4, 2010) and defer acquisition of the remaining air rights on Blocks 1120 and 1121 until later in the development process. ESDC reviewed a memorandum prepared by MTA staff summarizing the MTA Agreements prior to adoption of the 2009 MGPP on June 23, 2009. Under the MTA Agreements as described in the MTA staff summary, the outside date for FCRC's last purchase of air rights on Blocks 1120 and 1121 is 2031. However, the MTA Agreements also allow FCRC to acquire the air rights on a more expeditious schedule. The summary of the MTA Agreements indicated that conveyance of air rights with respect to a specific development parcel on Blocks 1120 and 1121 would occur upon (i) completion of the New Yard and (ii) FCRC's payment of the purchase price allocated to the air rights for that development parcel.

Recognizing that economic and financial conditions associated with the economic downturn could affect the progress of the Project, ESDC commissioned a study by KPMG, an 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. KPMG advised ESDC that it was not unreasonable to expect that the market could absorb the Project's units in that time period. ESDC staff also examined fundamental elements of the

² The MTA Agreements themselves, which were not finalized and signed until December 23, 2009, were not available to ESDC as of the time the 2009 MGPP was adopted or affirmed. In general, the terms of the MTA Agreements do not differ significantly from the terms outlined in the MTA staff summary.

Brooklyn real estate market in concluding, in its Response to Comment document, that demand for the Project's housing units would be robust over a 10-year period.

On September 17, 2009, the ESDC Directors affirmed the 2009 MGPP in the form approved on June 24, 2009. On December 23, 2009, after months of negotiations, ESDC, MTA, FCRC and other entities completed a "Master Closing" at which the Development Agreement, the contracts comprising the MTA Agreements, and several hundred related contracts were signed pertaining to the Project. On March 1, 2010, ESDC acquired title to a large portion of the Project site (specifically, the Arena Block, Block 1129 and the adjoining segment of Pacific Street, Block 1120, Lot 35 and Blocks 1121, Lots 42 and 47) by eminent domain. ESDC obtained vacant possession of these properties on or before July 30, 2010.

The Remand Order was issued in two Article 78 proceedings. The first proceeding was filed by petitioners Develop Don't Destroy (Brooklyn), Inc., et al. (Index No. 114631/09). The second Article 78 proceeding was filed by petitioners Prospect Heights Neighborhood Development Council, Inc., et al. (Index No. 116323/09). In both cases, the petitioners challenge ESDC's determination not to prepare an SEIS in connection with its approval of the 2009 MGPP.

On March 10, 2010, the Supreme Court for New York County dismissed both Article 78 proceedings in a written decision, order and judgment. On April 7, 2010, petitioners filed motions to reargue and renew. Both motions claimed that the Development Agreement made available to the public in January 2010 supported their criticisms of the construction schedule assumptions made in the 2009 Technical Memorandum because it sets forth a 25-year outside date, subject to certain exceptions that could result in additional delays, for completion of the Project.

On November 9, 2010, the Court, in the Remand Order, granted the motions to reargue and renew. ESDC has filed motions to appeal the Remand Order in each proceeding, but it is nevertheless making the findings required by the Court.

B. A Summary of The Relevant Terms of the Development Contracts

Several hundred documents were executed at the Master Closing. The Remand Order has directed that ESDC examine the effects that certain of these agreements, including the Development Agreement and the MTA Agreements, have on the construction schedule for the Project. In order to comply with this directive, ESDC will first summarize relevant provisions of the agreements, and then discuss whether and how they affect the schedule for Project development. It should be noted that the discussion below is a summary only; the Development Agreement and MTA Agreements are quite lengthy and contain numerous provisions that are not summarized here, as the discussion below mentions only key provisions of these contracts.

1. The Development Agreement

In the Development Agreement, ESDC engages FCRC to develop and construct the Project. Its relevant provisions are as follows:

- The Development Agreement states that ESDC is engaging FCRC to “develop and construct” the “Project.” Development Agreement § 2.1. The term “Project” is defined by reference to the Atlantic Yards Land Use Improvement and Civic Project as described in the 2009 MGPP. *See* Development Agreement § 2.3 and at page 1 (first Whereas clause). As required by the 2009 MGPP, the Project must be developed in conformance with the Design Guidelines that were approved by ESDC in 2006 and which have not changed since that time. *See* Development Agreement § 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.” Development Agreement § 2.1.
- The term “Unavoidable Delay” or “Unavoidable Delays” is a force majeure concept that is narrowly defined. *See* Development Agreement Appendix A at 18. FCRC’s inability to obtain construction financing or pay the monies required to perform its obligations under the Development Agreement is not considered an Unavoidable Delay. *Id.*
- 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.” Development Agreement § 2.2 (emphasis added).
- The “Outside Phase II Substantial Completion Date” is defined as the 25th anniversary of the “Project Effective Date,” subject to Unavoidable Delays (discussed above) and Affordable Housing Subsidy Unavailability (discussed below). *See* Development Agreement § 8.7.

³ The FCRC affiliates that are parties to the Development Agreement are Atlantic Yards Development Company, LLC, Brooklyn Arena, LLC, and AYDC Interim Developer, LLC. Each has distinct obligations under the Development Agreement, but for the sake of simplicity, the discussion above and below refers to all FCRC affiliates simply as “FCRC.”

- The Project Effective Date is defined as the earlier of: (i) the date on which ESDC has acquired and achieved Vacant Possession of the properties at the site initially acquired by ESDC through eminent domain or (ii) the date on which FCRC waives the Vacant Possession requirement. *See* Development Agreement Appx. A at 15 (definition of “Project Effective Date”). The Project Effective Date was ultimately established as May 12, 2010, the date on which FCRC waived the Vacant Possession requirement. Thus, the Outside Phase II Substantial Completion Date is the 25th anniversary of this date (May 12, 2035).
- In general, the term Affordable Housing Subsidy Unavailability mentioned above is defined as the inability of FCRC to obtain financing under such programs for Affordable Housing Units then generally available to developers of Affordable Housing Units. *See* Development Agreement Appx. A at 1. The Development Agreement has very detailed requirements and a number of somewhat intricate provisions to limit the extent to which Affordable Housing Subsidy Unavailability may delay the outside dates for completion of Phase I and Phase II of the Project. *See* Development Agreement §§ 8.6(d)(i)(IV), (VI), 8.6(d)(ii), 8.8(g). Ultimately, however, a continued Affordable Housing Subsidy Unavailability may delay the construction of the Project’s required affordable housing (and could even delay Project completion beyond the 25-year outside date for Phase II) because: (i) the Project is required to contain a large number and percentage of affordable housing units, as specified in the 2009 MGPP and (ii) the affordable housing units are expected to be constructed under the affordable housing programs generally available to other real estate developers in New York City.
- Phase I of the Project is to be completed not later than the Outside Phase I Substantial Completion Date, which is defined as the 12th anniversary of the Project Effective Date (*i.e.*, by May 12, 2022), subject to Unavoidable Delay and, with respect to the affordable housing component of Phase I, subject to Affordable Housing Subsidy Unavailability. *See* Development Agreement § 8.6.
- In addition to the 12-year outside date for completion of Phase I, there are deadlines for the construction of individual Phase I buildings. Subject to certain provisions concerning Affordable Housing Subsidy Unavailability and Market Financing Unavailability (a term that is narrowly defined to exclude finance unavailability due to FCRC-specific financial circumstances), FCRC must begin construction of (i) the first non-Arena building on the Arena Block within 3 years of

the Project Effective Date (*i.e.*, by May 12, 2013), (ii) the second non-Arena building on the Arena Block within 5 years of the Project Effective Date (*i.e.*, by May 12, 2015); and (iii) the third non-Arena building on the Arena Block within 7 years of the Project Effective Date (*i.e.*, by May 12, 2017). Breach of these deadlines will incur payment of certain specified liquidated damages.

- Within 10 years of the Project Effective Date (*i.e.*, by May 12, 2020), subject to Unavoidable Delays, Affordable Housing Subsidy Unavailability and Market Financing Unavailability, FCRC is required to commence construction of one of the residential buildings on Block 1129. *See* Development Agreement § 8.7(c).
- Within 15 years of the Project Effective Date (*i.e.*, by May 12, 2025), subject to Unavoidable Delays, FCRC is required to enter into a Development Lease with associated completion guarantees to construct at least one Phase II building over the LIRR rail yard, together with the platform associated with that Phase II building and its associated open space. *See* Development Agreement § 8.5.
- The requirement that FCRC use commercially reasonable effort to cause the substantial completion of the entire Project by December 31, 2019 is not modified, limited or impaired by the separate and distinct contractual requirements to meet all of the outside dates specified above (*i.e.*, the first non-Arena building on the Arena Block by May 12, 2013, the second non-Arena building on the Arena Block by May 12, 2015, the third non-Arena building on the Arena Block by May 12, 2017, the first Phase II building on Block 1129 by May 12, 2020, the first Phase II building over the rail yard by May 12, 2025, the completion of Phase I by May 12, 2022 and the completion of Phase II by May 12, 2035). *See* Development Agreement § 8.1(d).
- The “commercially reasonable effort” provision is subject to stipulated penalties of up to \$10,000 per day for violations of this covenant. *See* Development Agreement § 17.2(a)(x). These stipulated penalties are not exclusive. *See* Development Agreement § 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.”).

- The Development Agreement also contains numerous other stipulated penalties and liquidated damages provisions. For example, if FCRC does not complete Phase I by the first anniversary of the Outside Phase I Substantial Completion Date, subject to Unavoidable Delay and, with respect to the affordable housing component of Phase I, subject to Affordable Housing Subsidy Unavailability, FCRC is required to pay liquidated damages of \$5,000,000 per Project Building. *See* Development Agreement Schedule 3 at 4. Missing the Outside Phase I Substantial Completion Date, depending on the extent and duration of the delay in missing that deadline, may also result in the requirement to pay more than \$29,000,000 in liquidated damages to the City of New York. *See* Development Agreement Schedule 3 at 10. In the event that the entire Project is not completed by the Outside Phase II Substantial Completion Date, ESDC can terminate FCRC's right to develop the remaining undeveloped areas of the Project site. *See* Development Agreement §§ 17.2(a)(vi), 17.5.
- In a different contract, also executed at the master closing that occurred on December 23, 2009, ESDC entered into a Recognition Agreement with Gramercy Warehouse Funding II LLC (“Gramercy”), the entity that provided financing to FCRC to acquire a portion of the Project site. In consideration for providing such financing to FCRC, Gramercy holds a leasehold mortgage on certain Project parcels. Under the terms of the Recognition Agreement, ESDC has agreed that in the unlikely event that FCRC defaults on its obligations to Gramercy and Gramercy forecloses on its leasehold mortgage, ESDC would provide additional time for Gramercy, beyond that which is provided to FCRC, to perform certain construction obligations under the Development Agreement and various leases. Providing a mortgagee with additional time to cure the default, or an imminent default, of a borrower is not unusual for complex real estate transactions.

2. The MTA Agreements

As noted above, the MTA Agreements are comprised of several distinct contracts. Certain key terms of such contracts are described separately below.

⁴ It should be noted that MTA and FCRC have entered into a number of agreements with respect to the Project, in addition to those addressed in these findings.

(a) **Air Space Parcel Purchase and Sale Agreement for Air Space over Block 1120, Lot 1 and Block 1121, Lot 1 (the “Air Space Purchase Agreement”).**

The Air Space Purchase Agreement was entered into between MTA and LIRR (collectively, the “MTA Parties”) and FCRC in order to grant FCRC the right to purchase the “Air Space Parcel” (specifically defined as an area within the air space over the specified lots of the Vanderbilt Yard above a defined horizontal plane). Its relevant provisions are summarized below.

- The agreement provides for the subdivision of the Air Space Parcel into up to 6 separate “Air Space Subparcels” each of which may be purchased separately. *See* Air Space Purchase Agreement at 2. FCRC is granted the right “from time to time” until the “Purchase Right Expiration Date” of June 1, 2031 to purchase each of the Air Space Subparcels, subject to certain conditions. *See* Air Space Purchase Agreement at 11, 13, 15. Among those conditions are that the construction of the New Yard shall have been completed in accordance with the project documents. *See* Air Space Purchase Agreement at 15.
- The purchase price is to be paid under the agreement through a combination of annual installments and accelerated lump sum payments due at the closing for each Air Space Subparcel. (As noted above, the agreement allows Air Space Subparcels to be purchased individually, “from time to time.”) The “Annual Initial Payment” begins at \$2,000,000, with payments due each year in 2012, 2013, 2014 and 2015. *See* Air Space Purchase Agreement at 13. Thereafter, “Annual Ongoing Payments” beginning at \$11,033,357 are to be paid from 2016 until 2031, unless all of the Air Space Subparcels have been purchased prior to that date. *Id.* The purchase price (including both the accelerated lump sum payments and the installment payments) is allocated among the Air Space Subparcels, with the allocation for each subparcel being in proportion to the ratio that the gross square footage of floor area to be built under the 2009 MGPP on such subparcel bears to the aggregate square footage of floor area to be built under the 2009 MGPP within the entire Air Space Parcel. *Id.* at 14. (This ratio is defined under the agreement as the “GSF Allocation Percentage” for that Air Space Subparcel.) Payments are due at the closing for each Air Rights Subparcel (referred to as the “Subparcel Balance Purchase Price”) in an amount calculated (in accordance with the GSF

⁵ The FCRC affiliate that is a party to this agreement is Atlantic Yards Development Company, LLC. For the sake of simplicity, the affiliate is referred to as FCRC in the discussion below.

Allocation Percentage) so that the aggregate purchase price for the entire Air Space Parcel will equal \$80,000,000, discounted to January 1, 2010 at a discount rate of 6.5% per annum. Id. After a closing occurs, the annual installment payments are reduced by excluding the portion of the payment that would have been allocated to the Air Space Subparcel(s) already paid for by FCRC. Id. at 15.

- At the closing of each Air Space Subparcel, MTA is to deliver fee title to the applicable subparcel to FCRC or its designee. It is anticipated that ESDC will be that designee, and will simultaneously lease such Air Space Subparcel to an affiliate of FCRC. Id. at 26.
- The Agreement defines various “Developer Events of Default,” including one concerning the construction of the New Yard. Id. at 30. Under that provision, it is an event of default if the New Yard is not completed by the expiration of the “New Yard Substantial Completion Liquidated Damages Period,” a term defined in the Yard Relocation and Construction Agreement (at page 11) as 90 days after September 1, 2016, subject to certain extensions. The MTA Parties may terminate the Agreement upon written notice to FCRC with respect to all Air Space Subparcels as to which a closing has not occurred if a Developer Event of Default occurs.

(b) Air Space Parcel Development Agreement

The parties to this agreement are MTA, LIRR and FCRC. The agreement sets forth the parties’ obligations with respect to the development of the air space (including the platform and other improvements) over the Vanderbilt Yard (defined, for purposes of this agreement, as Block 1120, Lot 1, Block 1121, Lots 1, 42 and 47). Certain relevant provisions are summarized below:

- The agreement requires that the platform be constructed in accordance with specific “Design and Construction Requirements,” which are incorporated into the agreement as attachments (and which are subject to modification by MTA in accordance with the agreement). More particularly, it obligates FCRC to build the platform in accordance with plans and specifications, and pursuant to a schedule, approved by MTA, and sets up a detailed process for the development of both the plans and specifications for the platform, and the schedule for its construction. It allows work on the platform to be “commenced, performed and completed” within up to three separate “Platform

⁶ The FCRC affiliate that is a party to this agreement is Atlantic Yards Development Company, LLC.

Construction Periods,” with the work within each phase being “designed, constructed and completed as a single coordinated development.” *See* Air Space Parcel Development Agreement at 18-19. The Air Space Subparcels involved in each Platform Construction Period must be “adjoining and contiguous” to each other, and the work in each subsequent Platform Construction Period must be contiguous to completed work. Id. The agreement allows the Platform Construction Periods to be “continuous with one another and [to] overlap in timing.” Id.

- The Agreement establishes an orderly process for the design and construction of the platform. With respect to design and planning prior to construction, it provides for:
 - Delivery to MTA of a “Platform Construction Period Notice,” in which FCRC conveys its intention to begin a phase of the platform work, identifies the affected Air Space Subparcels; and describes in narrative detail the work to be performed. If the notice is deemed acceptable, FCRC may begin to prepare plans and specifications for the work. Id. at 19.
 - Delivery of “Conceptual Plans”, to be submitted no later than 60 days following delivery of the Platform Construction Period Notice. Id. at 21.
 - Delivery of 30% plans, within 30 days after LIRR delivers comments to FCRC with respect to the Conceptual Plans. The 30% plans must reflect those comments. Id.
 - Delivery of 60% plans, within 60 days after LIRR delivers comments on the 30% plans. The 60% plans are to reflect LIRR’s comments on the 30% plans. Id.
 - Delivery of 90% plans, within 90 days after delivery of LIRR comments on the 60% Plans, responding to LIRR comments on the 60% plans. Id.
 - Delivery of 100% plans to LIRR for approval, within 90 days after delivery of LIRR comments on the 90% plans. Once approved, the Platform Work is to conform to these plans and specifications. Id.
- Similarly, an orderly process is set up for the development of a schedule for the construction of each phase of the platform work. A preliminary milestone schedule (including the schedule for requested track outages) is to be submitted to LIRR for its review and approval along with the 60% plans. The preliminary schedule is then to be refined as the design for the work evolves. More specifically, an updated “proposed construction schedule,” reflecting LIRR comments,

is to be submitted and refined at the 90% plans stage and when 100% plans are submitted. Id. at 23-24. Further updates are required as the date for commencement of construction approaches. Id. at 24. The final schedule is to be based on calendar dates.

- Prior to the commencement of construction, FCRC must secure LIRR’s final approval of the “Baseline Construction Schedule.” Id. at 25. The schedule may include a “contingency period reasonably satisfactory to the Developer” to account for unforeseen construction delays. The agreement identifies the time between the dates set forth in the Baseline Construction Schedule for commencement of construction and substantial completion as the “Permitted Platform Construction Period.” Id. After LIRR has signed off on the Baseline Construction Schedule, and throughout the period of construction, FCRC is obligated to provide updates and modifications in a series of 6 month “Look Ahead” and 12 week “Rolling” schedules.” Id. at 43, 44.
- Upon the satisfaction of numerous additional conditions, the MTA Parties are to deliver a “Release to Proceed,” allowing construction work to begin on a particular phase. Id. at 32. Among those conditions are that FCRC shall have: (i) provided satisfactory evidence that it has secured financing sufficient to fund the complete construction of the entire work included in the relevant Platform Construction Period; (ii) delivered a “Platform Completion Guaranty,” from a guarantor reasonably acceptable to MTA, that guarantees “absolutely, unconditionally and irrevocably” the “timely and continuous” performance of the work to substantial completion or in the event FCRC defaults on its obligations, that partially completed work will be removed; and (iii) provided LIRR with performance security (in the form of payment and performance bonds issued by acceptable sureties) for all major contracts. Id. at 32-33, *see also* Air Space Parcel Development Agreement, Exhibit F (Form of Platform Completion Guarantee).
- FCRC is obligated to meet the Baseline Construction Schedule established for each phase of the platform work, subject to day-to-day extensions for delays by reason of force majeure, railroad emergencies, delays caused by the MTA Parties and “commercially reasonable interruptions.” Id. at 35. It is an event of default if it fails to do so. It is also an event of default for FCRC to fail to construct the entire

⁷ The agreement sets up the same sort of design review and approval process for other “Air Space Improvements,” the construction of which could have a material impact on the Yards Parcel, the platform or the operation of the LIRR system (e.g., any improvement the construction of which requires entry into the Yard Parcel).

platform within 25 years from the “Project Effective Date” of May 12, 2010, subject to the same day-to-day extensions. In the event of a default, MTA may “exercise any and all of their rights and remedies under this Agreement, at law, in equity or otherwise, including without limitation their right to suspend performance under or terminate this Agreement, to receive compensation for damages, to obtain mandatory, injunctive or other equitable relief, to receive liquidated damages [and exercise other remedies].” Id. at 62-63.

- Since the agreement imposes a number of time-consuming tasks upon LIRR, it provides that LIRR is to make arrangements to dedicate sufficient personnel performing those tasks, at the expense of FCRC. Id. at 23, 38.

(c) Declaration of Easements by MTA for LIRR Vanderbilt Yard, Brooklyn, Block 1120, Lot 1 and Block 1121, Lots 1, 42, and 47

The Declaration of Easements is a document by which MTA grants an easement with respect to the above referenced property (the “Premises”) to facilitate the construction of certain elements of the Project on that property. Its key provisions are summarized below:

- MTA, as the “Declarant,” executed the Declaration “to facilitate development at the Premises,” while providing for LIRR and its successors or assigns to continue to use and occupy specified portions of the Premises for “Yards Parcel Operations.” Declaration at 2.
- Under the Declaration, MTA subdivided the affected property into a “Yards Parcel” lying below a specified horizontal plane and an “Air Space Parcel” lying above that plane. Id. at 21. The Declaration gives the owner of the Air Space Parcel “the right from time to time” to sever that parcel into separate “Air Space Subparcels” and to convey such subdivided Air Space Parcels to new owners. Id. at 21-22.
- The Declaration includes numerous provisions relating to the design, construction and maintenance of the platform over the Yards Parcel, designed to accommodate implementation of the Air Space Development Agreement. Among other things, under the Declaration, each “Air Space Subparcel Owner” is required to cause the “Platform Component” for its subparcel to be constructed in accordance with plans and specifications approved by the MTA Parties pursuant to the Air Space Development Agreement. The Declaration further requires each Air Space Subparcel Owner to contribute to the continued maintenance of the platform after it is constructed. In order to

facilitate the performance of the maintenance obligations of the Air Space Subparcel Owners, the Declaration calls for the establishment, immediately upon the sale of the second Air Space Subparcel, of an Air Space Subparcel Owners Association (the “ASSP Owners Association”) to “assume and perform all of the obligations” of the Air Space Subparcel Owners with respect to the “operation, repair, alteration, improvement, replacement, [r]estoration, maintenance and management” of the platform. Id. at 23. Each individual owner is required to fund its allocable share of the costs and expenses incurred by the ASSP Owners Association, in an amount reflecting the GSF Allocation Percentage. Id. A reserve fund for ongoing platform maintenance is to be established with an “Aggregate Minimum Reserve Base Amount” in the initial sum of \$3,300,000, which is to thereafter be adjusted to reflect actual annual maintenance costs and the Consumer Price Index. Id. at 3-4, 11, 53. This reserve obligation is allocated among the subparcels pursuant to the GSF Allocation Percentage. Id. The ASSP Owners Association, as well as each Air Space Subparcel Owner, are obligated to maintain the platform in good order and repair. Id. at 51.

- The Declaration creates a number of specific easements in the Yards Parcel and the Air Space Parcel for the initial construction and subsequent operation and maintenance of the platform and Air Space Subparcel improvements (*i.e.*, Project buildings). The easements include an “Easement for Initial Construction of Platform Component,” “Easement for Initial Construction of Air Space Subparcel Improvements,” “Easement for Location of Support Facilities,” “Easement for Location of Ventilation Systems,” “Easement for Inspection, Repair, Maintenance and Capital Improvements” and “Easements for Vertical and Lateral Support,” among others. Id. at 28-32. The easements that allow entry upon or the performance of work within the Yards Parcel are subject to certain notice requirements, work rules and regulations and other restrictions assuring continued safe and efficient rail operations.
- The Declaration requires each Air Space Subparcel Owner to contribute its allocable share of the increased costs associated of the operation of the Vanderbilt Yard as a result of the platform, as determined by an engineering report prepared in accordance with the Declaration. Id. at 39.

(d) Yard Relocation and Construction Agreement

The Yard Relocation and Construction Agreement sets forth the terms and conditions for the construction of the New Yard within the Vanderbilt Yard. The parties to the agreement are MTA, LIRR and FCRC. Its relevant provisions are set forth below:

- This agreement imposes specific Design and Construction requirements for the construction of the New Yard, which are attached as exhibits to the agreement. *See* Yard Relocation and Construction Agreement at 15-16. It also puts into place a detailed process for the review and approval of the design for the New Yard, with rounds of submittals to, and comments from, MTA/LIRR at the 30%, 60%, 90% and 100% stages of design completion. *Id.* (MTA/LIRR may retain, at FCRC's expense, an independent design consultant to assist in reviewing the plan submissions.) Mandatory milestone dates are established for the submission of each phase of the design, with the 100% complete design due on the later of July 1, 2011 or 90 days after FCRC receives MTA/LIRR's comments on the 90% Plans. *Id.* If FCRC fails to deliver any plans or specifications by the dates required, an event of default occurs, which may be cured on a one time basis by the submission of, and adherence to, a recovery plan approved by MTA/LIRR. The New Yard must be constructed in accordance with the plans that are finally approved by MTA/LIRR.
- At the 60% complete plan stage, FCRC is to submit a "Preliminary Construction Schedule," with milestone dates for building the major yard components. The Schedule is thereafter to be refined as the design evolves to the 100% complete plan stage. A final updated schedule is due no later than forty-five business days prior to the actual commencement of construction. *Id.* at 21.
- Several preconditions must be satisfied before construction may commence, including the delivery of a guarantee of the performance of the work from Forest City Enterprises, Inc. (a publicly traded Ohio corporation) and the posting of a letter of credit. *Id.* at 33. Construction must begin "on or prior to the Construction Commencement Deadline," which is identified under the agreement as June 30, 2012, subject to extension due to force majeure, owner's delay or railroad emergency. *Id.* at 34. Construction must thereafter be prosecuted "with all reasonable diligence and without interruption," subject to extension for the same defined circumstances. *Id.* The "New Yard Construction Completion Deadline" under the agreement

⁸ The FCRC affiliate that is a party to this agreement is Atlantic Rail Yards, LLC.

is September 1, 2016, subject to the same allowed extensions. Id. at 35. In the event that the New Yard is not substantially completed by the New Yard Construction Completion Date (and that date has not been extended for the above-defined reasons), FCRC is to pay liquidated damages at the rate of \$5,000 per day for up to 90 days. Id. An event of default will not arise if the New Yard is substantially completed during that “New Yard Substantial Completion Liquidated Damages Period.” Id.

- FCRC must “utilize all commercially reasonable efforts to complete the construction of the New Yard” in accordance with the milestones contained in the approved schedule. Id. at 36. If a milestone is missed at any point during the course of construction, FCRC must submit a proposed plan to get back on track, which is to include, without limitation the use of overtime and premium labor, so that the project will be completed by the end of the liquidated damages period. Id. at 37.
- An event of default occurs, and MTA/LIRR is entitled to “exercise any and all of its rights and remedies under the Agreement, at law, in equity,” including self help, if FCRC fails to achieve substantial completion of the New Yard by the New Yard Construction Completion Date (subject to the allowed extensions) and that failure continues beyond the 90 day period of liquidated damages. Id. at 60-61. Failure to complete the New Yard by this deadline is a cross-default under the Air Space Parcel Purchase and Sale Agreement (*see* page 30 of that agreement), providing MTA/LIRR with the right to terminate FCRC’s ability to purchase the air rights over the rail yard, under certain conditions.

(e) Sale Purchase Agreement between MTA, FCRC and ESDC (Tax Block 1119 Lot 7).

This agreement sets forth the terms and conditions for the sale from MTA to ESDC of the portion of the Vanderbilt Yard (*i.e.*, Block 1119, Lot 7) within the Arena Block. The purchase price for the property, which was paid for by FCRC, was approximately \$20,000,000. This transaction closed on March 4, 2010. The provisions of this agreement are not relevant to the issues addressed in the Remand Order.

⁹ The FCRC affiliate that is a party to the Sale Purchase Agreement is Brooklyn Arena LLC.

C. Explanation of ESDC's Findings

1. **The Development Contracts do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project.**

As summarized above, the Development Contracts have outside dates that extend up to an additional 16 years beyond 2019 (or potentially more than 16 years in certain limited circumstances). Thus, the outside date for completion of the New Yard is 2016; the outside date for the non-Arena buildings included in Phase I of the Project is 2022; and the outside date for completion of both the platform under the MTA Agreements and the Project under the Development Agreement is 2035. All of these dates are subject to extensions for specified exigencies. However, outside dates incorporated into complex, heavily negotiated development agreements do not reflect reasonable business projections as to the actual timetable for completing the project under discussion. Rather, they reflect the prudent business judgment of the parties and their transactional lawyers seeking to anticipate any and all of the possible risks, however unlikely, that potentially could arise as a project goes forward, including how and when a project may be deemed failed or incomplete. Thus negotiated contractual deadlines are not synonymous with reasonably expected project completion dates.

Here, a close reading of the Development Contracts establishes that their design is not to extend the schedule for construction of the Project to the outside dates. Rather, the Development Contracts create a legally binding framework of rights and obligations designed to: (i) require construction to proceed towards completion of the Project at a commercially reasonable pace, with the goal being completion in 2019; and (ii) in addition, establish deadlines to define the outer allowable limits for Project completion. With respect to the first requirement, the Development Agreement is explicit that FCRC must “use commercially reasonable effort” to substantially complete the Project by 2019. The agreement is also clear that the outside dates do not supersede this requirement. *See* Development Agreement § 8.1(d) (providing that the commercially reasonable effort obligation is not modified, limited or impaired by the outside date provisions of the agreement). The Development Agreement further obligates FCRC to use “prudent and reasonable business practices in the performance of [its] obligations ... under this Agreement,” and those obligations include the duty to work in a commercially reasonable manner towards achieving Project completion in 10 years. Thus, the Development Agreement establishes a two-tiered duty with respect to the schedule for the Project. First, FCRC must use commercially reasonable efforts to achieve completion of the Project by 2019, and second it may not, in any event, go beyond the outside limits set forth in the agreement (except for specifically defined reasons).

This two-tiered structure with respect to FCRC's schedule obligations is also evident in the MTA Agreements. The Air Space Development Agreement imposes an outside date for completion of the platform of 25 years from the “Project Effective Date” of

May 12, 2010, thereby creating a deadline of 2035 for platform completion. However, the agreement (at page 24) *also* contemplates the development of the *actual* schedules for the construction during each of the three Platform Construction Periods, “based upon the Developer’s then current estimate of the date for Commencement of Construction and final completion of the Platform Work.” There is nothing in this provision to suggest that such schedules are to be tied to the outside completion date. Moreover, once FCRC’s preliminary schedules are refined into “Baseline Construction Schedules” approved by the MTA Parties, “time is of the essence” in meeting those schedules (page 36). Thus, the agreement imposes a dual obligation on FCRC: to (i) “Substantially Complete ... each portion of the Platform Work associated with each Platform Construction Period in a timely, diligent and continuous manner” in accordance with the approved Baseline Schedule, subject to contingencies, including commercially reasonable interruptions (page 35) and (ii) in any event, complete all platform work by 2035.

A similar two-track structure is put into place by the Yard Relocation Agreement. That agreement imposes a deadline of 2012 for the commencement of construction and an outside date for substantial completion of the Yard of 2016. At the same time, it calls for the submission of a “proposed preliminary schedule” by FCRC, showing “the approximate date that Developer expects to begin construction,” as well as the “anticipated duration” for construction of various critical elements of the New Yard. As with the other MTA agreements, there is nothing that ties the proposed *actual* schedule for the performance of the work to the *outside* date in 2016. Moreover, upon the refinement and approval of the construction schedule, it becomes mandatory. Under the agreement (page 34), “[c]onstruction of the New Yard shall be ... prosecuted by Developer (subject to Force Majeure, Railroad Emergency and Owner’s Delay) with all reasonable diligence and without interruption (with the Construction Milestones at various stages each being substantially completed in accordance with the Construction Schedule).” More particularly, FCRC must “utilize all commercially reasonable efforts to complete the construction of the New Yard” in accordance with the milestones contained in the approved schedule (page 36).

Moreover, the agreements are structured to *facilitate* construction of the Project at a commercially reasonable pace. From a general perspective, it was to get the Project going in a difficult economic climate that ESDC and MTA agreed to allow FCRC to purchase Project property in pieces and to proceed with the platform construction in three distinct phases. More specifically, the Air Space Development Agreement streamlines the design review process by including specific time limits for LIRR’s review and approval of the evolving plan submissions. Under that timetable, LIRR must provide comments within 21 days after most major submittals, or 30 days after submittal of conceptual plans and 30% plans. Given the administrative burden these deadlines impose on LIRR, the agreement provides for the dedication of LIRR staff to the Project, at FCRC’s expense. Likewise, FCRC must meet specified deadlines in producing subsequent rounds of submittals, measured from its receipt of LIRR comments. The design review process created under the Yard Relocation Agreement is even more exacting, imposing specific calendar dates for FCRC submittals. In addition, measures have been established to assure proper

coordination between FCRC and LIRR during the course of the design and construction of the work. For example, the Air Space Development Agreement requires FCRC to continuously update the construction schedule as field work progresses, by submitting 6 month “Look-ahead” schedules and 12 week “Rolling” schedules, with those schedules being reviewed at “meetings held weekly or at such other intervals as the parties may mutually agree.”

The agreements also put into place the safeguards needed to assure that the work, once commenced, is pursued and completed on time. Among the preconditions required for the issuance of a notice to proceed are the delivery of appropriate labor and material payment and performance bonds, performance guarantees, letters of credit, and other financial assurances. With respect to the platform work, FCRC must also have provided the MTA Parties with evidence that financing “sufficient to fund the complete construction of the entire platform work” has been secured for the relevant Platform Construction Period.

It bears noting that the Development Agreement imposes stipulated penalties of up to \$10,000 per day for breach of the covenant to use “commercially reasonable effort” to complete the Project within the 10 year timetable, Development Agreement § 17.2(d); and that these remedies are not exclusive, in that ESDC is specifically entitled also to pursue its common law and equitable remedies, if it elects to do so. *Id.* § 17.2(a). ESDC recognizes that the amount of such stipulated penalties is less than the penalties that could be invoked for certain other events of default, including the failure to meet the outside dates. It further understands the complexities it would face in pursuing its common law and equitable remedies, particularly in establishing FCRC’s failure to proceed with the Project in a commercially reasonable manner. At the same time, ESDC is aware that FCRC has invested hundreds of millions of dollars in the Project and has a significant incentive, separate and apart from ESDC remedies, to pursue it to a successful and speedy conclusion because undeveloped land, the acquisition cost of which has been borne entirely by FCRC, does not earn any substantial return. In the context of this heavily negotiated, complex and large-scale real estate development, ESDC does not believe that more substantial stipulated penalties or additional enforcement remedies are needed to require and induce FCRC to pursue the Project with commercially reasonable diligence.

In sum, the Development Contracts do not preclude the Project from being constructed in 10 years and both require and encourage construction to take place at a commercially reasonable pace. In light of these considerations, the Development Contracts are not inconsistent with a ten year schedule for Project construction.

2. **As of the date of these findings, it appears unlikely that the Project will be constructed on a 10-year schedule, because the construction of the Project's residential buildings has lagged behind the 10-year schedule provided by FCRC to ESDC in 2009, and because of continuing weak general economic and financial conditions.**

Prior to ESDC's approval of the Project in September, 2009, FCRC delivered a schedule prepared by its construction management firm, setting forth how FCRC would build the Project on a ten-year timetable. ESDC was advised by its own construction experts that this schedule was reasonable from a constructability perspective. At the same time, ESDC considered, with the assistance of its financial consultant, the projected population growth in the Borough of Brooklyn, the current need for affordable and market-rate housing and the long term prospects of the real estate market over the next 10 years. On that basis, it determined that FCRC's 10-year schedule was reasonable. ESDC also acknowledged that the Project schedule could be delayed.

As of December 2010, the Project is not proceeding on the schedule reviewed by ESDC in 2009, or on a timetable consistent with a 10-year build out. For example, the 10-year construction schedule presented in the 2009 Technical Memorandum assumed that by the end of 2011, three or four non-Arena buildings would be under construction at the site. Currently, based on the information provided to ESDC by FCRC, it appears likely that only one non-Arena building will be under construction at that time. As of today, FCRC has not started construction of any of the non-Arena buildings.

Moreover, the commencement date of October 30, 2012 assumed for the construction of the platform on Block 1120 in the 2009 construction schedule precedes that schedule's completion date for the New Yard by approximately eight months. This sequence of activities does not, in one respect, conform to the requirements of the MTA Agreements as finally negotiated, which require that the New Yard be constructed before work begins on the platforms. (This information about the MTA Agreements – which were negotiated after the 2009 MGPP was approved – was not available to ESDC at the time it approved the 2009 MGPP because this term was not included in the MTA staff summary.) Although eight months is not on its face a significant discrepancy, the 10-year schedule for construction assumed in the 2009 Technical Memorandum would require adjustment to correct that discrepancy. Accordingly, as of the date of these findings, it is likely that the 10-year schedule for construction of the Project will be extended.

¹⁰ The 2009 Technical Memorandum, in Table 2, indicates that the commencement date for platform construction on Block 1120 under the 10-year schedule is 2011, but that table uses the term "platform" broadly to encompass both the demolition of the remaining buildings on Block 1120 and the construction of the platform. The more detailed underlying schedule upon which Table 2 was based did not assume that the actual platform on Block 1120 would commence construction until October 30, 2012.

3. **A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS and 2009 Technical Memorandum and would not require or warrant an SEIS. The analysis of the potential environmental impacts of a 25-year construction schedule confirms the conclusion reached by ESDC in 2009 that an SEIS is not required or warranted for the 2009 MGPP. Similarly, the Development Contracts do not require or warrant an SEIS.**

Notwithstanding the delay analysis set forth in the Technical Memorandum, project opponents and members of the public have expressed concern with respect to the potential for additional delays beyond 2024. ESDC believes that it had a rational basis in 2009 for: (i) the 10-year schedule assumed in the 2009 Technical Memorandum; (ii) the delay analysis also presented in the 2009 Technical Memorandum; and (iii) the conclusion that it reached in 2009 that the potential for a delay in the Project would not itself require or warrant an SEIS. Nevertheless, to comply with that aspect of the Remand Order requiring a determination as to whether an SEIS is warranted in light of the outside dates of the Development Contracts, ESDC has performed SEQRA analyses that put aside any consideration of FCRC's contractual and financial incentives to bring the Project to completion on a more expeditious schedule, and instead focus the technical portion of the SEQRA analyses on the 25-year outside date in the Development Agreement. This analysis of a very lengthy 25-year build out allows ESDC to determine whether the 2024 Build year assumption in the 2009 Technical Memorandum was critical to that document's conclusion that a delay in the Project's 10-year construction schedule would not result in significant adverse environmental impacts not identified in the FEIS.

Accordingly, ESDC requested its environmental consultant (AKRF, Inc.) to consider the potential effects of a delay extending beyond the 2024 date previously considered in the 2009 Technical Memorandum and to assume for analysis purposes that construction would continue until 2035. The results of that analysis are set forth in the report titled "Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project" (the "Technical Analysis") attached hereto and which is incorporated by reference herein. ESDC concludes that the assessment presented in the Technical Analysis confirms ESDC's determination in 2009 that an SEIS was neither required nor warranted to study the 2009 MGPP or the potential for a delay in construction of the Project beyond the 10-year timetable. ESDC also concludes that the Development Contracts, which are consistent with the 2009 MGPP, do not require or warrant an SEIS.

ESDC staff has worked closely with its consultant in the preparation of the Technical Analysis. It also has consulted with representatives of FCRC in order to obtain the information necessary to develop the conceptual sequence of activities assumed in assessing the impacts of constructing the Project according to a hypothetical schedule ending

in 2035 (referred to in the Technical Analysis as the “Extended Build-Out Scenario”), and in order to secure other information with respect to Project implementation. In conducting its inquiry, ESDC considered the detailed analyses previously set forth in the FEIS. Those previously conducted analyses identified several significant environmental impacts related to construction of the Project, and ESDC has taken such impacts, and how they would be affected by an additional delay, into careful account in reaching the conclusions set forth in these findings.

a. The Memorandum of Environmental Commitments

In considering the effects of an extended build out of the Project, ESDC is mindful of the measures that have been developed over the course of the SEQRA process to minimize or avoid the impacts of the construction and operation of the Project. FCRC is obligated to implement such measures, which are set forth in the “Memorandum of Environmental Commitments” that is attached to the Development Agreement. (This document is referred to as the “Amended Memorandum of Environmental Commitments” in the Technical Analysis, because it amended an earlier memorandum prepared in connection with the SEQRA Findings Statement in 2006.)

Among other things, FCRC must:

- undertake a comprehensive program to minimize the potential for dust generated by construction activities to affect the surrounding area; that program includes a mandatory speed restriction of 5 mph for vehicles operating within the construction site, and requirements for wetting down unpaved surfaces, covering or water-misting stockpiled materials, washing the tires of vehicles exiting the site, and inspecting departing trucks for proper sealing or covering of loose materials;
- implement a diesel emissions reduction program requiring the use of ultra-low sulfur diesel fuel and best available tailpipe emissions reduction technologies, enforced idling restrictions and the placement to the extent practicable of stationary engines at a minimum of 50 feet from sensitive locations, and the use of electric engines, rather than diesel equipment, where practicable;
- put into place a community air monitoring plan to be implemented when a contractor is engaged in excavation activities;
- undertake a comprehensive program to minimize noise from Project construction, including the use and proper maintenance of equipment with noise emission levels conforming to those specified in the FEIS and the provision of a minimum 8-foot high perimeter barrier (constructed of 3/4” thick plywood), with a 16-foot high barrier (of 3/4”

thick plywood) adjacent to sensitive locations (and operation of noisy vehicles, such as concrete-mixing trucks, behind the barriers);

- at the option of potentially affected residents, provision of double-glazed or storm windows and alternative ventilation for those residential locations where the FEIS identified significant noise impacts, where such windows and air conditioning units are not currently installed;
- develop Maintenance and Protection of Traffic (“MPT”) plans in consultation with the New York City Department of Transportation (“DOT”), to minimize the effects of construction activities on the flow of vehicular and pedestrian traffic in the vicinity of construction sites;
- implement specified permanent roadway improvements designed to reduce traffic impacts during construction and operation, subject to DOT approval;
- maintain on-site designated staging areas throughout the construction period to store materials and accommodate construction vehicles that require early arrival and marshalling for immediate material delivery to high-demand construction areas, in order to reduce the presence of construction vehicles on local streets;
- provide on-site parking for construction workers at levels appropriate in light of the number of workers employed at the site during different stages of construction, to minimize construction worker parking on local streets;
- equip interim construction staging and parking areas with directional lighting angled to limit light intrusion beyond the site and provide screening of interim parking areas and construction staging areas;
- develop and implement a construction protection plan to prevent impacts on historic resources within 90 feet of any construction;
- implement vibration monitoring;
- develop and implement a construction health and safety plan to prevent potential impacts related to contamination that could be encountered during the course of environmental remediation and excavation;
- implement a rodent control program, prior to the commencement of construction activities in a particular area; and

- reimburse ESDC for the cost of its environmental monitor, who has been inspecting the Project site on a regular basis and will continue to do so, to ensure that FCRC and its contractors comply with the commitments set forth in the Memorandum of Environmental Commitments.
- b. General Approach of the Technical Analysis

The Technical Analysis notes that the scheduling of construction activities for a major project is an exceedingly complex endeavor, with conceptual schedules for construction made early on in project planning evolving over the course of the design and development process. It recognizes, therefore, that the “Extended Build-Out” Scenario assumed for purposes of the analysis would be subject to modification as the Project evolves. Nevertheless, the assumptions incorporated into that scenario allow for a reasonable assessment of the potential consequences of a lengthy delay in the construction schedule for the Project. As noted in the Technical Analysis, the sequence of development assumed for the Extended Build-Out Scenario accounts for certain constraints that have been put into place by the Development Contracts subsequent to the time when the 2009 Technical Memorandum was prepared. For example, the assumed sequence calls for commencement of construction of the platform after the New Yard has been completed. It also assumes that the platform can be constructed in up to three contiguous phases, and that commencement of construction of a building on Block 1129 will begin by 2020.

The Technical Analysis further assumes that construction of the Project will proceed in the Extended Build-Out Scenario on a sequential basis, with each building being individually designed, financed, and built. It also accounts for the fact that during certain periods more than one building can be expected to be under construction simultaneously. The illustrative sequencing of building construction assumed in the Extended Build-Out Scenario is also consistent with the general approach of developing the Project from west to east, with more buildings completed in the early stages of construction. The Technical Analysis notes that even though the sequence for the actual build out of the Project may deviate from the assumptions underlying the Extended Build-Out Scenario, such variations would not be expected to result in material differences in the overall assessment of potential impacts as set forth in the Technical Analysis.

Rather than examining site conditions separately upon completion of each of the 17 Project buildings, the Technical Analysis assesses such conditions at seven stages of Project completion. These seven stages (described and depicted in the Technical Analysis as “Stages” 1 through 7) are used as “snapshots” in time, showing how the Project site would appear, and would affect the surrounding area, at certain points in the construction process, with each stage depicting which Project elements would have been completed, which would be under construction, and which would not have been started.

The Technical Analysis notes that although the overall construction of the Project would be delayed under the Extended Build-Out Scenario, the time involved in

constructing each component of the Project would not be substantially affected. Thus, the amount of time and effort devoted to the construction of each of the Project buildings would be approximately the same as assumed in the FEIS, regardless of the calendar year in which such buildings are constructed. The analysis also accounts for the fact that the program and use contemplated for the Project would be unchanged under the Extended Build-Out Scenario. Thus, notwithstanding the date the Project is completed, it would need to be consistent with the 2009 MGPP, 2006 Design Guidelines and Memorandum of Environmental Commitments. Therefore, any difference in the Project's impacts *upon its completion* would result from changes in background conditions occurring during the period of extended delay.

The Technical Analysis addressed three sorts of impacts that could arise from the Extended Build-Out Scenario: (i) impacts that could occur upon completion of the Project in 2035; (ii) the effects of construction activities taking place over an extended period of time; and (iii) impacts associated with the appearance and use of the Project site during the extended period of construction. Each of those potential impact categories are addressed specifically below.

c. Operational Impacts upon Completion of the Project in 2035

Since the date for completion of the Project would not affect its ultimate program, site plan or building bulk and configuration, the Technical Analysis concluded that the Project, once completed under the Extended Build-out Scenario, would not have significant adverse impacts not previously addressed in the FEIS in the areas of Land Use and Public Policy, Socioeconomic Conditions, Open Space, Shadows, Historic Resources, Urban Design and Visual Resources, Hazardous Materials, Infrastructure, Air Quality, Noise, Neighborhood Character or Public Health. The Technical Analysis examined carefully the operational effects of the Extended Build-Out Scenario on Community Facilities, Traffic, Parking, Transit and Pedestrians.

Community Facilities

With respect to Community Facilities, the Technical Analysis noted that the FEIS had found that the additional students generated by the Project would have a significant adverse impact on public elementary and intermediate schools. In accordance with the SEQRA Findings, the Memorandum of Environmental Commitments requires FCRC to provide space, at the option of the School Construction Authority ("SCA"), for a public school on the Project site. The Technical Analysis considered more recent Board of Education projections, but those projections were found not to alter the conclusions of the 2009 Technical Memorandum, which continued to identify a significant adverse impact, at least with respect to elementary schools. The Technical Analysis found that a delay in Project construction under the Extended Build-Out Scenario would affect the timing within which a significant adverse impact to public schools would occur, because the number of new public school students generated by the Project will increase only as new residential units come on line. However, the ultimate FEIS conclusion that the Project will result in a

significant adverse impact to public schools, and FCRC's obligation to provide space for a public school on the Project site at SCA's option, would not be altered.

The Technical Analysis also considers the potential impacts of the Project under the Extended Build-Out Scenario on publicly funded child care facilities. It notes that the analysis performed with respect to such facilities in the 2009 Technical Memorandum found that the updated background conditions and updated methodologies (*i.e.*, the new CEQR generation rates for child care eligible children in effect at the time of the 2009 Technical Memorandum) would result in additional demand for publicly funded child care facilities in the study area as compared to the FEIS analysis, which could result in a shortfall of child care slots in the 2019 future with the Project. To meet the additional demand, the project sponsor was required, in the Memorandum of Environmental Commitments, to construct on the project site and arrange for the long-term operation of a licensed day care center accommodating at least 100 children and, if necessary, work with the New York City Administration for Children's Services to provide up to approximately 250 additional child care slots either on site or in the vicinity of the site to meet project-generated demand to the extent required to avoid a significant environmental impact. On that basis, the 2009 Technical Memorandum concluded that there would be no new significant adverse impacts on publicly funded child care facilities in the study area. FCRC's obligation under the Memorandum of Environmental Commitments to monitor the need for additional slots as Project implementation progresses and to provide for facilities that meet such need at the level necessary to avoid a significant adverse impact on publicly funded child care facilities, would remain the same under the Extended Build-Out Scenario.

Traffic, Parking, Transit and Pedestrians

In general, the conclusions of the FEIS with respect to the impacts of the Project on traffic were based upon an analysis that: (i) identified existing traffic conditions in the study area during each of the relevant peak hours; (ii) made a projection as to how traffic conditions would evolve without the Project by the 2016 build year (the "No Build" condition); (iii) estimated the additional trips that would be expected to be generated by the Project upon completion; (iv) superimposed that additional traffic on the affected roadway network as of the Project's build year; and (v) assessed the impact of the Project-generated traffic on the No Build traffic conditions that would otherwise exist in the build year. Since a delay in the year of Project completion would not increase the overall size or mix of uses proposed for the Project, such a delay would not change the number of Project-generated trips in any of the analyzed peak hours at full build-out. Accordingly, any additional traffic or parking impacts associated with the Project under the Extended Build-Out Scenario would be caused by a worsening of the No Build conditions in the years up to 2035. The Technical Analysis assesses this issue and concludes that the FEIS – when assessed in light of more recent traffic data (which show that traffic volumes in 2010 are less than the 2005 traffic volumes used as the basis for the FEIS), the changes in the other projects that are expected to be constructed in the transportation study area and a change in the City's projections of the long-term background growth rate for Brooklyn – made sufficiently

conservative assumptions as to the 2016 No Build network that the Extended Build-Out Scenario would not be expected to change materially the conclusions regarding its traffic impacts. In this regard, it is noteworthy that the FEIS disclosed that the Project would result in significant adverse traffic impacts at numerous intersections and required traffic mitigation (which would only partially mitigated the adverse traffic impacts) that will be implemented in close cooperation with and as approved by DOT; the traffic mitigation measures would continue to be implemented as approved by DOT in the Extended Built-Out Scenario. The Technical Analysis also assesses parking, transit and pedestrian impacts and concludes that the Extended Build-Out Scenario would not result in adverse impacts in these technical areas upon Project completion.

d. Construction Period Impacts – Introduction

The Technical Analysis also assessed the potential for the Extended Build-Out Scenario to result in environmental impacts not adequately addressed in the FEIS that would occur during the construction period. Two related but discrete issues were assessed: (i) how environmental impacts associated with construction activities would change under a scenario in which they would take place over a longer period of time (25 years instead of 10 years), but would also be generally less intense (because fewer buildings would be under simultaneous construction at the site); and (ii) whether and how the environmental impacts of the Project would change as a result of a delay in the construction of certain Project buildings and the open space. Each of these issues is discussed separately below.

e. Impact of Construction Activities In The Extended Build-Out Scenario

The FEIS analyzed the environmental impacts of: (i) construction-related traffic, taking into account potential impacts associated with construction trucks and construction-worker vehicles; (ii) construction-related air emissions, focusing primarily on fine particulate matter emitted from the operation of construction equipment, and the dust associated with the disturbance of site soils and the movement of construction vehicles; and (iii) construction-related noise associated with the operation of construction equipment and construction-related traffic. The FEIS assessed each of these areas using quantitative models based on identified peak periods of construction during a 10 year construction period, when multiple buildings were assumed to be under simultaneous construction in close proximity to each other at the site. In connection with these analyses, the FEIS identified and assessed one or more peak periods for both Phase I and Phase II of the Project when construction would be taking place at a level most likely to result in the potential for significant adverse traffic, air and noise impacts. In addition to these technical areas, the discussion below also summarizes the conclusions of the Technical Analysis with respect to neighborhood character. The Technical Analysis also examines other construction-related issues.

Construction-Related Traffic

With respect to traffic, the FEIS concluded that the construction of the Project would result in significant adverse impacts at a number of intersections in the area.

The Technical Analysis concludes that under the Extended Build-Out Scenario the volume of construction-related traffic would be reduced during much of the construction period, because approximately the same total volume of construction trucks and construction-worker vehicles would be spread out over 25 years, instead of over 10 years. The construction of the Project over 25 years would continue to result in significant adverse traffic impacts, as in the 10-year scenario analyzed in the FEIS, but the traffic impacts in the Extended Build-Out Scenario are likely to be at fewer intersections and result in less incremental delay time at the affected traffic movements at these intersections. As noted above, the SEQRA Findings Statement and Memorandum of Environmental Commitments imposed extensive traffic mitigation measures for the Project, and, in general, concluded that these measures would also address, to the maximum extent practicable, the significant construction-related traffic impacts. Pursuant to the Memorandum of Environmental Commitments and discussions with FCRC and DOT earlier this year, the network-related traffic mitigation will be implemented by the Arena opening date, and will therefore mitigate traffic conditions to the extent practicable during the construction period thereafter. In addition, the Technical Analysis notes that, in accordance with the Memorandum of Environmental Commitments and DOT regulations, an MPT plan will be developed and implemented for each construction site, in order to maintain public safety during construction and to minimize impacts to traffic and pedestrians. Each MPT plan would be prepared at the time that a permit is required for a new major phase of construction activity, such as starting a new building. For the foregoing reasons and based upon the additional information provided in the Technical Analysis, 2009 Technical Memorandum and FEIS, ESDC concludes that an SEIS is not required or warranted to further study construction-related traffic impacts.

Construction-Related Noise

The FEIS concluded that the construction of the Project would also result in significant adverse noise impacts at a number of noise receptor locations, and adjacent areas that are specifically identified in the FEIS and SEQRA Findings Statement. The FEIS focused on noise emanating from construction equipment, because operating construction equipment was identified as the predominant source of noise during the period of construction. The Technical Analysis concludes that construction of the Project under the Extended Build-Out Scenario would, in general, reduce the volume of construction-related equipment that would be in operation at any one time at the Project site because fewer buildings would be under concurrent construction. However, an extended build-out would also prolong the period of time that construction-related noise would occur at the site.

The Technical Analysis identified which of the noise receptor locations examined in the FEIS would experience significant adverse noise impacts during each of the seven stages analyzed in the Extended Build-Out Scenario. That analysis indicated that, although certain receptors would be adversely affected over multiple stages of construction, the noise-related impacts of construction activities generally would move from one area to another as those activities progress across the 22 acre site. Thus, the Technical Analysis

indicates that under the Extended Build-Out Scenario most receptor locations would experience construction-related noise impacts only during certain stages of the construction schedule, when construction work (such as excavation and building shell construction) is being performed in proximity to the noise receptor, rather than for the entire duration of the 25-year period. Moreover, periods of high noise levels can be expected to be episodic at the affected receptors, because many Project buildings would be constructed sequentially and high levels of noise do not occur throughout the entire period during which a building is under construction.

A prolonged construction schedule may prolong the duration during which certain receptor locations would experience significant adverse construction-related noise impacts. However, the significant adverse noise impacts would not be expected to occur at receptor locations not previously identified in the FEIS as locations that would experience such significant impacts. The SEQRA Findings Statement imposed comprehensive noise mitigation measures to address the noise related to Project construction to the maximum extent practicable. These requirements have been incorporated into the Memorandum of Environmental Commitments whose measures FCRC is required to follow pursuant to the Development Agreement, as noted above. Among other things, FCRC is obligated to provide double-glazed windows and alternative means of ventilation at residences nearby significantly impacted receptor locations. The Technical Analysis, like the FEIS, indicated that such measures would be effective in reducing interior noise levels at the residences opting to accept them. Such mitigation measures would continue to address the noise impacts of construction under the Extended Build-Out Scenario, to the extent practicable. For the foregoing reasons and based upon the additional information provided in the Technical Analysis, 2009 Technical Memorandum and FEIS, ESDC concludes that an SEIS is not required or warranted to further study construction-related noise impacts.

Construction-Related Air Impacts

The FEIS concluded that the construction of the Project would not result in significant adverse air quality impacts, even during the peak periods of construction when multiple buildings in close proximity to each other were assumed to be under construction concurrently. The FEIS analysis with respect to fine particulate emissions was based on the assumption that FCRC's contractors would implement a state-of-the-art emission reduction program (including but not limited to the use of diesel particulate filters on major construction equipment and concrete trucks). Accordingly, the Memorandum of Environmental Commitments requires FCRC to comply with the FEIS commitment to implement such a program. ESDC's environmental monitor has been closely monitoring the construction work with respect to compliance with these measures, and the Memorandum of Environmental Commitments requires FCRC to reimburse ESDC for the cost of that monitor; accordingly, ESDC's oversight, with the assistance of its environmental monitor, will continue for the entire duration of the Project's construction work, regardless of any delay in the construction schedule.

According to the air quality assessment in the FEIS for construction-related air impacts, fine particulate matter concentrations of potential concern at individual receptor locations, should they occur, would be due to emissions from construction equipment operated in close proximity to the receptor location. The Technical Analysis examines construction activities in each of the seven stages, and concludes that the Extended Build-Out Scenario – although prolonging the overall duration of construction across the 22 acre site – would not increase the duration of the construction work on individual Project elements, and therefore would not prolong intense construction operations near individual receptor locations. The Technical Analysis supports the conclusion that a prolonged construction schedule would not be expected to increase the frequency, duration or intensity of elevated concentrations at individual receptor locations and, as in the 10-year FEIS construction scenario, would not result in significant adverse impacts to air quality.

The Technical Analysis also assessed the potential impacts of a prolonged construction schedule on nuisance dust from the construction work, an issue the FEIS and Memorandum of Environmental Commitments also address. FCRC's compliance with the required dust control measures are being monitored carefully, and will continue to be monitored carefully, by ESDC's environmental monitor. Although the potential for dust would continue in the general vicinity of the construction area for a longer duration since the Extended Build-Out Scenario would have a longer construction schedule, concentrations would not persist in any particular location because the activities generating dust would not occur continuously at any single location throughout construction. In addition, since there would be less simultaneous work on multiple sites and buildings and more time in between the start of each building's construction activities, the overall dust emissions at any stage in the Extended Build-Out Scenario would be expected to be less than that analyzed in the FEIS. The Technical Analysis concludes that a prolonged construction schedule – which would not materially change the total amount of soil excavation or construction traffic required to build the Project – would not exacerbate nuisance dust from the construction site so as to result in dust-related significant adverse environmental impacts. For the foregoing reasons and based upon the additional information provided in the Technical Analysis, 2009 Technical Memorandum and FEIS, ESDC concludes that an SEIS is not required or warranted to further study construction-related air quality impacts.

Neighborhood Character

The FEIS concluded that intensive construction activities carried on over a ten year duration would result in significant localized adverse impacts to neighborhood character in the areas, such as those along Dean Street, Pacific Street and Carlton and Flatbush Avenues, in the immediate vicinity of the Project site. The FEIS noted that in addition to being exposed to the effects of prolonged construction activity, during certain phases of the construction work, these areas would be inconvenienced by construction-related closures of the Carlton Avenue Bridge and 6th Avenue Bridge over the rail yard and would also experience significant impacts from construction traffic and noise. As noted in the 2009 Technical Memorandum, since the FEIS, it has been determined that it will no

longer be necessary to demolish and replace the 6th Avenue Bridge; this change will reduce the impacts of such closure on the area. Also, a delay in the construction of the Project would not affect the duration of the closure of the Carlton Avenue Bridge, because the 2009 MGPP requires the Carlton Avenue Bridge to be re-built and operational by the Arena opening condition.

As noted in the Technical Analysis, a more prolonged construction schedule would not increase the duration of the construction activity associated with individual Project buildings. Thus, residences immediately across the street from the building sites will not experience a more prolonged construction period for any specific building. But certain areas adjacent to the Project site are near several building sites; for example, the residences on the northeastern edge of Block 1128, on Carlton Avenue, are across the street from the sites of Buildings 7 and 14, and diagonally across from the sites of Buildings 6 and 8. Under the Extended Build-Out Scenario, such areas would experience less intense construction (because fewer buildings would be under concurrent construction) but would experience construction of at least one building in the immediate vicinity for a more prolonged time period. As noted above, the FEIS already disclosed a significant localized adverse impact to neighborhood character at the areas adjacent to the Project site, and identified construction-related mitigation measures to minimize these impacts to the greatest extent practicable, all of which have been imposed on FCRC pursuant to the Memorandum of Environmental Commitments made enforceable through the Development Agreement. For the foregoing reasons and based upon the additional information provided in the Technical Analysis, 2009 Technical Memorandum and FEIS, ESDC concludes that an SEIS is not required or warranted to further study construction-related neighborhood character impacts.

f. Impact Of The Delay In The Construction Of Project Buildings In The Extended Build-Out Scenario

A delay in Project construction would also result in a delay in the realization of the benefits of certain of the Project elements. Among other issues, the Technical Analysis addressed the effect of the Extended Built-Out Scenario on one key component of the Project: the provision of 8 acres of publicly accessible open space, which would be developed incrementally during Phase II as buildings during this phase are completed. The FEIS identified a temporary significant adverse open space impact in the non-residential (1/4-mile) study area between the completion of Phase I and the completion of Phase II. In considering this temporary impact, ESDC takes note of the qualitative consideration set forth in the FEIS of the availability of large nearby open spaces like Prospect Park and Fort Greene Park. Moreover, the Extended Build-Out Scenario would affect the timing of the open space development, but not the ultimate layout of the 8 acres of publicly accessible open space or the project's population, which would remain the same as described in the FEIS. The Extended Build-Out Scenario would prolong the temporary significant adverse open space impact in the non-residential (1/4-mile) study area identified in the FEIS – especially if all of the Phase I buildings were to be constructed before any of the Phase II open space is made available – but would not result in new significant adverse impacts not

addressed in the FEIS. Moreover, the Phase II open space would be provided incrementally as the Phase II buildings are constructed, as required by and in conformance with the Design Guidelines. The open space deficit would also be partially addressed, during certain interim delay periods in the Extended Build-Out Scenario, through the provision of the publicly accessible plaza at the Building 1 site and the publicly accessible open space at the Building 3 site; these temporary open spaces, however, would be eliminated upon the construction of Buildings 1 and 3, respectively. As noted in the FEIS, however, Building 1 will include the Urban Room, which the FEIS characterized as a public amenity that was considered qualitatively in its open space assessment. ESDC concludes that an SEIS is not required or warranted to further study a potential delay-related prolongation of the open space impact in the non-residential (1/4-mile) study area caused by a potential gap between the construction of the Phase I buildings and the Phase II open space in the Extended Build-Out Scenario.

The Technical Analysis assessed the urban design, neighborhood character, open space and other impacts of the delay in the construction of the Project buildings in the Extended Built-Out Scenario, principally through its discussion of the “Stages” that serve as the analysis tool used in its assessment. To synthesize this information, the impact of such delays are summarized below, proceeding generally from the western end of the Project site eastward. The discussion below is intended to supplement, not replace, the discussion set forth in the Technical Analysis.

A delay in the construction of the building on Site 5 would likely result in the existing condition (two retail stores) operating for a longer time period at this location. Such a delay would postpone the benefits of the Project building to be constructed at Site 5 but would not warrant preparation of an SEIS.

Building 1, at the southeast corner of Flatbush and Atlantic Avenues, is a multi-use building with a significant commercial office component. The building cannot be financed until an anchor tenant is identified, which has not yet occurred. The delay in the construction of Building 1 will delay the construction of the Urban Room, which is one of the Project’s public benefits. In the interim condition, however, an urban plaza and the new subway entrance are being constructed at this location, and the arena signage and design have been developed to take into account the delay in the construction of Building 1. Such a delay would postpone the benefits of the Urban Room and the economic development benefits of its new commercial office space, but does not warrant preparation of an SEIS. The delay in the construction of Building 1 would not result in significant adverse impacts; moreover, the preparation of an SEIS would not provide information that would be useful in addressing the conditions caused by a delay in the construction of Building 1, particularly in light of the public plaza that will be constructed at this location until construction of Building 1.

Building 2, which will be located on Dean Street adjacent to the arena, is expected to be the first residential building at the Project site. Its construction is expected to begin in 2011 and is therefore not expected to be delayed significantly under the Extended Build-Out Scenario.

One important effect of the delay in Building 3 is that a portion of the permanent buffer that would be provided by constructing residential buildings between the arena and the residential area to the south along Dean Street will not be in place until such building is constructed. However, construction of Building 2 would provide a partial buffer, and the publicly accessible interim open space planned for this location prior to the construction of Building 3 is a public amenity that would somewhat buffer the arena at the location of Building 3. An SEIS would not provide information that would be useful in addressing a delay in the construction of Building 3.

The effect of a delay in Building 4, at the northeastern corner of the arena, would be that the existing below-grade rail yard cut at this location would be in place for a longer period of time. This is a continuation of the historic condition of the Building 4 site. Such a delay would delay the benefits of Building 4, but would not warrant an SEIS. The delay in the construction of Building 4 would merely cause a perpetuation of the long-existing condition at this location. Although Building 4, when constructed, would partially buffer the arena to the north of the Project site, that area is a predominantly commercial area of Atlantic Avenue and would not be significantly affected by the absence of Building 4 and the resulting unbuffered views of the arena's northeast corner, particularly since Atlantic Avenue itself is a major thoroughfare. Moreover, an SEIS would not provide information that would be useful in addressing the delay in the benefits from a delay in the construction of Building 4.

The effect of a delay in Buildings 5, 6 and 7 – to be located on Block 1120 over the rail yard and on the land adjacent to Atlantic Avenue – is, in general, that the existing historic condition at Block 1120, which is predominantly characterized by the below-grade open rail cut, would be in place for a longer period of time. Lot 35, however, would be in use for construction staging and access to the below-grade rail yard to enable FCRC to build the permanent rail yard. The delay in the construction of Buildings 5, 6 and 7 would cause a perpetuation of the long-existing condition on Block 1120 and would not warrant an SEIS, which is not likely to provide useful information as to what measures could be taken, if any, to speed the construction of an at-grade platform, buildings and open space on Block 1120 to cover the rail yard.

The effect of a delay in Buildings 8, 9 and 10 – to be located on Block 1121 over the rail yard and on the land adjacent to Vanderbilt Avenue – is, in general, that the existing historic condition at Block 1121, which is predominantly characterized by the below-grade open rail cut, would be in place for a longer period of time. The delay in the construction of Buildings 8, 9 and 10 would cause a perpetuation of the long-existing condition on Block 1121 and would not warrant an SEIS, which is not likely to provide useful information as to what measures could be taken, if any, to speed the construction of an at-grade platform, buildings and open space on Block 1121 to cover the rail yard.

The effect of a delay in Buildings 11, 12, 13 and 14 – to be located on Block 1129 – would be that the interim surface parking facility to be constructed at this location

would be in place for a longer period of time. Prior to the work on the Project, Block 1129 was a blighted area, characterized by a mix of abandoned industrial buildings, occupied residential and commercial buildings, a homeless shelter and much smaller surface parking lots. The interim surface parking lot on Block 1129 will be screened by landscaping and a 10' tall semi-transparent fence. In the interim condition, the parking lot on Block 1129 will be large – holding as many as 1100 vehicles – and, as disclosed in the FEIS analysis, this condition will result in significant adverse traffic impacts during peak travel periods. Upon Project completion, however, Block 1129 will have 2070 below-grade parking spaces; thus, vehicular traffic associated with the interim surface parking lot of 1100 spaces is expected to be less than the traffic impacts associated with the larger parking lot on Block 1129 in the Phase II completion condition analyzed in the FEIS. The FEIS has already considered the traffic impacts of a parking lot on Block 1129 thoroughly; the traffic impacts are not exacerbated by a delay in the construction of Buildings 11, 12, 13 and 14 on Block 1129. The interim surface parking on Block 1129 will have an effect on the residential blocks in the immediate vicinity of Block 1129, but would not change the character of the larger neighborhoods surrounding the Project site. Moreover, the Development Agreement requires that FCRC begin construction of a least one building on Block 1129 by 2020. FCRC has advised ESDC that the first building to be constructed on Block 1129, in the Extended Build-Out Scenario, would likely be Building 14, which is on the western end of the block. The construction of Building 14 would help screen the residential buildings on Carlton Avenue from the interim surface parking lot that would remain on other areas of Block 1129 after Building 14 is constructed. A delay in Buildings 11, 12, 13 and 14 would delay the benefits of these buildings, but would not create significant adverse neighborhood character or other impacts not disclosed in the FEIS, especially when considered in light of the blighted condition of Block 1129 prior to ESDC's acquisition of the Project site and the localized nature of the visual impact of a surface parking lot. Moreover, an SEIS would not identify additional measures to reduce the impacts of the surface parking on Block 1129 because FCRC has already committed to improving the perimeter of the parking lot with screening and to using directional lighting to minimize light intrusion on nearby buildings, and the FEIS already provides for traffic mitigation to address vehicular traffic associated with the parking lot. Accordingly, an SEIS is not warranted to study the impact of a potential delay in the construction of buildings on Block 1129.

A delay in the construction of Building 15 – a building on a relatively small portion of the western end of Block 1128 – would delay the benefits of Building 15, but would not result in significant adverse impacts that would warrant an SEIS.

¹¹ ESDC has already acquired Block 1129 through the exercise of eminent domain, at FCRC's expense. Thus, this land is available to FCRC for development pursuant to the 2009 MGPP and the Development Agreement without any incremental cost for property acquisition, since FCRC has already incurred the costs of acquiring the right to develop 1.257 million square feet of residential development on Block 1129. *See* 2009 MGPP, Exhibit C. A delay in the development of Block 1129 is not anticipated.

For the foregoing reasons and based upon the additional information provided in the Technical Analysis, 2009 Technical Memorandum and FEIS, ESDC concludes that an SEIS is not required or warranted to further study the effect of a potential delay in the construction of the Project buildings.

For the foregoing reasons, and based on the information in the FEIS, 2009 Technical Memorandum and Technical Analysis, ESDC further concludes that the Technical Analysis confirms ESDC's conclusion made in 2009 that the 2009 MGPP did not require or warrant an SEIS. Similarly, the Development Contracts did not require or warrant an SEIS. Moreover, ESDC determines that an SEIS would not provide information that would be of material utility in identifying the environmental impacts of the Project or practicable measures to minimize or avoid such impacts beyond those already imposed in the SEQRA Findings Statement and the Memorandum of Environmental Commitments made enforceable by the Development Agreement.