SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of

DEVELOP DON'T DESTROY BROOKLYN; et al,

Petitioners – Appellants

AFFIRMATION OF JEFFREY S. BAKER

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment

- against -

Index No. 104597/2007

URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION; et al.

Respondents - Respondents

JEFFREY S. BAKER, an attorney duly admitted to practice before the Courts of the State of New York, does hereby affirm the following to be true under the penalties of perjury:

1. I am an attorney licensed to practice law in the State of New York and I am a partner at the law firm of Young, Sommer, Ward, Ritzenberg, Baker and Moore, LLC, attorneys for Petitioners-Appellants ("Appellants" or "Petitioners") in the above-captioned proceeding. I make this affirmation in support of the Motion for a Preliminary Injunction pursuant to CPLR § 5518, pending the resolution of the appeal in this case. I am fully familiar with the facts and circumstances set forth in this affirmation.

2. Appellants appeal from the Decision and Order of the Supreme Court, New York County (Hon. Joan A. Madden, J) dated January 11, 2008 which denied and dismissed Appellants' Article 78 Petition and denied Appellants' Motion for a Preliminary Injunction. Appellants seek a Preliminary Injunction from this Court to preserve the status quo in the area of the proposed Atlantic Yards Project pending consideration of this appeal.

3. Should construction of the project proceed in the interim, Appellants will be irreparably harmed by changes to the area which will have a lasting effect on the local environment and the quality of life. In particular, Respondents are planning on closing the Carlton Avenue Bridge on or about January 23, 2008 for at least two years. That closure, by Respondents' own admission in the Final Environmental Impact Statement (FEIS), will result in significant unmitigated adverse impacts as traffic is directed to alternative routes. Within an indeterminate time, but shortly after the bridge is closed, it will be dismantled as part of the Atlantic Yards Project. As a result, if the appeal is successful, Appellants will be irreparably harmed as the bridge will be demolished without any plan or financing for its replacement.

4. Appellants are appealing all aspects of Justice Madden's decision. As more fully discussed below, Appellants, without waiving any other appealable issues, specifically contest the following for the purposes of this motion:

A. The Public Authorities Control Board ("PACB") violated the State Environmental Quality Review Act ("SEQRA") by failing to issue the required Statement of Findings. N.Y.S, Environmental Conservation Law ("ECL") §8-0109(8). The court below erroneously held that the PACB's approval of funding for the project and Empire State Development Corporation's ("ESDC") involvement in the project was not an "action" under SEQRA, despite the discretionary nature of PACB's approval.

B. ESDC is statutorily prohibited from undertaking the approval and funding for the Barclay's Arena as it does not meet the statutory definition of a "civic project". McKinney's Uncon. Laws of NY, §6260(d). The court below erroneously held that watching professional basketball games qualified as a recreational activity under the UDCA. The court also erroneously held that leasing of the arena to a private for-profit entity qualified as legal entity

engaged in carrying out a "community, municipal, public service or other civic purpose." as required by the UDCA.

C. The court erroneously determined that ESDC properly determined that the project site was blighted, misapplying relevant case law and failing to carefully consider the record which demonstrated that ESDC arbitrarily and capriciously included the entire three block southern section of the project area, comprising 40% of the entire project area, without sufficient basis and without responding or considering the public comments that challenged the blight determination.

Project Description and Procedural History

5. The Atlantic Yards Project represents the largest single-developer project in New York City history. The Project would cover all or parts of 8 city blocks (22 acres), and would require the permanent closing of three city streets. It includes a sports arena for the professional basketball franchise currently known as the New Jersey Nets, which will accommodate up to 20,500 persons; 16 high-rise apartment and office towers containing 8 million square feet of residential (6,430 units), office and commercial space; and a 180-room hotel.

6. Most of Blocks 1119, 1120 and 1121 on the project site are comprised of the Vanderbilt Yards, which are owned by the MTA, along with a few privately-owned parcels. The balance of the Project site encompasses Blocks 927, 1118, 1127, 1129 and the western portion of Block 1128. Slightly more than 50% of the Project site – specifically the area north of Pacific Street and including Blocks 927, 1118, 1119, 1120 and 1121 – is within the Atlantic Terminal Urban Renewal Area ("ATURA"). Three blocks included within the Project site, comprising approximately 40% of the Project site – 1127, part of 1128, and 1129 – <u>are not part of ATURA</u>. (A map of the project site is attached as Ex. A).

7. The procedural history set forth at pp. 5 to 10 of Justice Madden's decision is generally accurate as to the dates and steps involved in the approval process by Respondents ESDC, Metropolitan Transportation Authority (MTA), PACB and the actions of the project sponsor Forest City Ratner Companies, LLC (FCRC).

8. On April 5, 2007, Appellants, consisting of 26 community and neighborhood associations surrounding the project area commenced this proceeding and requested a Temporary Restraining Order and Preliminary Injunction enjoining FCRC from commencing demolition of buildings on Blocks 1127, 1128 and 1129 pending the resolution of the proceeding.

9. Justice Madden denied the TRO primarily on the basis that the buildings to be demolished were already owned by FCRC and under New York City law, an owner may demolish its own buildings subject only to a ministerial demolition permit from the Department of Buildings. The court did set an expedited briefing schedule for all of the claims in the Petition and a non-evidentiary hearing was held before Justice Madden on May 3, 2007. At that time the court reserved judgment on the preliminary injunction and the petition itself and Justice Madden indicated that she hoped to rule in approximately six weeks which was also the estimated period during which FCRC planned to still be demolishing the buildings it owned.

10. At the time of the request for a Preliminary Injunction construction of the project that would materially affect Appellants was limited to the demolition of the aforesaid buildings. Other work contemplated for the project was generally limited to preparatory work within the MTA-owned Vanderbilt Yards associated with the relocation of the yards for the platform that would be eventually built over the yards.

11. Appellants have always supported redevelopment of Vanderbilt Yards, but have supported a development limited to the 8 acres of the yards themselves and have opposed a

project of the magnitude of the FCRC proposal which also encompasses the blocks south of Pacific Street, across Flatbush Avenue and includes the arena. Appellants have also opposed the project under the UDCA which overrides and avoids New York City's zoning law and the Uniform Land Use Review Process (ULURP), effectively disenfranchising local residents, their elective representatives and the City's master plan for development.

12. From December 2006 until this date, FCRC's activities for the project have been limited to the demolition of buildings owned by FCRC and preliminary work in the Vanderbilt Yards and minor local infrastructure work. On January 2, 2008, FCRC notified Petitioners and the court that it expected to close the Carlton Avenue Bridge on January 16, 2008 and begin demolition.[1] On January 7, 2008, Petitioners requested a telephone conference with Judge Madden and the other parties and stated that they would be required to make an additional motion for a preliminary injunction to keep the bridge from being closed and demolished pending the decision on the merits. Judge Madden told the parties that a decision would be issued by the end of the week and the decision was issued at approximately 4:00 PM on Friday, January 11th.

13. Upon information and belief, FCRC, ESDC and MTA have still not signed final financing, leasing and other necessary contracts to proceed with the project, nor has a contract been signed much less a closing taken place for the purchase of the Vanderbilt Yards. All of the work being undertaken to date by FCRC is subject to license agreements that permit FCRC to proceed with construction work at its own expense and own risk subject to the final agreements with the agencies and, apparently, the outcome of litigation over the project. Upon information and belief, should the agreements not be finalized or the approvals for the project be overturned,

[1] The estimated date for closing the bridge has since been delayed until January 23, 2008.

FCRC has no recourse to the agencies for the expenses it incurred in making improvements to Vanderbilt Yards.

14. FCRC and ESDC have also been unable to proceed with the project, particularly construction of the arena because of pending litigation surrounding ESDC's attempts to use eminent domain on behalf of FCRC to obtain properties for the arena. Property owners and tenants in the project footprint have brought challenges in state and Federal court under the New York State Eminent Domain Procedure Law and the U.S. Constitution challenging the constitutionality of ESDC taking private property for the benefit of a preferred private developer when the project was initiated and designed by the private developer without any independent planning or consideration by the governmental agency. Goldstein v. Pataki was commenced in Federal court in the Eastern District of New York on October 26, 2006. On June 6, 2007 the court granted defendants' pre-discovery motion to dismiss for failure to state a cause of action. Plaintiffs have appealed that decision to the Second Circuit Court of Appeals. Oral argument was held on October 9, 2007. A decision on the appeal is pending.

15. Without obtaining title to the properties and eviction of the property owners and tenants in the footprint for the arena, construction for the arena and surrounding buildings cannot begin.

Likelihood of Success on the Merits

16. This case represents the one and only opportunity that residents of the project area, including Boerum Hill, Fort Greene, Park Slope and Prospect Heights have an opportunity to seek an independent review of the project to assure that their rights are protected and that ESDC and the other agencies acted in compliance with the law and did not undertake a sham analysis in order to further the goals of a favored developer.

17. Appellants are well aware of the deference afforded agencies in their decision making on projects like these. They are also well aware that it is not the role of the courts to weigh the desirability of an action or to substitute the view of the court for that of the agency. However, the only protection for persons aggrieved by an agency action is careful review by the court of the law and the record to determine if the agency acted appropriately.

18. This is not the first case brought concerning the manner in which ESDC has proceeded with the approval of the Project. Some of the Petitioners-Appellants in the instant proceeding brought an earlier Article 78 proceeding against ESDC in 2006. *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d. 144, 816 N.Y.S.2d 424 (1st Dept. 2006). That case challenged ESDC's decision to permit the demolition of various buildings before the completion of the SEQRA process and sought the disqualification of ESDC's special counsel for a conflict of interest as he had previously represented FCRC on the same project and would not provide objective advice to a public agency reviewing a privately sponsored project. Supreme Court (Edmead, J) upheld ESDC's decision to permit demolition of the buildings due to their deteriorated state and granted the petition and disqualified ESDC's counsel for an apparent conflict of interest. Petitioners and respondents appealed that decision and this Court upheld Judge Edmead's decision with respect to demolition of the buildings and reversed her finding of a conflict of interest and disqualification of counsel. This Court found that petitioners did not have an attorney-client relationship with the attorney and thus had no standing to move for disqualification. With respect to petitioners claim that the close relationship between FCRC and ESDC and ESDC's reliance upon an attorney employed by FCRC, this Court noted that the project was still undergoing governmental review and that petitioners would have the opportunity to comment during that process and seek judicial review

if necessary. *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d. at 156.

19. This case demonstrates that the relationship between ESDC and FCRC was far too cozy and that rather than take an objective look at the various issues involved in the project, ESDC facilitated a sham process intended to grant FCRC the approvals for which it was not otherwise entitled. Appellants are counting on this Court to provide the meaningful judicial review that has otherwise been denied.

20. In this instance, the lower court misapplied the relevant law and failed to give the record the careful review that is mandated, and as discussed below, the court ignored Appellants' request for an evidentiary hearing pursuant to CPLR §7804(h) to determine the record basis for the blight determinations for Blocks 1127, 1128 and 1129. Such a hearing was required as the record failed to explain the basis for ESDC's determination either that individual lots were blighted or why the designated blocks or sections thereof were blighted.

PACB is Required to Issue SEQRA Findings

21. It is not disputed that ESDC could not proceed with the project without the approval of the PACB. The sole issue is whether the approval by the PACB constituted an action under SEQRA. If that approval is an action, because the project is the subject of an EIS, then the PACB could not approve it without first issuing SEQRA Findings.

22. The court below erroneously held that PACB's review was solely limited to reviewing the financial elements and guarantees of the project and that it did not have discretion regarding other issues and that environmental considerations had no bearing on its determination.

23. The court ignored the inherent discretion vested in the PACB that requires the unanimous consent of the three voting members of the Board. The court also ignored

Appellants' argument and proof that PACB members regularly consider factors outside the financial feasibility in deciding on a project. Appellants specifically quoted the statements of Assembly Speaker Sheldon Silver who explained his vote against the approval of a new stadium for the New York Jets on the west side of Manhattan by noting his concern about the impacts the project would have on the redevelopment of Lower Manhattan.

24. The court also ignored the clear statement of the Legislature in the SEQRA statute where it mandates that all agencies are to act as stewards of the environment and to include consideration of environmental factors in their decision-making. The Legislature further found that all agencies that regulate the activities of other agencies have the same obligation. ECL §8-0103(8) and (9).

25. Instead, the court put misplaced emphasis on *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993). That case concerned the issuance of a building permit, a purely ministerial action for which an applicant had an absolute right to a permit that granted no discretionary authority to the agency issuing the permit. *Village of Atlantic Beach* cannot be extended to cover the broadly discretionary function of the PACB to provide oversight of ESDC decisions.

26. Justice Madden also ignored Appellants' basic argument that if the Legislature wished to exempt PACB actions from SEQRA it clearly could have done so, but chose not to do so. When considering an issue of this import it is not the role of the courts to rewrite the statutes to fit the structure that they think might be appropriate, rather the courts must leave it to the Legislature to amend the law if it deems it appropriate. The Legislature has frequently provided that certain actions or agencies are exempt from SEQRA, but chose not to do so for the PACB.

In the absence of such exclusion, the PACB is bound by SEQRA and acted illegally when it failed to issue SEQRA Findings.

Barclay's Arena Cannot Qualify as a Civic Project Under the UDCA

27. The court below ignored the clear language of the UDC Act by upholding the designation by ESDC of the arena as a Civic Project under the Act. The court found that the arena could properly be deemed a recreational facility where the only persons actually doing any recreational activity would be the professional basketball players. The court held that spectators viewing the game would be gaining an amusement value and that amusement equated to a recreational activity.

28. In holding that a private sports arena qualified as a civic project the court ignored specific separate legislation adopted by the Legislature to permit ESDC to fund sports stadiums. In that instance the Legislature found it necessary to make specific findings that such facilities were in the public interest, promoted economic development and limited that authorization to a specific list of facilities. N.Y. Session Laws 1993, Ch. 258. The Legislature did not amend the UDCA to more broadly define civic projects to include sports stadiums. The Legislature thereby demonstrated that it felt special authorizing legislation was necessary for that purpose without broadening the authority of ESDC beyond what was permitted in that specific law.

29. The court below also effectively ignored the mandate of the UDCA that requires a civic project to be "leased to or owned by the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose . . ." McKinney's Uncon. Laws of NY, §6260(d).

30. The court erroneously determined that because under separate statutes or special legislation, the construction of sports stadiums is permitted, therefore in this case, notwithstanding the strict language of the UDCA, a private for-profit entity could lease and operate the civic project.

31. The court reached that conclusion without any logic or authority. While the Legislature may be entitled to authorize stadiums under special legislation, in this case it specifically limited the scope of ESDC's authority for civic projects. Thus, even if watching professional basketball could be considered "recreational" within the definition of a civic project, leasing the facility to a for profit entity nevertheless violates the UDCA. ESDC's extraordinary authority to override local laws and approvals must be narrowly read to that specifically authorized by the Legislature. The UDCA requires that a civic project must be owned or leased to a public entity or a not-for-profit corporation. To permit it to be leased and operated by a private for profit corporation is to make the restriction in the statute meaningless.

ESDC's Blight Determination is Arbitrary and Capricious

32. Appellants' fundamental challenge to ESDC's blight determination, a prerequisite to ESDC undertaking the project, is the lack of a basis for ESDC's decision to deem the entire project site located south of Pacific Street as blighted. ESDC designated all of Blocks 1127 and 1129 blighted and part of 1128 blighted.

33. As set forth below, Justice Madden ignored significant facts presented by Appellants that demonstrated that those blocks are not blighted. Justice Madden apparently was not concerned that ESDC never contested those facts and never responded to the hundreds of pages of detailed comments on ESDC's blight study.

34. While the Project was formally announced in December 2003, alleviation of blight on the subject blocks was never mentioned at that time as a basis or goal of the project and was never mentioned by ESDC until its Draft Scoping Document was released in September 2005.

35. When ESDC and FCRC entered into a Memorandum of Agreement for the development of the Project in February 2005, the presence or alleviation of blight on the subject blocks was never mentioned. Instead ESDC stated it would take all necessary steps to approve the project as required by the UDCA.

36. Prior to the 2006 Blight Study, neither ESDC nor any other governmental agency ever undertook any study that identified the blocks south of Pacific Street as blighted.

37. Instead, FCRC defined the project boundaries and then, *31 months later*, ESDC commissioned the Blight Study that looked only at those properties within the boundaries chosen by FCRC. Even where the project boundary bisected Block 1128, ESDC's study never looked at the lots immediately adjacent to that boundary to determine their status.

38. ESDC did not undertake any analysis of market conditions on the subject blocks to determine investment and redevelopment trends. Such an analysis is essential for the determination, made by ESDC, that the area is blighted and is preventing economic investment and redevelopment.

39. ESDC never responded to or considered the hundreds of pages of comments from the community, including members of the plaintiff organizations, that provided a detailed critique of the blight study.

40. For example, ESDC arbitrarily declared lots blighted if they were built out to less than 60% of their maximum build out under the New York City zoning code. In making its

determination ESDC did not consider the overall use, condition or vitality of the existing structure and, instead, determined that a lot was blighted if it was "underutilized", defining that term as less than 60% of maximum build-out.

41. The concept of "underutilization" absent the presence of other manifestations of blight has never been recognized as a valid criteria for determining blight in New York.

42. Additionally, while ESDC's blight study includes a lot by lot description of each lot's conditions, those descriptions are not evaluative and do not disclose if a lot is blighted or explain any such conclusion.

43. The only designation of which lots are blighted is on a single map that designates the lots without explanation for the conclusion. Thus, as was demonstrated to the court below, when one looks at the individual lot descriptions in the study, one cannot determine why one lot is designated blighted on the map and another is omitted.

44. The court below also misapplied case law that permits the designation of non-blighted parcels as blighted if the surrounding area is blighted. There is a distinct area of blight – the Vanderbilt Railyards – and a distinct area of non-blight, the three blocks south of the railyards. It is the railyard blight itself that is surrounded by non-blight. Appellants are challenging the designation of the entire southern portion of the project area where ESDC expanded the blight designation without any rational basis.

45. Appellants demonstrated in their papers and at oral argument all of the foregoing, most of which was admitted by Respondents. Appellants pointed out that if the court had any basis for believing that the ESDC conducted a proper blight study, then an evidentiary hearing must be held because the record produced by ESDC clearly failed to present that basis.

46. The court never responded to Appellants' request.

47. In light of the foregoing the blight determination by ESDC is clearly arbitrary and capricious. To let that determination stand would be to condone blight determinations based solely on volumes of papers without consideration for their actual content and accuracy. To do so would be to make a mockery of judicial review of agency action and would permit entire neighborhoods to be leveled simply on an agency's bald statement and to assist a favored developer.

Closing the Carlton Avenue Bridge Will Cause Irreparable Harm

48. As the next stage of construction for the project, FCRC plans to close the Carlton Avenue Bridge for a period of at least two years. The FEIS for the project recognizes that the closure will result in significant unmitigated traffic impacts at five analyzed intersections and turning movements. (FEIS p. 17-47, Table 17-a2) The FEIS noted that conditions at those intersections would be significantly worse than the impacts after the project was built, which already identified those intersections as being significantly impacted by the project.

49. According to ESDC's own conclusions in the FEIS, the Carlton Avenue Bridge currently handles up to 700 vehicles per hour during weekday peak periods. (FEIS p. 12-11) Closing of the bridge will divert northbound traffic to either the 6th Avenue bridge to the west which will be converted from a one-way southbound bridge to a two-way bridge or to Vanderbilt Avenue to the east. The FEIS estimates that the majority of the traffic will use Vanderbilt Avenue. (FEIS p. 17-43). A map showing the closing of the Carlton Avenue Bridge and the alternative routes is attached as Exhibit B.

50. Closing of the bridge will also effect the response times for the Fire Department Station located on Dean Street. That station currently serves the Fort Greene neighborhood to the north of Vanderbilt Yards and uses the Carlton Avenue Bridge at least several times a day to

access that area. Closing the bridge will significantly affect response times as it will require Fire Department vehicles to use the alternative routes which by the FEIS' own analysis will reach saturated conditions during the construction period. Where fire department vehicles are already facing response time delays due to traffic congestion, those delays will be significantly exacerbated, endangering the lives of those that the Fire Department is charged with protecting.

51. Upon information and belief, just recently, on January 16, 2008, Forrest Taylor, the ESDC Community Ombudsman for the Project met with members of the Dean Street community who are very upset about the disruption that will be caused by the Carlton Avenue Bridge closing. Specifically addressing the concerns about access for the Fire Department, Mr. Taylor revealed for the first time that fire trucks would avoid congestion on Dean Street and 6th Avenue by going the wrong way, down one way streets against the traffic flow. Such a route was never revealed in the FEIS and it was not explained how that could be a beneficial solution.

52. Despite ESDC's protestations to the contrary, there is no documentary evidence in the record that ESDC or its consultants met with the Fire Department or obtained their agreement on the Carlton Bridge closing. With respect to Appellants' general objection that ESDC failed to properly consider the impacts on emergency services, the court below acknowledged that the record is devoid of comment from the Fire Department, but places the onus on the Fire Department for failing to comment, not ESDC for failing to obtain approval.

53. The irreparable nature of the injury caused by the closing of the bridge is not only due to the closing itself, but the planned demolition. If, as expected, Appellants are successful on the appeal, they could be faced with a bridge that has already been demolished without the financial means for its replacement or an extended period of time before it is replaced. That will

result in extended significant unmitigated traffic impacts and increase of fire department response times into the indefinite future.

The Balance of the Equities Favors Appellants

54. To date progress on the project has been very limited. The delays in the project have not been due to any action by Appellants but are due to Respondents' inability to finalize their agreements, obtain financing and to secure title to the Vanderbilt Railyards and other properties integral to the first phase of the project. Appellants seek this injunction to preserve the status quo and preserve the character and conditions in their community while the project undergoes the proper level of judicial review.

55. While Appellants' initial motion for a preliminary injunction was effectively denied because Justice Madden did not rule on the motion for more than eight months, FCRC has only proceeded with the demolition of buildings it owned. The only other work involved preparatory and infrastructure work on Vanderbilt Yards itself. Appellants do not object to the work on the Railyards.

56. As noted above, FCRC has yet to finalize agreements with ESDC and MTA for the full development of the project and obviously lacks the financing to proceed with the project at this time. A further delay to allow the Court to consider this appeal will not result in a significant further delay since so little progress has occurred to date.

57. FCRC and ESDC are also barred from proceeding due to the on-going litigation concerning the attempt to use eminent domain. That case is still pending in Federal Court and even if decided against plaintiffs will be further appealed to the U.S. Supreme Court as well as through the state courts as provided in the EDPL.

58. Regardless, of that outcome, there will be at least many months until that litigation is resolved and FCRC will be unable to commence meaningful construction on Phase I of the project, further demonstrating that an injunction will have a minor effect on FCRC as compared to the lasting impacts on Appellants.

59. Finally, it must be noted that FCRC has, to date, benefited from its preferred relationship with the former Pataki Administration which permitted it to gain approval in a reckless fashion before it left office. This review is the first state court review of the project and the Appellants are entitled to a careful review without the risk of having the area permanently disfigured while they pursue their claims in court.

60. Should the Court grant the Preliminary Injunction, the Court should exercise its discretion to require the posting of only a nominal bond. As demonstrated above, FCRC is not in a position to move forward in any significant manner with the project while the appeal is being heard and thus it cannot realistically claim any significant increase in cost as a result of the injunction.

Dated: Albany, New York
January 18, 2008

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Jeffrey S. Baker