

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

In the Matter of	:	New York County
	:	Index No. 104597/2007
	:	
DEVELOP DON'T DESTROY BROOKLYN, INC., et al.	:	REPLY AFFIRMATION
	:	OF PHILIP E.
Petitioners-Plaintiffs-Appellants	:	KARMEL IN SUPPORT
	:	OF THE CROSS-
For a Judgment Pursuant to Article 78 of the CPLR and	:	MOTION FOR A
Declaratory Judgment	:	BRIEFING SCHEDULE
	:	AND PREFERENCE
	:	
- against -	:	
	:	
URBAN DEVELOPMENT CORPORATION d/b/a	:	
EMPIRE STATE DEVELOPMENT CORPORATION,	:	
et al.	:	
	:	
Respondents-Defendants-Respondents.	:	

PHILIP E. KARMEL, an attorney admitted to the practice of law in the State of New York, hereby affirms and declares under the penalty of perjury:

1. I am a member of Bryan Cave LLP, which, together with Sive, Paget & Riesel, P.C., represents respondent-defendant-respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) in this proceeding. I am fully familiar with all the proceedings heretofore had herein and the facts hereinafter recited and respectfully submit this reply affirmation in support of ESDC’s cross-motion for an expedited briefing schedule and preference.¹

2. “Preferences in the hearing of an appeal may be granted in the discretion of the court to which the appeal is taken.” CPLR § 5521(a). An expedited

¹ ESDC strongly disagrees with appellants’ assertions in their counsel’s reply affirmation dated January 31, 2008 in support of their application for a preliminary injunction, but these assertions will not be addressed here in light of the prohibition on sur-reply papers. This affirmation is a reply with respect to ESDC’s cross-motion only.

briefing schedule and preference have been requested by ESDC and the two other governmental agencies that have been sued in this proceeding because the expeditious resolution of the appeal would be in the public interest.

3. This proceeding seeks to challenge the determinations of three governmental bodies to approve the Atlantic Yards Land Use Improvement and Civic Project (the "Project"), a multi-faceted development with important public benefits and purposes. The public benefits and purposes were described in detail in the ESDC decision-making documents cited in my initial affirmation. These benefits and purposes have now been recognized by the U.S. Court of Appeals for the Second Circuit, which recently rejected the contention that ESDC's exercise of the power of eminent domain with respect to the Project was not for a public use. *See Goldstein v. Pataki*, No. 07-2537-CV (2nd Cir. Feb. 1, 2008) (annexed hereto as Exh. A).

4. The instant proceeding does not seek money damages or other relief that is particular to the appellants or certain aspects of the Project. It seeks to challenge the legality of the Project's approvals *in toto*. The mere pendency of such litigation, no matter how lacking in merit, is a potential roadblock to the massive capital investment required to proceed with the Project's critical components. Thus, in his affidavit dated January 18, 2008, appellants' counsel (Jeffrey Baker, Esq.) averred that "FCRC is not in a position to move forward in any significant manner with the project while the appeal is being heard." Baker Aff. ¶ 60.

5. Delay in construction would delay completion of the Project, postponing its significant public benefits. It is thus critically important that the appeal be perfected so as to be argued before this Court's customary summer recess. This is

particularly so because all of the other litigations challenging this Project have been dismissed. See *Anderson v. New York State Urban Development Corp.*, 44 A.D.3d 437, 842 N.Y.S.2d 909 (1st Dep't Oct. 16, 2007); *Anderson v. New York State Urban Development Corp.*, 45 A.D.3d 583, 846 N.Y.S.2d 218 (2nd Dep't Nov. 7, 2007); *Goldstein v. Pataki*, *supra*. Although Justice Madden dismissed the instant proceeding, it is the only pending litigation with an unexhausted non-discretionary right of appeal.

6. In his most recent submission on behalf of appellants, Mr. Baker makes the extraordinary statement that there is no "overriding public interest" in the speedy adjudication of his own clients' claims. Baker Aff. ¶ 18 (Jan. 31, 2008). That statement is belied by the obvious importance to the public of a final judicial resolution of appellants' challenges to the legality of the governmental approvals for the Project.

7. In paragraph 20 of his affirmation, Mr. Baker correctly asserts that this case is not subject to the preference for eminent domain proceedings codified in the Eminent Domain Procedure Law ("EDPL"), which provides that a challenge to a condemnor's determination and findings "shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters." EDPL § 207(B). But his assertion misses the point, which is that the same policies that warrant a speedy adjudication of eminent domain proceedings also apply to the Atlantic Yards Project, a public project involving ESDC's exercise of the power of eminent domain. Indeed, the schedule for this appeal is already well behind the EDPL § 207 challenge heard and rejected by the Appellate Division for the Second Department, cited *supra*.

8. The New York State Legislature enacted the EDPL's expedited judicial review provisions to address the delay of public projects by lengthy litigation. "Complex litigation has frequently delayed the final determination of whether the project should proceed. If this practice broadens and continues, it may very well result in the suspension of many public projects." 1974 Report of the State Commission on Eminent Domain and Real Property Tax Assessment Review at 21 (March 1, 1975). Thus, the provisions of EDPL § 207 requiring expedited judicial review were enacted to protect public projects involving condemnation from protracted litigation. This policy would be frustrated if appellants were permitted to string out their appeal for an extended duration, because the Atlantic Yards Project – a government-sponsored project with significant public benefits that requires the State to exercise its condemnation power – is precisely the type of project for which the Legislature intended to expedite judicial review.

9. In paragraph 2 of his affirmation, Mr. Baker asserts that the arguments of ESDC and its co-respondents are based on "misrepresentations of discussions I had with Respondents' attorneys regarding a briefing schedule for this appeal." Yet the description in paragraph 13 of my original affirmation of the tentative scheduling agreement I reached with Mr. Baker is consistent with his own description of the facts. Mr. Baker's vague references to unspecified trial dates and vacation schedules of unidentified attorneys allegedly involved in this appeal do not contradict the fact that, as recited in my earlier affirmation, he told me that, subject to checking with his clients, he would agree to perfect this appeal by February 19, 2008.

10. Paragraphs 5-8 and 10 of Mr. Baker's affirmation complain that appellants "had only a very limited time to prepare and present their arguments to the


court below,” and in particular that they had “only one week” to file their reply papers. In fact, the governmental approvals that appellants challenge in this proceeding were granted in December 2006, and ESDC’s approval – the primary focus of their petition – was made on December 8, 2006. The appellants waited almost four months to bring this proceeding, which was initiated on April 5, 2007. They used the intervening four months productively, producing voluminous litigation papers comprising, *inter alia*, a 75-page, 429-paragraph Verified Petition and Complaint, an 80-page Memorandum of Law and seven affidavits, several of which were very lengthy.

11. Mr. Baker asserts that appellants need “to comb through the record” for “the clear evidence supporting their arguments.” Baker Aff. ¶ 8. But he and his clients have had the heart of the record – the agency approval documents, the draft and final environmental impact statements, the blight study, and the public comments on these documents – in their possession since December 2006 or earlier, since the documents were posted on ESDC’s web site and widely available at public libraries in Brooklyn since that time. They should have made the necessary effort “to comb through the record” during the lengthy time they took to file their massive set of initial litigation papers with the Supreme Court. Indeed, the assertion that they did not do so is preposterous. Since arguments cannot be raised on appeal that were not raised below, appellants, when perfecting their appeal, need to explain why the record materials they cited to Justice Madden are inconsistent with her decision, rather than searching for heretofore unidentified “clear evidence.”

12. For all of the foregoing reasons, as well as those set forth in ESDC’s original motion papers, it is in the public interest for this appeal to be

expeditiously perfected, briefed and argued. ESDC is proposing the very schedule that appellants' lead attorney had provisionally agreed to, which would allow the appeal to be heard in the May term of this Court. If, upon consideration of the motion papers, this Court determines that appellants should be given additional time to perfect their appeal, ESDC respectfully requests that a briefing schedule be established to allow the appeal to be heard in the June term of this Court and that a preference be granted.

Dated: New York, New York
February 4, 2008


PHILIP E. KARMEL