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

In the Matter of

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners-Plaintiffs-Appellants,

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

- against -

URBAN DEVELOPMENT CORPORATION, d/b/a Empire State Development Corporation, et al.,

Respondents-Defendants-Respondents.

New York County
Index No. 104597/07

AFFIRMATION IN OPPOSITION TO APPELLANTS' MOTION FOR LEAVE TO APPEAL

JEFFREY L. BRAUN, an attorney admitted to practice before the courts of the State of New York, affirms under penalties of perjury as follows:

1. I am a member of the law firm of Kramer Levin Naftalis & Frankel LLP, the attorneys, together with Fried, Frank, Harris, Shriver & Jacobson LLP, for respondent-defendant-respondent Forest City Ratner Companies, LLC ("FCRC"). I make this affirmation in opposition to the motion by petitioners-plaintiffs-appellants ("petitioners") for leave to appeal to the Court of Appeals from this Court's February 26, 2009 decision and order.

2. FCRC joins in ESDC's opposition to the motion for leave to appeal and will not repeat the arguments made by ESDC regarding the merits of petitioners' motion. The principal purpose of this affirmation is present two practical considerations that we ask this Court

to bear in mind in its deliberations: first, that the Atlantic Yards project at issue in this litigation is intended to achieve important public purposes; and second, that the petitioners in this case already have consumed an enormous amount of judicial resources, and have received an enormous amount of judicial attention, in this and other litigations with which they have bombarded the courts in a thus far unsuccessful campaign to defeat this project.

3. Based on the lack of merit to petitioners' claims (as shown in ESDC's opposing papers) and the enormous amount of judicial attention that already has been devoted to petitioners' spate of litigations, the present case should not be a vehicle to for further prolongation of litigation by imposing this case on the Court of Appeals.

A. The Atlantic Yards Project and Its Public Purposes

4. The appellate courts have recognized in a variety of contexts that the pendency of litigation can prevent or hinder progress on worthy development projects, and that lawsuits that challenge those projects should be carefully administered with an eye to preventing the prolonged pendency of litigation from aborting projects that should proceed – particularly projects that serve legitimate public purposes. *See, e.g., Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991) (SEQRA litigation can "generate interminable delay and interference with crucial governmental projects"); *East Thirteenth Street Comm'ty Ass'n v. N.Y.S. Urban Dev. Corp.*, 84 N.Y.2d 287, 294-95 (1994) (the Legislature intentionally narrowed the scope of judicial review of condemnation decisions in order to "expedite development once the hearing" required by the Eminent Domain Procedure Law has been "concluded"); *Brody v. Village of Port Chester*, 434 F.3d 121, 136 (2d Cir. 2005) ("The government clearly has a strong interest not only in completing projects necessary for public use, but in completing them in a timely and efficient manner"); *cf. Jackson v. N.Y.S. Urban Dev.*

Corp., 67 N.Y.2d 400, 426 (1986) (rejecting a "requirement of constant updating [of environmental analyses], followed by further review and comment," because it "would render the administrative process perpetual and subvert its legitimate objectives").

5. The Atlantic Yards project is an ambitious public-private project that is intended to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn into a vibrant and revitalized community. The project is intended to sustain and enhance Brooklyn's ongoing renaissance by, among other things, eliminating blight from the project's 22-acre site, bringing a multipurpose arena to Brooklyn, remediating environmental contamination at the MTA's Vanderbilt Yard (which is an existing eight-acre rail yard), building important new mass transit facilities and improvements for the MTA, closing an enormous open trench that separates adjacent neighborhoods by means of a new platform that will cover the MTA's rail yard, and creating numerous other improvements, including more than 6,400 units of needed new housing, of which 2,250 units will be affordable (*i.e.*, below-market-rate) housing. The arena will be the home of the New Jersey Nets N.B.A. basketball team and will bring a top-tier professional sports franchise to Brooklyn for the first time since the Dodgers baseball team left in 1957; the arena also will host amateur athletic events, circuses, graduations and other civic and entertainment events.

6. In addition to the foregoing public benefits, the project will be a powerful engine of economic growth. The environmental impact statement for the project estimated that the project would create 15,000 construction jobs and between 1,300 and 6,400 permanent jobs, as well as $4.4 billion in net tax revenues for the City and the State over 30 years. Furthermore, pursuant to an innovative Community Benefits Agreement (A 625a–697a), the FCRC affiliates that sponsor the project are contractually bound to provide a wide array of far-reaching benefits

to the historically most disadvantaged segments of Brooklyn's communities, including (but not limited to) contracting and employment opportunities, job training for permanent employment and job placement services, and affordable housing preferences.[1] For example, the Agreement obligates FCRC's affiliates to "use good faith efforts" to cause at least 35% of the construction workers in the project to be members of minorities and at least 10% to be women, with 35% of each category to be "journey level" workers (§ IV(B)). Not only are the Agreement's obligations contractually enforceable against FCRC's affiliates, but the Agreement obligates FCRC to fund an "Independent Compliance Monitor" hired by the community groups that are parties to the Agreement to monitor FCRC's compliance and investigate any complaints about FCRC's implementation of its commitments (§ III(D)).

7. The Atlantic Yards project was the subject of an extensive public review process that was conducted pursuant to the Eminent Domain Procedure Law (the "EDPL"), the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law § 8-0101, *et seq.*) and the Urban Development Corporation Act (the "UDC Act") (Unconsolidated Laws § 6251, *et seq.*). The project received final approval from ESDC on December 8, 2006, at which time ESDC's Board of Directors approved the adoption of (1) ESDC's determination and findings under Article 2 of the EDPL, (2) a General Project Plan under the UDC Act, and (3) a Final Environmental Impact Statement and environmental findings under SEQRA. On December 13, 2006, the MTA's Board of Directors adopted a findings statement under SEQRA and authorized the MTA's Chairman and Executive Director to proceed with the MTA's portion of the project. On December 20, 2006, the Public Authorities Control Board – a State body whose three voting members are appointed by, respectively, the Governor, the Senate Majority

[1] Citations preceded by "A" refer to the Appendix on the appeal to this Court, while citations preceded by "R" refer to the record in the motion court.

Leader and the Speaker of the Assembly – determined that the project is financially feasible, and approved ESDC's financial commitments to the project.

8. As shown below, however, even before the public review process culminated in the project approvals, DDDB had launched its extensive litigation campaign against the project.

B. The DDDB Litigations

9. The lead petitioner in this proceeding, Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), is the organization spearheading the opposition to the Atlantic Yards project. DDDB has orchestrated and coordinated a litigation strategy that includes not only this litigation but three other lawsuits as well. These lawsuits have been brought either in DDDB's own name or in the name of its spokesman and leader, Daniel Goldstein.[2]

10. **This case.** In the present litigation alone, which was commenced in April 2007, the petitioners unsuccessfully sought both a temporary restraining order and a preliminary injunction from the motion court to halt construction activities at the job site, and unsuccessfully sought both an interim stay and a stay pending appeal from this Court. In the motion court, Justice Madden issued a 66-page opinion addressing the petition's various claims, after which this Court rendered a thorough, scholarly opinion that meticulously addressed all of the petition's contentions, with a separate concurring opinion by a member of the panel.

11. Despite all this intense judicial scrutiny, none of the Justices who have considered the issues in this case have supported any of DDDB's contentions. Significantly,

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[2] Mr. Goldstein has repeatedly and consistently held himself out to the public and the media as DDDB's spokesman (*see* R 9751, 18492, 18538, 18557, 18558, 18608, 18610, 22758). Mr. Goldstein owns a condominium unit in a 50-unit building in the project's footprint and is the only unit owner in the building who declined to sell his unit to an FCRC affiliate. His unit is now the only unit in the building that remains occupied.

even Justice Catterson, notwithstanding the substantial misgivings about the use of eminent domain to address blight that he expressed both at oral argument and in his concurrence, ultimately concluded that the record compelled him to vote in favor of affirming the motion court's decision and sustaining ESDC's determination.

12. This extensive judicial attention, all of which has ended with the same result, militates strongly against a grant of leave for still another appeal. But that is just this case, and there are three others that are worthy of mention.

13. **The emergency demolition/disqualification case.** In January 2006, nearly one year before ESDC's final approval of the project, DDDB commenced a proceeding in the Supreme Court in which it sought to (a) prevent FCRC from demolishing on an emergency basis, with ESDC's approval, several vacant buildings that FCRC had just acquired and that its consulting structural engineers determined to be so severely structurally unsound that they posed an immediate danger to public safety, and (b) disqualify ESDC's environmental counsel from representing ESDC in the public review process for the project on the grounds of a purported appearance of impropriety due to his prior representation of FCRC.

14. On January 19, 2006, the Justice Edmead of the Supreme Court denied petitioners' application for a temporary restraining order enjoining FCRC's emergency demolition of the buildings and ESDC's proceeding with its environmental review of the project. On February 14, 2006, the court denied the petition to the extent that it sought to prevent demolition of the buildings, but granted it to the extent that it sought to disqualify ESDC's environmental counsel. ESDC and DDDB both appealed from this decision, and once again DDDB applied to this Court, without success, for an interim stay and a stay pending appeal to halt the demolitions. On May 30, 2006, this Court affirmed Justice Edmead's decision to the

extent that she allowed the demolition to proceed, and reversed the decision insofar as it disqualified ESDC's counsel. This Court thereafter denied petitioners' motion for permission to appeal, after which the Court of Appeals denied a motion by petitioners for permission to appeal. *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *lv. to app. denied*, 8 N.Y.3d 802 (2007).[3]

15. **The federal eminent domain case.** In October 2007 – again, even before ESDC's review of the project had been completed – DDDB commenced an action in the name of Mr. Goldstein and other condemnees in the United States District Court for the Eastern District of New York to challenge the ESDC's anticipated use of eminent domain in furtherance of the project as violative of the Public Use, Due Process and Equal Protection clauses of the federal constitution.[4]

16. On June 6, 2007, the district court dismissed that lawsuit, holding, among other things, that the project's numerous public purposes satisfy the public use requirement to which takings of property are subject under the Fifth Amendment to the U.S. Constitution, and recognizing that ESDC's blight study supported its determination that the project's public purposes included the elimination of blight. On February 1, 2008, the United States Court of Appeals for the Second Circuit affirmed the district court's decision dismissing the complaint. The plaintiffs then filed a petition for a writ of certiorari in the United States Supreme Court, but on June 23, 2008, the Supreme Court denied their petition and declined to hear the case.

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[3] FCRC submits that this Court's decision allowing FCRC to proceed with the emergency demolitions of these numerous unsafe buildings – several of which were outside the ATURA portion of the project footprint – by itself demonstrates that, contrary to DDDB's contentions, there was substantial blight in the project footprint.

[4] DDDB's lead attorney in the present case, Jeffrey S. Baker, is one of the attorneys who co-signed the complaint in the federal case.

Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir.), *cert. denied*, ___ U.S. ___, 128 S. Ct. 2964 (2008).

17. **The state eminent domain case.** On August 1, 2008, after exhausting their options in the federal courts, several plaintiffs in the federal lawsuit, *Goldstein v. Pataki*, including Mr. Goldstein, commenced a proceeding in the Appellate Division, Second Department, pursuant to EDPL § 207, to challenge ESDC's approval of the project and use of eminent domain on precisely the same grounds that they had raised in the federal courts – except that in this litigation they asserted that the condemnations were violative of their rights under the Public Use, Due Process and Equal Protection clauses of the New York Constitution.[5]

18. In this fourth litigation, *Goldstein, et al. v. N.Y.S. Urban Development Corp., etc.*, No. 2008-7064, the Second Department *sua sponte* established an expedited briefing and hearing schedule, over the petitioners' objection. The case now has been fully briefed and was the subject of oral argument before a Second Department panel on February 23, 2009. The parties to the case are now awaiting the Appellate Division's decision.

19. The petitioners in the case at bar thus have brought four separate lawsuits to attack the Atlantic Yards project, to date without success. We therefore ask that this Court at last help close the book on all this litigation, and allow this project to proceed.

B. Conclusion

20. For the foregoing reasons and those set forth in ESDC's papers, petitioners' motion for leave to appeal to the Court of Appeals should be denied.

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[5] The petition in the case also asserts that the use of eminent domain in furtherance of the Atlantic Yards project violates a requirement in EDPL § 207(C)(4) that condemnation must serve a "public use, benefit or purpose," and that the State's financial contribution to infrastructure costs of the project violates Article XVIII, § 6, of the New York Constitution.

Dated: April 7, 2009
New York, NY

JEFFREY L. BRAUN

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Certified pursuant to 22 NYCRR § 130-1.1-a

By _____

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