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August 17, 2009

VIA HAND DELIVERY

Stuart M. Cohen
Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

**Re: *Develop Don't Destroy Brooklyn, et al. v. Urban Development Corporation d/b/a
Empire State Development Corporation, et al.***
Index No. 104597/07

Dear Clerk of Court:

Enclosed for filing is an original and six copies of Petitioners-Plaintiffs-Appellants' Reply Affirmation of Jeffrey S. Baker, Esq. in the above-referenced matter along with an Affidavit of Service. On behalf of Petitioners, I respectfully request that the Court accept this brief affirmation to respond to the serious mischaracterizations in Respondent's papers.

Very truly yours,

Kristin Laviolette Pratt

Enclosure

cc:
All Counsel via email and Federal Express Overnight Delivery

COURT OF APPEALS
STATE OF NEW YORK

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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.
:
-----X

**REPLY AFFIRMATION
OF JEFFREY S. BAKER
IN SUPPORT OF
MOTION FOR LEAVE
TO APPEAL**

New York County
Index No. 104597/07

JEFFREY S. BAKER, 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 Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, which together with Barton Barton & Plotkin, LLP represents Petitioners-Plaintiffs-Appellants (“Petitioners”) in this proceeding. I respectfully submit this affirmation in response to the Affirmations of Philip E. Karmel sworn to August 13, 2009 on behalf of Empire State Development Corporation and Jeffrey L. Braun sworn to August 13, 2009 on behalf of Forest City Ratner Companies. I ask that the Court accept this brief affirmation to clarify Petitioners’ Motion for Leave to Appeal in light of the attempts by Messrs. Karmel and Braun to seriously mischaracterize Petitioners’ motion.

2. ESDC mischaracterizes petitioners' motion as asking this Court to conduct a "duplicative, project-specific document review" of ESDC's determinations. Karmel Affirm. ¶17. To the contrary, the First and Second Questions which petitioners ask this Court to accept for review concern the *legal* issue of whether the demonstrated bias and corruption on the part of ESDC are factors to be considered in determining whether its determinations under the UDCA and SEQRA were arbitrary and capricious.

3. There is no genuine dispute that ESDC purposefully denied and misrepresented the economic and development revival in and around the Project area and knowingly skewed crime data in the Non-ATURA Blocks in order to reach a predetermined conclusion, and ESDC's assertion that petitioners' contentions in that regard "have been rejected by every court that has heard them" is false. (Karmel Affirm. ¶15.) In fact, no court has rejected those factual contentions by petitioners; rather, the courts that have previously reviewed ESDC's determinations disregarded those factual contentions upon finding that ESDC stated other arguably "rational" bases to support its determinations.

4. The undisputed evidence in the record that the Non-ATURA Blocks were undergoing a private development boom until ESDC stepped in to announce that they would be taken for the Project was accurately summarized by Justice Catterson of the Appellate Division. *See* Decision at 36. Justice Catterson ultimately decided that, under the law as interpreted by the Appellate Division and Justice Madden, he was compelled to rule against petitioners despite his findings that the UDCA "is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are 'underutilized'". Decision at 36. Petitioners ask this Court to review whether the courts below correctly interpreted the law so as to permit the "destruction of a neighborhood in this fashion" which Justice Catterson found deplorable. *Id.* at 38.

5. Petitioners plainly argued in the courts below that ESDC improperly made biased, corrupt determinations to reach a predetermined outcome desired by FCRC, and thus preserved that issue for review by this Court, FCRC's conclusory assertion to the contrary notwithstanding. (*See Braun Affirm.* ¶8.) Indeed, petitioner's leading argument on appeal against ESDC's designation of the Project as a land use improvement project was captioned "ESDC's Blight Study Was a Post-Hoc Rationalization of a Pre-Planned Action". Appeal Brief at 69 (Legal Argument, Point V, Section A). *See also* Reply Appeal Brief at 1-2 ("ESDC went out of its way, as part of its public-private partnership with FCRC to facilitate the necessary blight determination, regardless of the lack of support to designate the blocks south of Pacific Street.")

6. ESDC further mischaracterizes petitioners' Second Question to this Court, regarding ESDC's purposeful denial of economic and development trends in and around the Project area to support its rejection of Project alternatives under SEQRA, as seeking a factual review of the Blight Study. To the contrary, the *legal* issue presented is whether the courts below should have considered that undisputable fact in determining whether ESDC actually took at "hard look" at Project alternatives and presented a "reasoned elaboration" of its basis for rejecting those alternatives – regardless of whether or not ESDC lawfully determined the area was blighted.

7. ESDC similarly mischaracterizes petitioners' Third Question to this Court, regarding whether ESDC was required to consider development trends in the Project area before designating the Project a land use improvement project under the UDCA, as asking this Court to review the Blight Study. The *legal* issue presented here does not concern the sufficiency of the Blight Study, but rather is one of statutory interpretation: whether the UDCA requires ESDC to

consider economic and development trends in order to determine that an area “tends to impair or arrest the sound growth and development of the municipality”. UDCA § 6260(c).

8. ESDC essentially sidesteps petitioners’ Fourth Question, regarding whether the UDCA permits the leasing of a “civic project” to a private, for-profit entity with no obligation or commitment to carry out any cognizable “community, municipal, public service or other civic purpose”, such as the FCRC facility to which ESDC intends to lease the Barclays Center Arena. UDCA § 6259(1). Instead, both ESDC and FCRC point out that in addition to professional basketball games, the Barclays Center Arena will host other events such as college and high school athletic events, graduation ceremonies, concerts, and circuses. (*See* Karmel Affirm. ¶33; Braun Affirm. ¶4.) But the fact remains that FCRC has pledged to make the arena available to those community organizations who might wish to hold actual civic events at the arena, such as graduation ceremonies, and college and high school athletic events – as opposed to professional entertainment events such as concerts and circuses – on no more than ten occasions per year, and then only if the community organization covers the arena’s operating expenses estimated to be more than \$100,000 per event.

9. Petitioners have presented important questions of law regarding Respondent ESDC’s obligations under SEQRA, the standard of review of a blight determination and legal ability of ESDC to lease a civic project to a for-profit entity under the UDCA. The Court should grant the motion for leave to appeal.

Dated: Albany, New York
August 17, 2009

Jeffrey S. Baker