SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., Petitioners-Plaintiffs, 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.	Index No. 104597/07 IAS Part 11 Justice Madden

MEMORANDUM OF LAW OF RESPONDENT-DEFENDANT NEW YORK STATE URBAN DEVELOPMENT CORPORATION D/B/A EMPIRE STATE DEVELOPMENT CORPORATION IN OPPOSITION TO ARTICLE 78 PETITION AND THE MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

At the heart of this case is a dispute about whether the Atlantic Yards Land Use Improvement and Civic Project (the "Project") is in the public interest. New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") concluded, in its December 8, 2006 decision documents, that the Project offers many significant benefits and should proceed, subject to the comprehensive program of mitigation measures imposed by ESDC's Findings Statement under the State Environmental Quality Review ("SEQRA").

The benefits identified by ESDC include the construction of a new arena in Brooklyn, the return of a professional sports team to the borough, the construction of 2,250 affordable housing units and thousands of units of market rate housing, the construction of new office space, the requirement that the new buildings be certified "green buildings," the location of intensive development at a major transit hub, the creation of 8 acres of publicly accessible open space, significant subway station improvements, a new and more efficient LIRR rail yard, thousands of new jobs and, over the life cycle of the facility, and billions of dollars of new tax revenues for City and State governments. Administrative Record ("AR") 19-21 (SEQRA Findings Statement at 18-20).

At the same time, the record establishes that the Project will result in a number of significant adverse impacts with respect to cultural resources, visual resources, open space availability (until the Project's open space is phased in), shadows, traffic, noise, construction, and school seat availability (if the Department of Education does not implement the mitigation measures). AR 25.62-25.64 (SEQRA Findings Statement at 86-88).

The balance to be struck between the Project's significant public benefits and significant environmental impacts is a question of public policy and is properly left to the sound discretion of ESDC. ESDC documented its decision-making in its SEQRA Findings Statement

(AR 1-25.69), which explains the basis for the agency's determination that the benefits of the Project far outweigh the environmental impacts it will cause. Notably, petitioners-plaintiffs ("Petitioners") do not challenge those findings, and hardly mention them at all in this proceeding.

Just beneath the surface of Petitioners' litigation papers is the insinuation that the Project was a "done deal" as soon as the Governor and Mayor announced that they supported it. This is a theme looking for a legal theory. There is nothing illegal, or in any way improper, about an elected official holding a press conference to express support for a project in its preliminary stages. Early project endorsements by elected officials occur routinely, but they do not provide a basis to overturn the results of the administrative process by which a project is ultimately approved.

Indeed, every Environmental Impact Statement ("EIS") prepared under SEQRA studies a "proposed action" and in many cases that action involves a project that the agency preparing the EIS has initiated, and wishes to pursue. 6 N.Y.C.R.R. § 617.7(a)(1). Notwithstanding Petitioners' heated rhetoric, there is nothing wrong with this. An EIS cannot be prepared until the proposed action is defined with the detail needed to determine its impacts on traffic, transit, pedestrians, shadows, schools, open space resources, urban design, infrastructure, air quality, noise, construction and other technical areas of analysis. Petitioners' contention that the SEQRA process should have begun before a discrete proposal was hashed out is baseless and, if adopted, would make a proper environmental review impossible.

In the course of making a series of provocative comments questioning the integrity of the state agencies' directors, professional staff, professional consultants and counsel, Petitioners have put forward several discrete causes of action, none of which is viable.

Point I below addresses Petitioners' second cause of action – that ESDC violated the Urban Development Corporation Act ("UDCA") by providing an inadequate period for public comment and failing to properly constitute a Community Advisory Committee ("CAC"). As described in ESDC's Verified Answer (the "Answer"), ESDC duly scheduled and convened a combined public hearing under the UDCA, Eminent Domain Procedure Law ("EDPL") and SEQRA, provided clear and timely notice of that hearing, opened the hearing by presenting a summary of the Project, and closed it after extensive oral comment – both for and against the Project – had been heard. Going above and beyond applicable legal requirements, ESDC also scheduled and convened two additional sessions for the submission of oral comments during the written comment period for the benefit of those who preferred to submit their comments orally, rather than in writing. These sessions were expressly designated as "community forums" – not public hearings. In accordance with the Notice, ESDC also allowed the submission of written comments over a period that extended for a total of 73 days after the DEIS was accepted and the draft general project plan under the UDCA was issued. Moreover, ESDC duly convened and consulted with the CAC, which was properly organized to represent a cross-section of the community. As discussed in Point I, this extensive public outreach satisfied, and in fact went beyond the requirements of the UDCA. Petitioners cite absolutely no authority for their theory that ESDC abused its discretion by attempting to facilitate additional public input by allowing the submission of oral comments during the written comment period.

Point II below addresses Petitioners' contention (in their fourth cause of action) that ESDC erred in approving the Project as a "land use improvement project." Petitioners note (correctly) that a portion of the project site is not within a City-designated urban renewal area, but there is no requirement that property be within such a designated area to be found blighted.

Petitioners assert that some of the buildings on the project site, unlike the others, are not in an insanitary condition, but authoritative caselaw establishes that an area can be designated as blighted even if individual buildings within the area are not dilapidated. Petitioners also trumpet newspaper articles about New York City real estate to argue that buildings in an insanitary condition today might some day be rehabilitated without government action, but the relevant issue is the status of the property today, not whether blighted conditions might improve sometime in the future. ESDC's blight finding is established by the well documented blighted conditions of the project site, and cannot be upset by the sort of arguments Petitioners advance in this proceeding.

Point III explains how ESDC rationally exercised its discretion to make the findings required under the UDCA for the Project to be approved as a "civic project." Petitioners' contrary arguments (in their third cause of action) have no basis in either the language of the UDCA or the record in this case.

Point IV addresses Petitioners' SEQRA claims. ESDC conducted an exacting environmental review in close consultation with MTA, the New York City Department of Transportation, the City Planning Commission, the Department of City Planning, the New York City Economic Development Corporation, the State Office of Parks, Recreation and Historic Preservation, and other involved and interested agencies, and took a "hard look" at the relevant environmental issues. During the course of this environmental review, ESDC identified all potentially significant impacts, developed a comprehensive slate of measures to avoid or minimize those impacts, and carefully considered a range of reasonable alternatives. Its conclusions with respect to such matters were well documented in its SEQRA Findings Statement. In addition to addressing Petitioners' "hard look" claims (their fifth, sixth, seventh,

eighth and ninth causes of action), Point IV also responds to the contention in Petitioners' tenth cause of action that ESDC made a series of procedural missteps in conducting the environmental review under SEQRA.[1]

As set forth in Point IV, courts have uniformly recognized that their role is not to conduct a *de novo* review of an agency's decisionmaking process and should avoid substituting their judgment for that of the agency. Courts have repeatedly noted that an opponent's submission of information differing from the conclusions in an EIS concerning potential significant adverse impacts is insufficient to make a case that SEQRA has been violated. The record in this proceeding clearly establishes that ESDC took the required "hard look" at environmental impacts.

Point V addresses Petitioners' first cause of action, which asserts that the Public Authorities Control Board ("PACB") also violated SEQRA by failing to make findings under the statute prior to approving the Project. As explained in Point V below, PACB's function under the Public Authorities Law ("PAL") is to assure the fiscal responsibility of public authorities. Accordingly, its decision-making relates solely to the adequacy of the financing of the projects that come before them, and decision-making with respect to such financial considerations is not the sort that would be elucidated by an EIS prepared under SEQRA. For that reason, the resolutions of the PACB are not "actions" subject to environmental review requirements under controlling Court of Appeals precedent.

Finally, Point VI briefly responds to Petitioners' separate request for a preliminary injunction. As noted therein, there is no basis for a preliminary injunction as Petitioners have not established any of the elements required for such relief.

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[1] This Memorandum of Law does not discuss Petitioners' claims against MTA, which are set forth as their eleventh cause of action, since those claims are addressed separately by that agency.

STATEMENT OF FACTS

As contemplated by the special pleading rules applicable to Article 78 proceedings, ESDC's affirmative statement of facts is set forth in its Answer.

STATUTORY FRAMEWORK

The specific issues in this case can best be analyzed in the context of the overall framework of the operative statutes – the UDCA, EDPL and SEQRA. These statutes are outlined below.

A. The UDCA

ESDC is the primary economic development agency of the State of New York. It was created in 1968 with the passage of the Urban Development Corporation Act. The UDCA was passed:

> to promote a vigorous and growing economy, to prevent economic stagnation and to encourage the creation of new job opportunities in order to protect against the hazards of unemployment, ... [to] increase revenues to the state and to its municipalities[,] ... to achieve stable and diversified local economies[,] .... to promote the sound growth and development of our municipalities through the correction of such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, and of areas reasonably accessible thereto[,] ... [to provide] educational, recreational and cultural facilities, and ... [to] encourage[] ... participation in these programs by private enterprise.

UDCA § 2, N.Y. Unconsolidated Laws ("Unconsol. L.") § 6252.

The agency's "primary mission ... is to encourage economic investment throughout New York State, and it does so in part by promoting large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas." *Develop Don't Destroy Brooklyn v. ESDC*, 31 A.D.3d 144, 146 (1st Dep't 2006). ESDC is directed to pursue its statutory mission by "encouraging maximum participation by the private sector of the economy,

including the sale or lease of ... [ESDC's] interest in projects at the earliest time deemed feasible." UDCA § 2, Unconsol. L. § 6252; *see East Thirteenth Street Community Association v. NYS UDC*, 189 A.D.2d 352, 358 (1st Dep't 1993).

ESDC has authority under the UDCA to adopt and approve various types of projects, including a "land use improvement project" and a "civic project." UDCA § 10(c) and (d), Unconsol. L. § 6260(c), 6260(d). To do so, ESDC must make specific findings in accordance with the UDCA.

In the case of a "land use improvement project," the area in which the project is to be located must be determined to be "substandard and insanitary," consistent with the statute's purpose of eliminating urban blight and improving surrounding areas. UDCA § 10(c), Unconsol. L. § 6260(c). Recent land use improvement projects that are comparable in size to the Atlantic Yards Project include the 42nd Street Development Land Use Improvement Project in Manhattan and the Hunters Point Waterfront Land Use Improvement Project in Queens.

No "blight" finding is required for a civic project. A "civic project" requires the existence of a need for an "educational, cultural, recreational, community, municipal, public service or other civic facility." UDCA § 10(d), Unconsol. L. § 6260(d). Recent ESDC-approved civic projects include the new Yankee Stadium under construction in the Bronx, the new CitiField Stadium for the Mets under construction in Queens, improvements to Ralph Wilson Stadium (home of the Buffalo Bills), and the construction of a new arena for the Buffalo Sabres.

ESDC may not make any commitment, enter into any agreement or incur any indebtedness for the purpose of acquiring, constructing, or financing any project unless the PACB determines that the commitment of funding for the project is sufficient. Public Authorities Law §§ 51(1), (3). The PACB was created in 1976 to help oversee the financing of

public benefit corporation projects and to ensure that adequate funding is available. Its creation was a direct response to a fiscal crisis in the State of New York, which had left a number of public benefit corporations on the verge of financial collapse.

B. SEQRA

The State Environmental Quality Review Act, codified at Article 8 of the Environmental Conservation Law ("ECL"), was enacted to "inject environmental considerations directly into governmental decision making." *Coca-Cola Bottling Co. v. Board of Estimate of the City of New York*, 72 N.Y.2d 674, 679 (1988). This statutory purpose is achieved through the "elaborate procedural framework" created by SEQRA's implementing regulations, which have been promulgated by the New York State Department of Environmental Conservation and codified at 6 N.Y.C.R.R. Part 617 (the "SEQRA Regulations"). *New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 347 (2003).

When the project or action involves multiple agencies, it is necessary to determine, before preparation of the EIS, which agency is to act as the "lead agency" in conducting the environmental review. 6 N.Y.C.R.R. § 617.6(b). An agency proposing to assume that role must notify other involved agencies of its intention to do so; if no objection is made to that proposal, the agency may take the lead, and the other involved agencies will continue to play a consulting role in the process. *Id.* § 617.6(b)(3).

Before embarking on the preparation of an EIS, the lead agency is encouraged, but not required, to engage in a "scoping" process. The goal of scoping is to "focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant." *Id.* § 617.8(a). Once scoping is completed, a draft EIS ("DEIS") is prepared. Upon completion of the DEIS, the lead agency must certify it as sufficient for public review. ECL § 8-0109(4); 6 N.Y.C.R.R. § 617.9(a)(3).

The lead agency may, in its discretion, conduct a public hearing on the DEIS. ECL § 8-0109(5); 6 NYCRR § 617.9(a)(4). Under the SEQRA Regulations, the "minimum public comment period on the DEIS is 30 days" from the time that a notice of its completion is published in DEC's *Environmental Notice Bulletin*. After the DEIS has been filed and public comments received and considered, the agency may then prepare a final EIS ("FEIS"). The FEIS must include any changes to the project, relevant new information and studies, and a summary of substantive comments received from the public and interested agencies, together with the agency's response to such substantive comments. ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.9(b)(8). Once the FEIS has been filed, and a minimum period of 10 days has elapsed after such filing, the agency must adopt SEQRA "findings" with respect to the action. In particular, it must make and file a written "findings statement" setting forth the facts and conclusions contained in the DEIS and FEIS that were relied on to support the decision. The findings statement must provide the rationale for the agency's decision, state that the requirements of SEQRA have been met, and certify "that consistent with the social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable...." 6 N.Y.C.R.R. § 617.11(d); *see* ECL § 8-0109(8).

C. The EDPL

The Eminent Domain Procedure Law, enacted in 1977, is applicable to projects involving condemnation. The EDPL sets forth the procedures by which property is acquired to assure that just compensation is provided to those individuals whose property rights are affected by the exercise of eminent domain, to establish opportunities for public participation in the planning of projects necessitating the exercise of eminent domain, and to consider the public

use(s) for which the property is being acquired as well as the interest of private land owners, local communities, and the quality of the environment.

Article 2 of the EDPL establishes procedures for public notice and comment regarding proposed condemnations. After providing notice of a project's proposed location, an agency is required to hold a public hearing to outline the purpose and proposed location and receive comments. *See* EDPL § 203. Thereafter, the agency is required to make its determination and findings, which must, at a minimum, specify "(1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality." EDPL § 204(B). While an agency's responsibilities under the EDPL differ from those under SEQRA, the statutes overlap in requiring that environmental effects be identified. *Jackson v. NYS UDC*, 67 N.Y.2d 400, 417 (1986).

POINT I

ESDC COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF THE UDCA

Petitioners advance two claims that ESDC violated the UDCA procedures. First, they argue that ESDC was legally bound to extend the public comment period beyond the initial 30 days it allowed because ESDC facilitated the submission of oral comments, as well as written comments, during the 30 day public comment period. In addition, they allege that ESDC failed to properly constitute and consult the CAC that ESDC created for the Project. Neither claim has any statutory or other basis.

A. ESDC Complied With the UDCA Public Comment Procedures, Including the Requirement to Have a 30-Day Public Comment Period After the Public Hearing.

1. ESDC's Decision to Allow the Submission of Oral Comments, as Well as Written Comments, During the 30-Day Public Comment Period Did Not Require ESDC to Extend the 30-Day Period.

Petitioners contend that ESDC's decision to allow the public to submit oral comments during the 30-day public comment period, in addition to written comments, required an extension of the time period during which written comments could be submitted. They provide no precedent to support this argument, nor do they explain the logic for the conclusion they draw from it – that ESDC's process for gathering comments in this case violated the UDCA because additional opportunities to comment were provided. As discussed below, Petitioners' claims are baseless because ESDC complied with the procedural requirements of the UDCA, to the letter, and then went beyond those requirements. Moreover, Petitioners make no claim that specific comments were excluded because of the process ESDC established, or that they would have provided additional comments if the period had been extended. Therefore, Petitioners have made no showing that they have been prejudiced by the process ESDC followed to inform the public and gather comments on the GPP. Moreover, the statutory purposes of the public review procedures of the UDCA were achieved by the process followed in this matter.

ESDC implements a project under the UDCA pursuant to a "general project plan" ("GPP"), which is approved by the ESDC board in a two step process. First, a GPP is "adopted" by the board, filed in the ESDC offices and with the affected municipality, and circulated for public comment. UDCA § 16, Unconsol. L. § 6266. Thereafter, the board, upon consideration of any public comments provided, may "affirm, modify or withdraw" the plan. UDCA § 16(3)(d), Unconsol. L. § 6266(3)(d). The UDCA establishes specific procedures for the public review of a GPP. Where ESDC intends to override local zoning or acquire real property by

eminent domain, those procedures require that a public hearing be held "on thirty days notice following adoption of the plan by the corporation," *id.* § 6266(3)(a); that such hearing "be conduct[ed] ... pursuant to such notice," *id.* § 6266(2) and (3); and that the public comment period be held open for "thirty days after the public hearing." *Id.* § 6266(3)(b).

2. ESDC Satisfied – and Even Exceeded – the Public Review Requirements of the UDCA.

The plain language of the UDCA sets out the minimum requirements for the public review of a GPP: a hearing on 30 days notice after the GPP has been adopted, followed by a 30 day comment period. UDCA § 16(2)(c), Unconsol. L. § 6266(2)(c); *see also* Unconsol. L. § 6266(3)(b). ESDC satisfied these minimum requirements by (i) publishing notice of a combined public hearing pursuant to the UDCA, EDPL and SEQRA; (ii) holding that hearing as scheduled, and (ii) keeping the period for public comment open for more than thirty days thereafter.

Each day from July 24 to July 28, 2006, ESDC duly published a notice (the "Initial Public Notice") in the *New York Post* and *City Record*, pursuant to Sections 6 and 16 of the UDCA, Article 2 of the EDPL and SEQRA. AR 22471, 22474, 22477, 22504–06. The Initial Notice announced that the public hearing would take place on August 23, 2006 at the New York City College of Technology (Klitgord Auditorium), 285 Jay Street, Brooklyn, New York, from 4:30 to 8:30 PM. AR 22458-22477. In addition, notice of the public hearing was published in the *Environmental Notice Bulletin* on July 26, 2006, and provided in the DEIS Notice of Completion. The Initial Notice advised the public that the purposes of the hearing were to include "informing the public about the Project," and allowing interested persons an opportunity to provide comments on the GPP, the DEIS, and the proposed property acquisitions. AR 22459. In accordance with the requirements of the UDCA and SEQRA, the Initial Notice also invited