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 **AFFIRMATION IN OPPOSITION TO T.R.O. APPLICATION**

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

1. I am a member of the law firm of Kramer Levin Naftalis & Frankel LLP, attorneys for respondent Forest City Ratner Companies, LLC ("FCRC") and its affiliates in connection with the Atlantic Yards Land Use Improvement and Civic Project (the "Project"). The Project received final approval from the Board of Directors of respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), on December 8, 2006. I make this affirmation in opposition to an application by opponents of the Project, the petitioners in this litigation, for a temporary restraining order to halt demolition of vacant buildings at the Project's site.

2. All of these buildings are owned by FCRC affiliates, except that the requested T.R.O. also seems to encompass the demolition of one building, 175 Flatbush Avenue (Block 1118, Lot 6), that is owned by the City of New York. This building is to be demolished by FCRC, with the City's authorization, to enable FCRC to proceed with mass transit improvements for the MTA. Based on the statement made by petitioners' lead counsel, Jeffrey S. Baker of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, at the robing room conference on April 5, 2007, FCRC believed that petitioners had no objection to the demolition of this building.

3. FCRC made a public announcement of its commencement of work at the Project site eight weeks ago, on February 20, 2007. The work itself commenced on the following day. The Project, the work that has commenced, the work that is about to commence, and the severe adverse impact on the public and on FCRC of even a short interruption of this work all are described in the accompanying affidavit of James P. Stuckey, the President of FCRC's Atlantic Yards Development Group, to which the Court is respectfully referred. This affirmation primarily addresses legal issues that are implicated in the application for a T.R.O.[1]

4. It is axiomatic that a party seeking a temporary restraining order or preliminary injunction must demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable harm in the absence of injunctive relief, and (3) a balance of the equities in its favor.

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[1] There is a suggestion in petitioners' papers (see Baker Aff. ¶ 15) that FCRC has been dilatory in not starting work until February 21. However, the PACB did not approve the feasibility of the Project's financing until December 20, 2006, so only two months elapsed from that approval until the commencement of work, which is a considerable achievement in light of the Project's complexity and the need to finalize necessary plans, award contracts, obtain required permits and approvals, conclude a license agreement with the MTA, and mobilize the necessary work force and equipment. If anyone has been dilatory, it is petitioners, who for months have trumpeted their intention to seek an injunction halting demolition but did not apply for a T.R.O. until eight weeks after FCRC's public announcement of the work's commencement.

Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990); Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988). "A preliminary injunction is a drastic remedy which should be granted only if the moving party establishes clear entitlement upon the relevant facts set forth in the moving papers." Metered Appliances, Inc. v. St. Marks Housing Assocs., L.P., No. 16616/04, 2005 WL 465178, at *3 (Sup. Ct. Kings Cty. 2005). It is well established, moreover, that, on such an application, a court also should consider the public interest. See Golden v. Steam Heat, Inc., 216 A.D.2d 440, 441-42 (2d Dep't 1995); DePina v. Educational Testing Service, 31 A.D.2d 744, 745 (2d Dep't 1969).

5. When applied to the Project, all of these considerations favor the denial of injunctive relief. As shown below, (a) the public interest and balance of the equities favor denial of injunctive relief (¶¶ 6-10), (b) petitioners have not shown that they will suffer irreparable harm (¶¶ 11-18), and (c) petitioners have not shown a likelihood of ultimate success on the merits of the litigation (¶¶ 19-30).

A. The Public Interest and the Balance of the Equities Favor the Denial of Injunctive Relief

6. Only last summer, in a situation similar to the one at bar, Justice Cahn of this Court denied an injunction against the removal of mature trees – activity that certainly was irreversible – where the work was necessary for commencement of construction of the new Yankee Stadium. Save Our Parks v. City of New York, N.Y.L.J., Aug. 21, 2006, p. 21, col. 1 (Sup. Ct. N.Y. Cty.). There, as here, the project's opponents brought a challenge based on the alleged failure to comply with the State Environmental Quality Review Act, Environmental Conservation Law § 8-0101, et seq. ("SEQRA"). This Court refused to restrain the tree removals, concluding that the balance of the equities favored the respondents because of the "real and significant possibility that delaying the scheduled start of construction" would "cause

significant harm to the Yankees, the City and the residents of the South Bronx, and might well cause the project to be completely terminated." In reaching that conclusion, the Court observed that there was evidence that the Yankees' construction company would not be able to guarantee the new stadium's readiness for the 2009 baseball season if the work did not commence as scheduled, that "the additional cost of construction due to delay could be great," and that the Yankees might leave the City if they could not be assured that the new stadium would be ready for the 2009 season.

7. Here, too, the public interests served by the Project militate strongly in favor of the denial of any injunctive relief. As the accompanying Stuckey affidavit shows (¶ 9), the Project's public benefits include the elimination of blight, the redevelopment of a largely derelict 22-acre site, the return to Brooklyn of a major-league sports franchise for the first time since the Dodgers baseball team left Brooklyn 50 years ago, the creation of new housing (including 2,250 units of affordable housing), environmental remediation of the MTA's Vanderbilt Yards rail and bus maintenance and storage facility, the construction of extensive new mass transit improvements, the creation of thousands of jobs, and the generation of billions of dollars in new tax revenues. The Stuckey affidavit further demonstrates (¶¶ 10-13) that the Project's public benefits also include important benefits accruing to members of Brooklyn's least advantaged communities under the Project's historic Community Benefits Agreement.

8. The Stuckey affidavit also shows (¶¶ 24-30) that the enormous potential financial harm to FCRC and its affiliates from an interruption of FCRC's intricate construction schedule threatens FCRC with economic harm that is potentially so severe that the balance of the equities tips decidedly in FCRC's favor. FCRC's construction schedule has been carefully planned to allow FCRC to complete the arena in time for the 2009-10 basketball season by

commencing work now on those properties that are owned by FCRC – or by the MTA or the City, both of which support the Project. Therefore, even a short interruption of this schedule is likely to mean not only that the Nets' arrival in Brooklyn will be delayed (which is a matter of genuine public concern), but also that the Nets basketball franchise will suffer at least one more year's operating losses of about $35 million.[2]

9. Significantly, the potential economic harm to FCRC of injunctive relief is so substantial that petitioners' papers devote considerable space to a specious effort to persuade the Court that, notwithstanding the fact that petitioners for the most part are associations of homeowners and other residents of prosperous Brooklyn neighborhoods, petitioners should be allowed to avoid financial responsibility for the economic havoc that they seek to impose upon FCRC by being excused from any requirement that they post an injunction bond in an amount sufficient to protect FCRC from its potential losses (see Pet. Mem. pp. 10-13).[3] As the Court of Appeals has recognized, however, once a developer has obtained "the approvals necessary to commence construction," which can be "a time-consuming endeavor," there is nothing

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2 Petitioners assert that a T.R.O. would not harm FCRC because there are "at least three other lawsuits that will prevent FCRC from proceeding with construction of the Project regardless of whether this Court stays demotion of the buildings at issue herein" (Baker Aff. ¶ 19). This statement is false. These lawsuits, which are summarized in the Stuckey affidavit (see ¶ 8), challenge ESDC's determination to use eminent domain in furtherance of the Project to acquire properties in the Project's footprint from owners and tenants who are not willing to sell their interests voluntarily. Concededly, the pendency of these lawsuits prevent ESDC from actually acquiring title to and possession of these properties at the present time. However, these lawsuits in no way preclude FCRC from commencing work on those properties that are owned by its own affiliates or by public entities such as the MTA and the City of New York that support the Project and allow FCRC's contractors to enter upon their properties to perform such work. As the Stuckey affidavit points out (¶ 28), FCRC's construction schedule is designed to complete the area in time for the 2009-10 basketball schedule by working on properties owned by FCRC affiliates, the MTA and the City now, while deferring work on other properties until later.

3 As used in this affirmation, citations to "Pet. Mem." refer to petitioners' memorandum of law in support of their motion for a preliminary injunction, which was served on FCRC in court immediately prior to the robing room conference on April 5, 2007.

"unseemly" in the developer's proceeding "to complete the [project] as quickly as possible to profit from [its] investment and avoid paying interest on construction loans." CitiNeighbors Coalition of Historic Carnegie Hill v. N.Y.C. Landmarks Preservation Comm'n, 2 N.Y.3d 727, 729 (2004). Therefore, if a project's opponents seek to enjoin that work, the requirement that they file an adequate injunction bond if their application is granted is essential to prevent the project's opponents from "foist[ing] all financial risks" of the litigation on the project's developer. Id. at 730. In the absence of a sufficient bond, the movants' financial exposure is limited to their own attorneys' fees and costs, and the financial risk of the litigation falls entirely on the developer. Id.

10. By the same token, petitioner's unwillingness to post an undertaking in an amount commensurate with FCRC's financial exposure is grounds, in and of itself, for denial of injunctive relief pendente lite, because the harm that FCRC would suffer if injunctive relief is granted far outweighs any harm that petitioners will suffer if injunctive relief is denied. See, e.g., Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp., 70 A.D.2d 1021, 1022 (3d Dep't 1979) (the moving party must show that "the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant through imposition of the injunction").

B. Petitioners Cannot Show Irreparable Harm to Any Legally Cognizable Interest

11. Petitioners are unable to demonstrate that they will suffer irreparable injury to any cognizable legal right or interest of theirs in the absence of injunctive relief. Except for the building at 175 Flatbush Avenue, which is owned by the City and is to be demolished with the City's authorization in furtherance of mass transit improvements for the MTA, FCRC affiliates own each of the buildings that is to be demolished. Each building is vacant. The work

is being performed, moreover, in accordance with all required permits and approvals. Petitioners nowhere challenge or dispute the fact that FCRC's contractors have obtained the necessary permits and approvals for the work that has been performed or, in the case of future work, will acquire the necessary permits and approvals prior to the commencement of the work. Therefore, there is no basis for halting this work. In New York City, if the proper permits and approvals have been obtained, an owner is free to demolish its own building.

12. Petitioners' request for injunctive relief is based on the idea that (a) they have some protectable interest in the current character of these properties that they neither own nor occupy, and (b) if the Court were to set aside the Project's approvals FCRC might elect to reverse itself and rehabilitate and re-use these buildings. These suggestions are absurd. Petitioners simply cannot show any right to impose upon FCRC their own preferences for the use and disposition of these buildings.

13. First, petitioners have no cognizable interest in the properties that are the subject of demolition. None of the petitioners owns an interest in these properties or occupies space in the vacant buildings that are to be demolished. There is no claim by petitioners that FCRC has failed in some respect to comply with New York City laws applicable to pre-demolition asbestos abatement or to demolition itself, or that FCRC or its contractors have failed to obtain the necessary approvals and permits from the agencies with jurisdiction over asbestos abatement and building demolition. Therefore, petitioners have failed to assert a cognizable legal interest that would be prejudiced by the demolitions that they seek to halt.

14. Indeed, petitioners are conspicuously silent in their papers as to precisely who they are, and where they are located in relationship to the buildings that are to be demolished. No individual residents of the surrounding neighborhoods are named as petitioners,

and the only individuals whose names appear in the case's caption are named there in their capacities as presidents of unincorporated associations, so as to fulfill the requirement of CPLR 1025 that an unincorporated association, which, unlike a corporation, is not a legally distinct person, only may bring suit by its president or treasurer. Furthermore, membership organizations, whether incorporated or unincorporated, have standing to sue only if they are bona fide organizations with individual members who also would have standing to sue. N.Y.S. Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); MFY Legal Services, Inc. v. Dudley, 67 N.Y.2d 706, 708 (1986); Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1, 3 (1974). Here, petitioners have not identified who their members are or how they are organized, and petitioners' membership remains entirely anonymous – quite possibly to avoid potential financial responsibility to FCRC if there is any injunction. Thus, no individual has come forward to take responsibility for petitioners' claims and the extraordinary relief that they seek by the present application. Instead, petitioners rely exclusively on lawyers' affirmations. Even their petition – which purports to raise serious issues to challenge the propriety of a major public-private redevelopment project – has been verified by their lawyer, who is based in Albany and is thus a peculiar choice to serve as petitioners' only witness.

15. It is clear, moreover, that any member of any petitioner who actually owns or occupies real property in the Project's footprint cannot properly be a petitioner in this proceeding. Pursuant to § 208 of the Eminent Domain Procedure Law, any such person's "exclusive" vehicle for raising the SEQRA and UDC Act issues that the petition in this case asserts against ESDC, which is the principal respondent here, is a proceeding under EDPL § 207. Such a proceeding must be commenced in the Appellate Division, Second Department, within 30 days of ESDC's notice to such person of its determination to exercise eminent domain.

EDPL § 207(B). In this case, such notice was given in December 2006, and the 30-day period expired on January 11, 2007, nearly three months prior to this litigation's commencement.[4] Therefore, the claims of any member of any petitioner who owns or occupies real property within the Project footprint cannot be raised in this litigation, because those claims have been raised in the wrong forum, and because they are time-barred.[5]

16. Furthermore, even if petitioners were to prevail on any of their causes of action and succeed in annulling the Project's approvals, FCRC still would have the right to demolish the buildings at issue, and redevelop its properties with new structures that are more functional and potentially more profitable than the vacant (and obsolete) buildings – many of which are not only small but derelict – that it intends to demolish. Thus, while petitioners complain that FCRC has no "Plan B" for redevelopment of the Project site if petitioners are able to set the Project's approvals aside, even if petitioners prevailed in this litigation they would have no legal or equitable right to compel FCRC to effectuate a "Plan B" that encompasses the preservation, renovation and re-use of the buildings that FCRC is about to demolish.

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[4] Under EDPL § 207(C), the claims that must be asserted in a proceeding that is initiated in the Appellate Division under EDPL § 207 include whether "the proposed acquisition is within the condemnor's statutory jurisdiction or authority," and whether "the condemnor's determination and findings were made in accordance with" SEQRA – precisely the issues that petitioners raise in this lawsuit.

[5] The principal member and spokesman for the lead petitioner in this lawsuit, Develop Don't Destroy (Brooklyn), Inc., is Daniel Goldstein. He owns a condominium unit in the Project footprint and is the lead plaintiff in the principal lawsuit challenging the use of eminent domain in furtherance of the Project – Goldstein, et al. v. Pataki, et al., No. 06 CV 5827 (NGG) (RML), pending in the United States District Court for the Eastern District of New York. The photographs attached to petitioners' papers in this case, showing scenes in Ohio and China of properties surrounded by construction sites, have no possible relevance to this case, because the permissible petitioners in this case cannot include owners or occupants of property within the Project's footprint.

17. Nor does petitioners' citation to 6 NYCRR § 617.3(a) supply the missing legal right or interest. Under that regulation, the proponent of a project ordinarily is precluded from making physical changes to the project site while its application is being reviewed under SEQRA. Here, however, there is no SEQRA review underway. Instead, the SEQRA review of the Project was concluded in December, which is why FCRC is proceeding with its work at this time. Furthermore, for § 617.3(a) to have any future relevance, two contingencies would need to occur. First, petitioners would need to prevail in this litigation, which, FCRC submits, is a presumptuous assumption not supported by the facts or the law. Second, FCRC would have to respond to that adverse judicial determination by seeking approval of a development project that includes these properties and requires SEQRA approval, which is an entirely speculative scenario and therefore cannot justify injunctive relief.

18. In short, no legal right or interest of petitioners is prejudiced by the demolitions that FCRC is about to commence.[6]

C. Petitioners Have No Likelihood of Ultimate Success

19. By this litigation, petitioners attack the approvals relating to the Project by three New York State governmental agencies – ESDC, the MTA and the Public Authorities Control Board ("PACB") – on the basis of alleged failures to comply with SEQRA and, in the case of the ESDC, the Urban Development Corporation Act (Unconsol. Laws § 6251, et seq.)

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[6] The issuance by the New York City Department of Buildings of a permit authorizing demolition of a building is a ministerial act, involving no exercise of discretion, and therefore is exempt from SEQRA, which expressly exempts from its purview an "official act of a ministerial nature, involving no exercise of discretion." ECL § 8-0105, subd. 5(ii). See, e.g., Herald Square South Civic Ass'n v. Consol. Edison Co. of New York, Index No. 101667/03, 2003 WL 24132999 at *4 (Sup. Ct. N.Y. Cty. March 24, 2003) (Faviola, J.), aff'd, 307 A.D.2d 213 (1st Dep't 2003); 79th Street Mount Neboh Preservation Committee v. McGough, N.Y.L.J., June 1, 1983, p. 7, col. 1 (Sup. Ct. N.Y. Cty.) (Myers, J.).

(the "UDC Act").[7] It is not possible to address petitioners' claims – and thus petitioners' likelihood of ultimate success on the merits – in a comprehensive manner in the limited time available on an application for a T.R.O. made at the outset of the lawsuit. The three agencies whose determinations are under attack are in the process of preparing comprehensive responses to petitioners' assertions, including the record of their proceedings, which, at least in the case of ESDC, will contain many thousands of pages. Under the schedule that has been established by this Court, those materials will be served and filed on April 25, 2007.

20. We are confident that those materials will demonstrate clearly and unequivocally that all three agencies complied with their legal obligations, and that petitioners' assertions are completely without merit. At bottom, petitioners are unhappy with the result of an extensive public process which exhaustively explored the pros and cons of the Project, and in which petitioners fully and actively participated. Because petitioners disagree with the result of that public process, petitioners now ask this Court to substitute its judgment for the judgment of the responsible public officials who made the determinations now at issue. It is axiomatic, however, that a court may not do that.

21. In their memorandum in support of their motion for a preliminary injunction, and again in their attorney's affidavit in support of the present application for a T.R.O., petitioners summarize six basic assertions (see Pet. Mem. pp. 4-6, Baker Aff. ¶ 31) as purportedly showing the likelihood of their ultimate success on the merits of this litigation. A brief rejoinder to each of petitioners' assertions follows. These rejoinders preview the definitive

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[7] The Project's opponents also challenge the Project's approval by ESDC on other theories in consolidated lawsuits pending in federal court in Brooklyn, an action pending before Justice Tolub in this Court, and a proceeding for judicial review under EDPL § 207, which is pending in the Appellate Division, Second Department.

showing that will be made when all of the respondents serve and file their papers in opposition to the petition in this case.

22. First, petitioners assert that the PACB's "fail[ure] to make the written environmental findings statement required by SEQRA" is "a fatal flaw which mandates annulment of PACB's approval of the Project" (Pet. Mem. p. 4). Petitioners are mistaken for the simple reason that the PACB's determination is not subject to SEQRA. The PACB was created by § 50 of the Public Authorities Law in response to the fiscal crisis of the 1970's, for the sole purpose of protecting the fiscal integrity of the State from ill-advised financial commitments made by State-created public benefit corporations, including ESDC, that operate independently of other State agencies. See Public Authorities Law § 51, subd. 1. The PACB's membership consists of three voting members (i.e., the Governor, the Majority Leader of the Senate and the Speaker of the Assembly, or their respective designees) and two non-voting members (i.e., the Minority Leaders of each House of the Legislature), and its decisions must be by unanimous vote of the three voting members. Public Authorities Law § 50, subd. 2. By statute, the PACB's jurisdiction is limited to a determination as to whether a project that has been approved by ESDC or one of the other public benefit corporations enumerated in the statute is financially feasible. The statute thus requires that ESDC may not incur a financial commitment on behalf of the State without the PACB's prior approval, and authorizes the PACB to grant such approval "only upon its determination that, with relation to any proposed project, there are commitments of funds sufficient to finance the acquisition and construction of such project." Public Authorities Law § 51, subd. 3. Therefore, a review of the broad range of environmental issues that are included within SEQRA is outside the scope of the PACB's statutory mandate, and requiring the PACB to comply with SEQRA, which is what petitioners advocate, would be a pointless and, indeed,

wasteful exercise. It is now firmly established that where the jurisdiction of an agency is so narrowly circumscribed by statute that environmental issues are outside the agency's mandate, SEQRA simply does not apply, and compliance with SEQRA is not required. See, e.g., Incorporated Village of Atlantic Beach v. Gavalas, 81 N.Y.2d 322, 326 (1993); CitiNeighbors Coalition of Historic Carnegie Hill v. N.Y.C. Landmarks Preservation Comm'n, 306 A.D.2d 113 (1st Dep't 2003), app. dsmssd., 2 N.Y.3d 727 (2004). Furthermore, the PACB is really an extension of the Governor and the Legislature, both of which are exempt from SEQRA pursuant to ECL § 8-0105, subd. 1, and 6 NYCRR § 617.5(c)(37). See, e.g., Citizens for an Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 415 (1991); Settco, LLC v. N.Y.S. Urban Development Corp., 305 A.D.2d 1026, 1027 (4th Dep't), lv. to app. denied, 100 N.Y.2d 508 (2003); Cerro v. Town of Kingsbury, 250 A.D.2d 978, 979 (3d Dep't 1998), lv. to app. denied, 92 N.Y.2d 812 (1998).

23. Second, petitioners assert that "ESDC failed to provide the 30-day minimum comment period following the public hearing as mandated by SEQRA" (Pet. Mem. p. 5). This argument is specious. ESDC held a lengthy public hearing on the Project on August 23, 2006. The hearing exceeded the time that it had been scheduled to consume by at least two hours; it began with a presentation by ESDC staff about the project and then heard oral comments by approximately 100 members of the public, divided about evenly between supporters and opponents. ESDC thereafter accepted written comments from the public until September 29, 2006, which was more than 30 days after the conclusion of the August 23 public hearing, and which thus satisfied – and indeed exceeded – ESDC's statutory obligation. Petitioners' contention to the contrary is based solely on the fact that, after the conclusion of the August 23 public hearing, in recognition of the public interest in the Project, and to

accommodate members of the public who might lack the resources necessary to prepare and submit written comments, ESDC held two public forums – one on September 12 and one on September 18 – at which it accepted additional oral comments from members of the public notwithstanding the fact that ESDC was under no obligation to convene such forums and properly could have limited the public comments that it accepted after the conclusion of the August 23 public hearing to written comments. As a result of these good-faith efforts by ESDC to facilitate public comments, an enormous record has been amassed, including extensive oral and written comments by petitioners and their representatives. Petitioners ironically seek to turn on its head ESDC's openness to public participation, and use that openness as a basis for a fallacious argument, unsupported by any authority, that the public forums were really a continuation of the public hearing, and that the time for submission of written comments, which may not expire less than 30 days after the public hearing, was wrongfully truncated by ESDC. This claim fundamentally misconstrues the applicable public hearing requirement. Indeed, the disingenuousness of petitioners' contention is exposed by the fact that petitioners fail to identify any particular comment, concern or idea about the Project that was withheld from ESDC because of the cut-off date for written comments on the Project.

24. Third, petitioners assert that ESDC erroneously characterized the arena that is an important element of the Project as a "civic project" within the meaning of the UDC Act notwithstanding the fact that it will be "privately operated" as a "major league basketball arena which will be available for use by local organizations on an extremely limited basis" (Pet. Mem. p. 5). The UDC Act empowers ESDC to sponsor a "civic project," which the statute defines as a project that is "designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic

purposes." Unconsol. Laws § 6253(6)(d). The statute also authorizes ESDC to sell or lease such a project to "any" entity that "is carrying out a community, municipal, public or other civic purpose." Id. at § 6259(1). Here, ESDC or a subsidiary will own the arena and lease it to an FCRC affiliate. In the past, ESDC has sponsored the construction of numerous sports stadiums and arenas in various locations around the State and then leased them to private operators under similar arrangements; no court ever has ruled that such a facility is not a "civic project" within the meaning of the UDC Act, and for a court to do so now would be remarkable. The definition of a "civic project" in the UDC Act plainly is broad enough to encompass the arena, and only last year, in its 2006 session, the Legislature – in appropriating $100 million to ESDC to support the Project (Budget Bill S. 8470, A. 12044), and in authorizing ESDC to sell $100 million in bonds to be backed by the State's appropriation (c. 109, Pt. J-1, § 4), specified that the funds were for "economic development projects, ... public recreation projects and arts and cultural facility improvement projects" that specifically included the "Atlantic Yards Railway Redevelopment [and] Nets Project," which demonstrates that the Legislature understands the arena to be a "civic project" within the scope of the UDC Act. In related contexts, the courts have repeatedly recognized that privately operated sports stadium are valid public projects. See, e.g., Murphy v. Erie County, 28 N.Y.2d 80, 86-87 (1971) (upholding county's issuance of bonds to finance football stadium that would be operated by private entity); County of Erie v. Kerr, 49 A.D.2d 174, 179-80 (4th Dep't 1975) (sustaining same stadium's tax exemption), app. denied, 38 N.Y.2d 711 (1976); Dubbs v. Board of Assessment Review, 81 Misc.2d 591 (Sup. Ct. Nassau Cty. 1975) (sustaining tax exemption of the Nassau Coliseum). Similarly, it recently was observed that, consistent with the public use clause of the Fifth Amendment to the federal constitution (which requires that an exercise of the power of eminent domain must be in

furtherance of a public use or purpose), it is a "relatively straightforward and uncontroversial" proposition that "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use – such as with ... a stadium." Kelo v. City of New London, 545 U.S. 469, 498 (2005) (O'Connor, J., dissenting) (citing National R. Passenger Corp. v. Boston & Maine Corp., 112 S.Ct. 1394 (1992), and Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916)). Given these principles, petitioners' assertions that the arena does not constitute a "civic project" is untenable.

25. Fourth, petitioners assert that ESDC acted improperly in "designat[ing] three valuable city blocks in the midst of a residential development boom as 'blighted' in order to expand the Project area" (Pet. Mem. p. 5). The reference to "three valuable city blocks" is really a reference to two city blocks (Blocks 1127 and 1129) and about one-third of another block (Block 1128). Petitioners never dispute the determination by ESDC that the rest of the 22-acre Project site is properly subject to condemnation for the purpose of alleviating blight. As to the two-and-a-fraction blocks here at issue, ESDC made its determination on the basis of a comprehensive study that systematically surveyed each parcel in the Project's footprint and reported in detail on the condition of each parcel. This study reported that on these blocks there are numerous properties that are unimproved (and, in some cases, strewn with abandoned cars and similar debris), or improved with deteriorated buildings that are in poor condition. In fact, the buildings on five of the parcels on these very blocks were in such poor condition when they were acquired by FCRC that structural engineers concluded that the buildings were at risk of immediate collapse, posed a danger to the public safety, and should promptly be demolished. On that basis, notwithstanding that the Project was then in the midst of an ongoing environmental review, ESDC authorized FCRC to demolish these five buildings immediately on an emergency

basis. The Project's opponents, including the lead petitioner in this case and six other petitioners, commenced a proceeding to challenge ESDC's emergency determination and enjoin the buildings' demolition, but the courts sustained ESDC's determination and allowed the buildings to be demolished. 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).[8] It thus is indisputable that ESDC had a rational basis for determining that these two-and-a-fraction blocks should be condemned to eliminate blight even if not all of the properties on those blocks are blighted. It is well established that (1) blight may be addressed on an area-wide basis rather than a lot-by-lot basis, so that non-blighted properties within an area that suffers from blight may be condemned to allow redevelopment of the area as a whole to ensure that the solution to blighted conditions is permanent, and (2) the courts will not second-guess the condemnor's judgment about where to draw the boundary between properties that are to be condemned and those that are not. See, e.g., Berman v. Parker, 348 U.S. 26, 35 (1954); Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Development Corp., 771 F.2d 44, 46 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986); Spadanuta v. Incorporated Village of Rockville Centre, 16 A.D.2d 966 (2d Dep't 1962), aff'd, 12 N.Y.2d 895 (1963); Cannata v. City of New York, 24 Misc.2d 694 (Sup. Ct. Kings Cty. 1960), aff'd, 14 A.D.2d 813 (2d Dep't 1961), aff'd, 11 N.Y.2d 210 (1962).

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[8] Under New York law, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." Ryan v. New York Telephone Co., 62 N.Y.2d 494, 500 (1984). See also, e.g., Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349 (1999). Seven of the petitioners in the present proceeding, including the lead petitioner, were named petitioners in the prior proceeding and thus are barred from contesting the blighted condition of these parcels – i.e., Develop Don't Destroy (Brooklyn), Inc., Atlantic Avenue Betterment Association, Inc., Boerum Hill Association, Inc., Dean Street Block Association, Inc., Fort Greene Association, Inc., Prospect Heights Action Coalition and Society for Clinton Hill, Inc.

26. Fifth, petitioners assert that "ESDC violated SEQRA by excluding the environmental impacts of a potential terrorist attack on the Project ... from the scope of its environmental review" (Pet. Mem. p. 5). However, there is nothing in SEQRA or in the regulations that implement it (6 NYCRR Part 617) that includes the risk of a terrorist attack in the potential environmental impacts that must be considered under SEQRA. Nor has any court ever held that the risk of a terrorist attack must be considered as part of compliance with SEQRA. In this case, the submissions in opposition to the petition will show that ESDC made the eminently sensible determination that the risk of a terrorist attack was not appropriate for inclusion in the SEQRA process, which would have entailed the publication, including availability on the Internet, of information about risk assessment and security measures. The submissions also will show that FCRC retained preeminent security consultants and, working with those consultants, participated in extensive confidential reviews of the Project with the New York City Police Department's Counter-Terrorism Task Force, to assess the risk of a terrorist attack and to address that risk in an appropriate manner. Given the nature of the threat, however, it would not be appropriate – indeed, it would be foolish – to expose the risk assessment materials to public scrutiny.

27. Finally, petitioners challenge the adequacy of the FEIS on various grounds. It is pointless to address each of the FEIS's purported deficiencies, and is sufficient instead to articulate the general principles applicable to judicial review of an FEIS. Here, in reviewing the Project, ESDC compiled and examined a Final Environmental Impact Statement of approximately 7,500 pages. This extensive document exhaustively examined the potential environmental impacts of the Project and certainly was sufficient to satisfy ESDC's obligations

under SEQRA. Given the narrow scope of judicial review of an FEIS, it is extremely rare for an attack on the adequacy of an FEIS to succeed.

28. The standard for judicial review of an FEIS is reasonableness, and there is no legal requirement that an FEIS consider every conceivable event or alternative. In Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 416-17 (1986), the Court of Appeals explained that judicial review of a claim that an FEIS was inadequate in its consideration of some issue is "supervisory only." A court's review is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination ...." Id. at 417. See also Eadie v. Town Board of Town of North Greenbush, 7 N.Y.3d 306, 318-19 (2006). Furthermore, judicial review of "an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason." Jackson, 67 N.Y.2d at 417. Therefore:

> "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" . . . The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal . . .

Id. at 417 (quoting Aldrich v. Pattison, 107 A.D.2d 258, 266 (2d Dep't 1985)). All that is required is that the agency analyze a reasonable range of alternatives to the proposed project, and upon meeting this standard, "judicial inquiry is at an end." Halperin v. City of New Rochelle, 24 A.D.3d 768, 777 (2d Dep't 2005), lv. to app. dsmssd., 6 N.Y.3d 890 (2006). See also C/S 12th Avenue LLC v. City of New York, 32 A.D.3d 1, 7 (1st Dep't 2006). "A failure to identify or analyze a particular alternative propounded by opponents or critics of a project does not render a FEIS deficient . . ." Halperin, 24 A.D.3d at 777. See also Coalition Against Lincoln West, Inc.

v. Weinshall, 21 A.D.3d 215, 222 (1st Dep't 2005) (petitioners' contention that there were better alternatives to consider than those addressed in the FEIS was not a basis to invalidate an FEIS).

29. Furthermore, "the courts may not substitute their judgment for that of the agency, because it is not their role to 'weigh the desirability of any action or to choose among alternatives.'" Akpan v. Koch, 75 N.Y.2d 561, 570 (1990) (citations omitted). In reviewing an FEIS, the courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. Town of Henrietta v. Department of Environmental Conservation, 76 A.D.2d 215, 224 (4th Dep't 1980). See also Jackson, 67 N.Y.2d at 417; City of Rome v. New York State Health Department, 65 A.D.2d 220, 225 (4th Dep't 1978), lv. to app. denied, 46 N.Y.2d 713 (1979). The "hard look" standard does not "authorize ... a detailed de novo analysis of every environmental impact of, or alternative to, a proposed project which was included in, or omitted from, a FEIS." Aldrich v. Pattison, 107 A.D.2d 258, 267 (2d Dep't 1985). See also Schiff v. Board of Estimate, 122 A.D.2d 57, 60 (2d Dep't 1986), lv. to app. denied, 69 N.Y.2d 604 (1987); Environmental Defense Fund, Inc. v. Flacke, 96 A.D.2d 862, 863 (2d Dep't 1983). Although petitioners may disagree with the agency's conclusion, this "does not prove that [the agency] did not take a hard look." Akpan v. Koch, 152 A.D.2d 113, 119 (1st Dep't 1989), aff'd, 75 N.Y.2d 561 (1990).

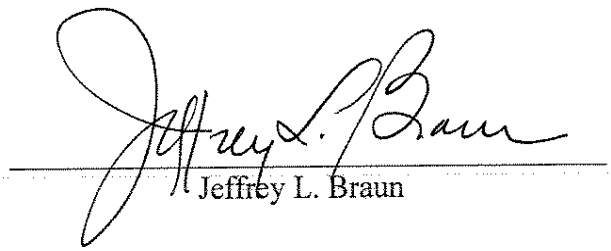
30. In view of the applicable rule of reason and the proscription against a court's substitution of its judgment for that of the agency responsible for making the decisions on a project, petitioners cannot show a likelihood of ultimate success on the merits.

Conclusion

31. For the foregoing reasons and those set forth in the accompanying Stuckey affidavit, petitioners cannot show a likelihood of ultimate success, irreparable harm in the

absence of injunctive relief, and a balance of the equities in their favor. In addition, the public interest clearly favors denial of any restraining order or injunction that would halt construction-related work for the Project. Therefore, no such injunctive relief should be issued.

Dated: New York, NY
April 17, 2007



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