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

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| In the Matter of | : | |
| DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., | : | **AFFIRMATION IN OPPOSITION TO RESPONDENTS' CROSS-MOTION FOR AN EXPEDITED APPEAL AND IN SUPPORT OF OF APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION** |
| Petitioners-Plaintiffs-Appellants, | : | |
| For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment | : | |
| -against- | : | New York County<br>Index No. 104597/07 |
| URBAN DEVELOPMENT CORPORATION, d/b/a Empire State Development Corporation, et al. | : | |
| Respondents-Defendants-Respondents. | : | |

JEFFREY S. BAKER, an attorney admitted to practice before the courts of the State of New York, affirms under the penalty of perjury as follows:

1. I am a member of the law firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for Appellants in the above-captioned proceeding. I make this affirmation in response to the cross-motion by the Respondents seeking a preference or order establishing a briefing schedule for an expedited appeal in this matter. This affirmation is also in support of Appellants' motion for a preliminary injunction enjoining the closing of the Carlton Avenue Bridge pending the resolution of this appeal. This affirmation is based upon my familiarity with the documents in this case and my personal knowledge.

The Cross-Motion Should Be Denied

2. Respondents' arguments in support of the request for a preference are based on fundamental misrepresentations of discussions I had with Respondents' attorneys regarding a briefing schedule for this appeal. Respondents also base their request upon vague references to difficulties in obtaining financing for the arena portion of the project, difficulties which, by their own admission are unrelated to the present litigation and reflect widespread difficulties in worldwide capital markets.

3. The Affirmation of Philip E. Karmel, Esq. erroneously states that I had agreed to a briefing schedule to provide Appellants' brief by February 19, 2008. That is not correct. In a telephone discussion with Mr. Karmel and Jeffrey Braun, Esq. we tentatively agreed on a briefing schedule. I repeatedly stated that the dates discussed were tentative and that I needed to consult with my clients and co-counsel to assess their views on the schedule. Both Mr. Karmel and Mr. Braun were well aware that other counsel, including community members working on a *pro bono* basis were assisting on this appeal. I later discussed a possible schedule with my clients and co-counsels and the consensus was that due to the considerable amount of work required for the appeal, a February 19th date was unrealistic. Several of my co-counsel have trials in the coming weeks or have previously scheduled vacations. I informed both Mr. Karmel and Mr. Braun promptly that the schedule would not work and expressed my willingness to set a different schedule well in advance of the full nine month period.

4. The statement in Mr. Braun's Affirmation that upon this Court's denial of the temporary stay, Appellants announced that they would take the full nine months to perfect the appeal is completely false. No such statement was ever made. Nor is it the intent of Appellants to take that much time. Currently, it is anticipated that the appeal will be perfected

approximately three to four months after the Notice of Appeal was filed on January 18, 2008. While the rules of the First Department indicate that a record and brief are to be filed within 30 days, that is not an absolute deadline and it is my understanding that appeals are commonly perfected after that period

5. Preparation of the brief on this appeal is no minor undertaking. It must also be recognized that Appellants had only a very limited time to prepare and present their arguments to the court below. Appellants commenced this proceeding on April 4, 2007 by Order to Show Cause challenging the actions of Respondents and seeking to enjoin the demolition of buildings on the project site. After a hearing on the request for a Temporary Restraining Order, Justice Madden set a very expedited schedule for briefing on both the motion for a preliminary injunction and the merits of the petition. Respondents served their answering papers on April 25, 2007 consisting of four briefs totaling over 200 pages, at least four affidavits with over 1000 pages of attached exhibits. In addition, Respondent ESDC provided its administrative record of nearly 25,000 pages and MTA produced its record of approximately 800 pages.

6. Faced with the onslaught of those papers, Appellants had only one week to file their reply papers and had oral argument before Justice Madden on the next day. Given that highly truncated time period to respond to the briefs and review the record, Appellants did not have an opportunity to present their arguments in as concise and persuasive manner as they would have desired.

7. Justice Madden took over 8 months to issue her decision. While on its face the decision appears to be thorough, as set forth in my moving affirmation it is rife with errors of law and facts and fails to recognize basic arguments made by Petitioners regarding Respondents compliance with SEQRA and the Urban Development Corporation Act (UDCA).

8. Appellants have the right to comb through the record and present to the Court the clear evidence supporting their arguments. Appellants have the difficult task of presenting in cognizable manner, within limited space, an argument that puts in proper perspective the scale of this project, its broad impacts and the biased and predetermined manner in which ESDC pursued the goal of a private developer.

9. ESDC and FCRC illegally rushed the public review period of this project, one of the claims on appeal, to gain approval before the end of the Pataki Administration. There was no opportunity for meaningful public comment and ESDC was not interested in considering those comments. ESDC and its consultants did not even bother to respond or consider the hundreds of pages of comments demonstrating that the southern half of the project site was not blighted.

10. Judicial review is the only means Appellants have to obtain an objective review of Respondents' actions and reach a determination whether the actions were in violation of law or arbitrary and capricious and an abuse of discretion. Appellants sought that relief in a timely petition to the Supreme Court and complied with an extremely shortened time to review the record and respond to Respondents papers. That rush obviously limited Appellants' ability to present the fatal flaws of Respondents actions in a manner for which the court below could have comprehended the full extent of Respondents invalid actions.

11. Respondents argue that providing Appellants a reasonable time to prepare the appeal will cause undue delay and increased costs to the project. However, even the affidavit of Andrew Silberfein recognizes that "lenders and bond insurers are facing financial difficulties and are becoming more cautious" (Silberfein Aff. ¶ 8) Mr. Silberfein does not know what the financial climate will be months in the future when bond financing for the arena is to be issued. (Id.).

12. Mr. Silberfein does not say that the presence of the appeal or the pending Federal litigation will block financing, only that it presents a threat to the project. The precise nature of that threat is not stated other than lenders will be cautious about financing the project.

13. But that is how the bond markets and bond insurers work. They evaluate the risk of a project not being able to meet its obligations and price the risk accordingly. In the due diligence on offerings such as this, they consider all aspects of a project including the validity of its legal approvals, permits, title etc. Opinion letters are issued by counsel verifying the legitimacy of those approvals. The lenders and insurers are either satisfied with those opinions or they adjust the transaction accordingly.

14. If Respondents are so certain that Appellants' claims are without merit, then presumably the lenders and bond insurers have considered their opinion and will be prepared to proceed with the financing. If, however, the lenders and bond insurers are of the opinion that Appellants may have valid claims, then the terms of the loans will be adjusted to reflect the risk. That is how the market works.

15. In fact, a managing director of Goldman Sachs was recently quoted in the New York Times as saying about the bond financing for the arena proposed under this project, "We're working on it to close later in the year. We like the deal" (A copy of the article is attached as Exhibit A) Presumably, therefore, they do not see the litigation as a significant bar to financing. In the same vein, and in the same *Times* article, contrary to Mr. Silberfein's unsupported claims regarding the financial jeopardy of the project, FCRC executive vice president Bruce Bender said, "Let's be very clear, Atlantic Yards and Barclays Center are coming to Brooklyn. Period." To the general public, FCRC claims that this project is "full steam ahead"; it is only to this court that FCRC claims it is having financial problems.

16. It goes without saying that FCRC is one of the largest real estate development companies in the United States. It is as sophisticated as any in the financing and approval process for major developments. FCRC knew there would be litigation challenging the project and should have planned its finances accordingly. To date, there have not been any legal injunctions keeping FCRC from moving forward with the project, and as stated in their papers, FCRC has admitted that construction has proceeded, albeit at a reduced rate. FCRC's own financial limitations and the inability to finalize agreements with ESDC and MTA have kept the project from proceeding with its intended schedule. If Appellants have any role in causing those delays, it is only due to exercising their fundamental constitutional rights to seek judicial review.

17. That point has also been raised by other reporters following Atlantic Yards. A January 29, 2008 article in *New York* Magazine's Daily Intelligncer blog by veteran political reporter Chris Smith also notes that litigation following an approval is the normal course of doing business and FCRC chose to risk this litigation by pursuing an approval outside of the normal New York City approval process. The article notes that outside real estate experts have estimated FCRC's profits on the project at nearly $1 billion. (A copy of the article is attached as Exhibit B). Thus while the profits for FCRC may shrink as a result of the normal course of litigation, it is not the role of the courts to protect FCRC's profits at the expense of providing Appellants their rightful opportunity to properly and fully present their case.

18. In other words, Respondents have failed to demonstrate that there is any overriding public interest whatsoever under CPLR §5521(a) which would authorize a preference in this case. This is not an election law case or any other similar type matter where the issues under appeal and the remedy may be mooted by the normal course of appellate consideration. Nor are the cases cited in Mr. Braun's affirmation relevant to the instant proceeding. This case

does not involve private parties seeking to use SEQRA for a private economic benefit or economic self-interest (*Society of Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761 (1991). Appellants' grievance is in no way economic. Respondents have not challenged Appellants' standing to bring this action. This case involves 26 community organizations fighting to preserve the character of their community against a project imposed by a State agency for a private developer that far exceeds the size and use permitted under New York City zoning rules, and overrides New York City's Charter.

19. Mr. Braun's reference to statutes providing short statute of limitations for the commencement of an action are completely irrelevant to the appellate schedule. This proceeding was already subject to the short four month statute of limitations for an Article 78 proceeding. There are no provisions in Article 78 or any of the other statutes referenced by Mr. Braun which require that the case at bar be given a preference on appeal.

20. Nor is this case governed by §207 of the Eminent Domain Procedure Law, despite Mr. Braun's suggestion that there is some relevance. None of the Appellants are property owners in the footprint who would be losing property by eminent domain condemnation. The challenges in this appeal are not based on the "public use" doctrine embodied in the Fifth and Fourteenth Amendments to the U.S. Constitution or the EDPL. Those issues are currently being litigated in a separate case, with other individual plaintiffs, in Federal Court. The issues in this appeal are whether ESDC complied with the requirements of the UDCA and SEQRA. The Court is not being asked to determine if the project satisfies a "public purpose", but whether it meets the narrow and specific statutory criteria in the UDCA that empowers ESDC to exercise its jurisdiction and override local laws and the approval process.

21. Finally, there is no grand or pressing public interest that warrants severely curtailing Appellants' rights to proceed in a deliberate manner on appeal. Mr. Braun's reference to the Community Benefits Agreement (CBA) is completely inappropriate. (Braun Aff. ¶ 8). The CBA was not a basis for determination by either ESDC or MTA in the approval of the project. The only reference to the CBA in ESDC's findings for the project is a single reference that FCRC has provided additional relocation assistance to tenants displaced by the taking of their homes. ESDC does not acknowledge or rely on the alleged promises purportedly made in the CBA. Nor should the court be affected in any way on Mr. Braun's completely disingenuous statement that the "environmental impact statement for the project estimates that the project will create... $4.4 billion in net tax revenues for the City and the State over 30 years." (Braun Aff. Par, 8) There is simply no projection at all regarding the net tax revenues contained in the EIS.

22. In light of the foregoing, there is no overriding interest that warrants limiting Appellants' time to perfect the appeal.

Appellants' Motion for a Preliminary Injunction Should Be Granted

23. Appellants motion for a preliminary injunction or stay should be granted to preserve the status quo and protect the neighborhood from a permanent change in traffic patterns should Appellants be successful on appeal. Respondents do not contest that if the bridge is removed and the approvals are annulled, that there is any means to assure that the bridge will be replaced in a timely fashion. Thus the community could be faced with a permanent, significantly impacted traffic problem if the Appellants are successful on this appeal.

24. Respondents would have the Court believe that every time a shovel is placed in the dirt that Petitioners/Appellants have an obligation to seek injunctive relief. That is absurd. It is only when Respondents are taking actions that could irreparably harm the community that

such a motion is warranted. Petitioners made the initial request to Justice Madden when buildings were being demolished that permanently altered the fabric of the community. That was denied. The next event that rose to the level of affecting the community was the closing of the Carlton Avenue Bridge and the instant application was made. This motion was necessary to protect the community and preserve its rights

25. Appellants believe they have a strong likelihood of succeeding in this appeal. That, of course, is the reason that they are pursuing their right to appeal. The Appellants maintain that court below misapplied fundamental principles of law, including rules for statutory construction. The Appellants further believe that the lower court erroneously determined that just because a project might meet the definition of a public purpose (notwithstanding the constitutional infirmities of a public agency taking property for a private developer without a pre-existing neutral plan for development) that a finding of public purpose satisfied the specific statutory criteria of the UDCA. Clearly there is a difference. And amongst the other areas, the court found no reason to question the rationality of ESDC's factual blight determination when ESDC admitted that alleviation of blight was a post hoc rationalization for the project after its announcement, that the boundaries of its blight study were determined by FCRC, that it never looked at adjoining properties to assess their condition and never evaluated or responded to comments challenging the Blight Study. Those arguments alone, together with PACB's improper avoidance of SEQRA and the violations of SEQRA by ESDC and MTA demonstrate a significant likelihood of success on the merits.

WHEREFORE, the appellants respectfully request that their within motion for a preliminary injunction or stay be granted in its entirety in order to maintain the status quo pending the hearing and determination of the within appeal, and that the respondents' cross

motion for a preference be denied in its entirety, and for such other and further relief as to this court seems just and proper.

Dated: January 31, 2008

JEFFREY S. BAKER