

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

In the Matter of	:	New York County
	:	Index No. 104597/2007
	:	
DEVELOP DON'T DESTROY BROOKLYN, INC., et al.	:	AFFIRMATION OF
	:	PHILIP E. KARMEL
Petitioners-Plaintiffs-Appellants	:	IN OPPOSITION TO
	:	THE MOTION FOR
For a Judgment Pursuant to Article 78 of the CPLR and	:	A PRELIMINARY
Declaratory Judgment	:	INJUNCTION AND IN
	:	SUPPORT OF THE
– against –	:	CROSS-MOTION FOR
	:	A BRIEFING
URBAN DEVELOPMENT CORPORATION d/b/a	:	SCHEDULE AND
EMPIRE STATE DEVELOPMENT CORPORATION,	:	PREFERENCE
et al.	:	
	:	
Respondents-Defendants-Respondents.	:	

PHILIP E. KARMEL, 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 Bryan Cave LLP, which, together with Sive, Paget & Riesel, P.C., represents respondent-defendant-respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) in this proceeding.

2. I am fully familiar with all the proceedings heretofore had herein and the facts hereinafter recited. I respectfully submit this affirmation in opposition to the motion of petitioners-plaintiffs-appellants (“appellants”) to halt the construction of the Atlantic Yards Land Use Improvement and Civic Project (the “Project”) pending their appeal of the comprehensive 71-page opinion and judgment of New York State Supreme Court, New York County (Justice Joan A. Madden) dismissing all of their claims (the

“Decision”). A copy of the Decision is annexed hereto as Exhibit 1. This affirmation is also submitted in support of ESDC’s cross-motion for a briefing schedule and preference to allow the argument of appellants’ appeal to be heard in the May term of this Court.

The Motion for a Preliminary Injunction Should Be Denied

3. Appellants’ application for a preliminary injunction is submitted on the same litigation papers appellants submitted in support of their application for a temporary restraining order for the same relief. That request was denied after argument of counsel before the Court (Justice Angela M. Mazzarelli) on January 18, 2008. Appellants’ motion for a preliminary injunction should also be denied. Appellants cannot establish a likelihood of ultimate success on the merits, the prospect of irreparable injury or that the balance of equities weighs in favor of enjoining the construction work.

4. At the heart of this case is a dispute about whether the Atlantic Yards Project is in the public interest. In approving the Project, ESDC weighed the Project’s benefits against the potential environmental impacts revealed in the three-volume environmental impact statement (“EIS”) prepared with respect to the Project under the State Environmental Quality Review Act (“SEQRA”). ESDC’s conclusion, on the basis of the EIS and other information contained in the Administrative Record in this proceeding, was that the Project offers many significant benefits and should proceed, subject to a comprehensive program of mitigation measures imposed by ESDC in connection with the approval. The benefits ESDC identified in coming to this conclusion include the construction of a new arena in Brooklyn and return of a professional sports team (the New Jersey Nets) to the borough, the elimination of blight from the Project site, the construction of 2,250 affordable housing units and thousands of units of market rate

housing, the construction of new office space, the design and construction of the new buildings as certified “green buildings,” the location of development at a major transit hub, the creation of eight acres of publicly accessible open space, significant subway station improvements, a new and more efficient Long Island Rail Road (“LIRR”) rail yard, thousands of new jobs and billions of dollars of new tax revenues over the life cycle of the facility for City and State governments. See SEQRA Findings Statement at 18-20 (annexed as Exhibit 2).

5. Appellants have no likelihood of success on the merits. To succeed, their claims would need to overcome the highly deferential standard of review that courts apply in challenges of agency decisions under SEQRA and the Urban Development Corporation Act (“UDC Act”). Justice Madden’s decision (Exhibit 1) examines in detail each of appellants’ claims and amply demonstrates that ESDC and the other governmental respondents-defendants-respondents complied with the substantive and procedural requirements of SEQRA and the UDC Act and that their determinations with respect to the Project were not arbitrary, capricious or an abuse of discretion.

6. Nor can appellants establish irreparable injury from the ongoing work at the Project site that will take place over the next several months, prior to the argument of their appeal. Appellants’ Article 78 petition claims that they will suffer injury from the Project as a whole, principally as a result of the scale of the development and the operation of its arena. At issue in the appellants’ motion, however, is not the construction of the Project buildings, which will take place over a period of several years, but the construction work expected to take place over the next several months; this work, which is a continuation of work that has been underway since shortly after the approvals

were granted by ESDC on December 8, 2006, merely seeks to prepare the Project site for the buildings that will eventually be erected there and to continue work on the temporary rail yard to be used by LIRR while the new permanent yard is under construction. The work planned over the course of the next few months includes continued asbestos abatement at and demolition of unoccupied buildings at the Project site, construction work at the sub-grade LIRR Vanderbilt Yard, the dismantling of the at-grade Carlton Avenue Bridge spanning the Yard and work on infrastructure improvements at and near the Project site. The Carlton Avenue Bridge, whose southern abutment must be removed at this time to complete work on the temporary rail yard, will eventually be rebuilt in its current location, with different supporting girders that are compatible with the layout of the modernized and reconfigured rail yard. Appellants cannot show that this preparatory work, which is what their motion seeks to enjoin, would cause them irreparable injury.

7. Appellants focus on the temporary closure of the Carlton Avenue Bridge, but the only impacts of this traffic diversion will be that non-emergency vehicles will face a longer wait at traffic lights at several intersections that will receive more traffic as a result of the temporary diversion of traffic from this one block of Carlton Avenue. EIS at 17-47 (AR at 11616). In a finding that appellants did not challenge in their Article 78 Petition, the EIS and SEQRA Findings Statement specifically found that the response times of emergency vehicles, such as fire trucks, would not be significantly affected by the street closure. See SEQRA Findings Statement at 54 (Exh. 2 hereto); EIS at 17-32 (AR at 11593). Other north-south streets in the neighborhood will remain open for the duration of the bridge's closure, EIS at 17-32 (AR at 11593), and the closure of the bridge has been coordinated with the New York City Department of Transportation

("NYCDOT"), which has required the maintenance and protection of traffic ("MPT") measures specified in the document annexed hereto as Exhibit 6 (the "MPT Plan"). The MPT Plan includes the permits for the planned work, which were issued pursuant to numbered stipulations. (The requirements represented by each stipulation are found in the index accompanying the permits.) The MPT Plan also includes the measures set forth on the map accompanying the permit, which requires traffic enforcement agents assigned to four intersections to direct and speed traffic, and the posting and enforcement of no standing zones on the Sixth Avenue Bridge to ensure that all of its lanes will be available for traffic flow.

8. The balance of equities weighs heavily against enjoining the construction work. There is no equitable reason why the abatement and demolition work taking place at the Project site should be halted, or why work at the LIRR Vanderbilt Yard or on other infrastructure should be discontinued. The work that will take place over the course of the next several months on the construction of the temporary LIRR rail yard is on the critical path for completion of the Project, as explained in considerable detail in the affidavits submitted by the other respondents-defendants-respondents in opposition to appellants' motion.

9. Far from preserving the status quo, the injunction sought by appellants would change the status quo by disturbing existing construction contracts and interrupting the work taking place at the Project site. In approving the Project, ESDC determined that its implementation would achieve significant public benefits that are summarized in Paragraph 4, supra, and which are discussed in detail in ESDC's approval documents, two of which are annexed here. See General Project Plan at 4-6 (annexed as

Exhibit 3); SEQRA Findings Statement at 18-20 (Exhibit 2). Stopping the ongoing work at the Project site would delay the realization of these significant public benefits.

Furthermore, the cessation of the work would be of no material benefit to the Appellants, who have not established that they will suffer injury as a result of this work.

10. The Administrative Record in this matter comprises approximately 22,800 pages. The EIS alone is more than 3,500 pages. These documents are too bulky to annex to this Affirmation. A synopsis of the relevant facts, however, is presented in the affirmative statement of facts in ESDC's Verified Answer (annexed hereto as Exhibit 4). A copy of ESDC's Memorandum of Law submitted to Justice Madden is annexed as Exhibit 5.

The Cross-Motion Should Be Granted

11. In its cross-motion, ESDC requests that a reasonable briefing schedule and an argument preference be established by the Court to allow the appeal to be heard in the May term of this Court. This would require that appellants perfect their appeal on or before February 19, 2008, under the normal schedule applicable to the May term. I am authorized to represent that each of the respondents-defendants-respondents supports the cross-motion.

12. An expedited schedule is in the public interest because the mere pendency of this litigation, regardless of the merits of appellants' claims, casts a cloud over the Project that is prejudicial to the extremely complex planning, public and private financing, condemnation and construction activities that must occur under a coordinated schedule to allow the Project to proceed on a reasonable time schedule.

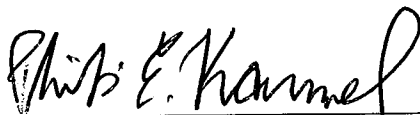
13. The proposed February 19th date for perfection of appellants' appeal, including the filing of their merits brief, is reasonable. It is more than five weeks after Justice Madden's decision on January 11, 2008. Indeed, in a telephone conversation that I had with appellants' principal litigation and appellate counsel (Jeffrey S. Baker, Esq.) on January 16, 2008, he provisionally agreed to this date, subject only to checking with his clients. He then e-mailed me the next day to disavow the schedule he had provisionally accepted on the ground that his clients wanted a much longer time period to perfect their appeal, allegedly due to conflicting litigation and vacation schedules of other counsel. In my opinion, his clients' rejection of the schedule he agreed to reflects a strategy to string out this appeal for the better part of 2008 rather than any actual need for more time to draft the appeal.

14. The memoranda of law that appellants submitted to Justice Madden were thorough and voluminous, albeit unpersuasive. Since they are not permitted to raise new arguments on appeal, and this is a case based on an administrative record that has not changed since the agencies' decision-making in December 2006, the appellants would have ample time to draft their brief if a deadline of February 19th were established for the perfection of their appeal.

15. In the alternative, ESDC requests that the Court establish an alternative briefing schedule and argument date that would allow the argument to take place during the May term.

WHEREFORE, ESDC respectfully requests that the motion for a preliminary injunction be denied, that the cross-motion be granted, and that the Court grant such further and additional relief as it deems just and equitable.

Dated: New York, New York
January 25, 2008

A handwritten signature in black ink, reading "Philip E. Karmel". The signature is written in a cursive style with a large, looping initial "P".

PHILIP E. KARMEL