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

----------x

In the Matter of

Index No.

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

----------x

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Petitioners-plaintiffs ("Petitioners") hereby move for a preliminary injunction to enjoin respondent-defendant Forest City Ratner Companies, LLC and its affiliates ("FCRC"), and its co-respondents-defendants (collectively, "Respondents"), from proceeding with the physical alteration of the site of the Atlantic Yards Arena and Redevelopment Project (the "Project"), including, but not limited to, demolition of buildings on the Project site, until the instant action is finally resolved. Petitioners represent constituents residing in and/or around the Project site in Brooklyn, New York, who will be directly impacted by the Project and by any physical alteration of the Project site.

The Project is subject to the New York State Environmental Quality Review Act ("SEQRA"), New York Environmental Conservation Law ("ECL") § 8-0101, *et seq.*, and the

New York State Urban Development Corporation Act ("UDCA"), New York Unconsolidated Laws § 6251, *et seq*. In this action, Petitioners ask this Court to annul certain determinations, findings, and acts of Respondents New York Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"), Metropolitan Transit Authority ("MTA"), and New York State Public Authorities Control Board ("PACB"), that violated various procedural and substantive requirements of SEQRA and/or the UDCA. The effect of annulling any one of the aforementioned statutory violations would be to nullify the environmental review and/or approval of the Project, and would thereby prevent the Project from going forward unless and until the relevant agencies comply with their legal obligations under SEQRA and/or the UDCA.

Respondent FCRC, the Project's private developer, has already acquired a number of privately owned properties in the Project site, which it intends to raze in preparation for the Project. Under SEQRA, FCRC is prohibited from demolishing properties in the Project site or from making any other physical alterations in the Project site (except in certain circumstances not at issue herein) until the SEQRA environmental review process is completed.

Therefore, after the Project received the final necessary governmental approval on December 20, 2006, FCRC proceeded with plans to commence demolition of properties in the Project footprint, and, to Petitioners' knowledge, does not intend to stay demolition while this action is pending. *See* FCRC press releases regarding the demolitions, submitted herewith as Exhibits 3, 4, and 5 to the accompanying Affidavit of Randall L. Rasey ("Rasey Affid."); *see also* Affidavit of Letitia James (New York City Councilmember) submitted herewith ("James Affid."), at ¶8. If Petitioners are successful in any of their claims under SEQRA or the UDCA, the Project will not go forward unless the violations are remedied. In particular, if Petitioners

succeed on any of their SEQRA claims, FCRC will be statutorily forbidden from demolishing any buildings in the Project site.

Thus, Petitioners face the prospect of a pyrrhic victory. If they succeed on any of their claims, the Project will be stayed pending further review and, quite possibly, prevented from ever going forward as currently planned by FCRC and the other Respondents. But by the time that happens, FCRC will have demolished most of the buildings in the Project site, leaving a large portion of the community which Petitioners seek to protect as vacant wasteland. To Petitioners' knowledge, FCRC has no alterative plans for the properties it owns in the Project site in the event the Project does not go forward as currently planned.

Therefore, Petitioners respectfully seek a preliminary injunction to prevent FCRC from demolishing buildings on the Project site until this case is resolved. As explained herein and in the accompanying papers, Petitioners have a strong probability of succeeding on the merits of at least some, if not all, of their claims, the risk of irreparable harm to Petitioners if FCRC is not enjoined is great, and the balance of equities tips strongly in Petitioners' favor.

The relevant facts of this case are set forth in full in the Affidavits of Jeffrey S. Baker, the Petition-Complaint, and Petitioners' Memorandum of Law in Support thereof ("Pet. Main Brf."), all submitted herewith, and Petitioners respectfully refer the Court thereto for a recitation of the relevant facts.

LEGAL ARGUMENT

In order for a preliminary injunction to be issued, pursuant to CPLR §6301, petitioners must demonstrate (1) a likelihood of success on the merits of any one of their claims in the underlying action, (2) the prospect of irreparable injury absent the granting of the preliminary injunction, and (3) the balance of equities tips in favor of issuing the injunctive relief. *See Doe v.*

Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45 (1988); *St. Paul Fire and Marine Ins. Co. v. York Claims Serv., Inc.*, 308 A.D.2d 347, 349, 765 N.Y.S.2d 573, 574 (1st Dep't 2003). Petitioners can plainly establish all three elements herein, and, therefore, this Court should enjoin respondents from proceeding with any demolition on or alteration of the Project site until this case is resolved. In addition, as discussed in Point IV, *infra*, this Court should exercise discretion to require only a nominal undertaking from Petitioners.

As a preliminary matter, we note that although FCRC and/or its affiliates own the buildings it intends to demolish, SEQRA regulations forbid a private developer of a project subject to SEQRA from commencing demolition or other physical alterations of the project site until the SEQRA process is complete. Specifically, except for certain specified activities not at issue herein, "[a] project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with." 6 N.Y.C.R.R. § 617.3(a).

POINT I: PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF SOME OR ALL OF THEIR CLAIMS

As set forth at length in the accompanying Petition-Complaint and Petitioners Memorandum of Law in support thereof, Petitioners allege 11 causes of action against Respondents ESDC, MTA, and/or PACB for violations of SEQRA and the UDCA. For the reasons discussed therein, Petitioners are likely to succeed on at least, some, if not all, of their claims. Indeed, Petitioners submit that they have already made out a *prima facie* case on some of their causes of action in their pleading and initial submissions.

For example, Petitioners allege in their First Cause of Action that Respondent PACB failed to make the written environmental findings statement required by SEQRA, a fatal flaw which mandates annulment of PACB's approval of the Project. *See* Pet. Main Brf., Point I. As demonstrated therein, the law is clear that PACB was required to issue specific written

environmental findings and to certify that it had complied with SEQRA. There can be little dispute that PACB failed to do so.

Petitioners allege in their Second Cause of Action that Respondent ESDC failed to provide the 30-day minimum comment period following the public hearing as mandated by SEQRA. *See* Pet. Main Brf., Point II(A). Again, the law is indisputably clear, and Petitioners have submitted sufficient documentary evidence and citations to the record before ESDC to establish that the two "community forums" at issue were in fact part of the public hearing.

In addition, Petitioners allege, among other things, that

- ESDC improperly designated the Barclays Center arena, a privately operated, major league basketball arena which will be available for use by local organizations on an extremely limited basis at a cost of more than $100,000 per event, as a "civic project" under the UDCA (Third Cause of Action; *see* Main Brf., Point IV);
- ESDC improperly designated three valuable city blocks in the midst of a residential development boom as "blighted" in order to expand the Project area under the guise of being part of a purported "land use improvement project" under the UDCA (Fourth Cause of Action; *see* Main Brf., Point V);
- ESDC violated SEQRA by excluding the environmental impacts of a potential terrorist attack on the Project, which would sit adjacent to a major New York transit hub that was the intended target of a thwarted terrorist attack in 1997, and located just three miles from Ground Zero, from the scope of its environmental review as unduly "speculative" (Fifth Cause of Action; *see* Main Brf., Point III);
- ESDC and/or MTA violated their obligations under SEQRA to take a "hard look" at actual and potential adverse environmental impacts from the Project by, among

other things, improper delegating duties to outside consultants and staff members, failing to give genuine consideration to practicable mitigating alternatives, purposefully relying on false assumptions and facts, and issuing a fatally deficient environmental impact statement. (Sixth through Eleventh Causes of Action; *see* Main Brf., Points VI-VIII.)

Moreover, Petitioners have supported most of their claims with documentary evidence, affidavits, and/or citations to the record. Again, the likelihood of success on at least some of these claims is strong.

POINT II: PETITIONERS FACE IRREPARABLE HARM ABSENT PRELIMINARY INJUNCTIVE RELIEF

The risk of irreparable harm to Petitioners if FCRC is permitted to proceed with demolitions while this case is pending is palpable. If the Project does not go forward, Petitioners will face blocks of vacant lots where a vibrant section of their community once stood. Alternatively, if the Project goes forward after Respondents are compelled to conduct a genuine environmental review pursuant to SEQRA, it will undoubtedly be altered substantially, making it likely that many buildings will have been demolished needlessly.

As an example of the irreparable harm that Petitioners face, one may look to the recent experience of the town of Norwood, Ohio, where three homeowners challenged the taking of their homes by eminent domain for a development project. In July 2006, the Ohio Supreme Court finally ruled that the takings were illegal, but by that time the developer had already razed the entire 11-acre site, leaving only the three homes of the plaintiffs standing in an otherwise desolate landscape.

A newspaper article about his matter was published recently in the *Cincinnati Enquirer*, and is submitted herewith as Exhibit 1 to the Rasey Affid. together with a photograph of one of

the plaintiff's home surrounded by vacant land. According to the article, the developer had no "Plan B" ready in the event the Court ruled in favor of the homeowners, and therefore the razed land remains vacant. Thus, the purportedly successful plaintiffs suffered the needless loss of their entire neighborhood.

A similar, albeit more extreme case was reported in an article published just last week on the front page of *The New York Times*, which included a photograph of the single house of an eminent domain holdout in Chongqing, China, perched atop a narrow, high promontory surrounded by excavation for a large development project which the house's owner was blocking. Copies of the article and the photograph are submitted herewith as Exhibit 2 to the Rasey Affid. While Petitioners herein expect that their City and State governments would provide at least somewhat stronger protections of the rights of property owners in the Project site who have resisted FCRC's efforts to acquire their property than were available to the homeowner in China, the irreparable harm experienced by the Chinese homeowner differs only in degree from the irreparable harm inflicted upon the successful plaintiffs in Norwood, Ohio.

Moreover, as discussed in the James Affidavit, the demolition of buildings in the Project site would create an aura of inevitability which would discourage further public challenges to the Project. *See* James Affid. at ¶¶4-7. Once community residents see portions of their neighborhood being razed, even those aware of the ongoing legal challenges to the Project may be intimidated into giving up and resigning themselves to the destruction of part of their community.

Courts in New York and elsewhere generally recognize that demolition of buildings implies a risk of irreparable harm sufficient to warrant preliminary injunctive relief. *See, e.g., Wildmetro, Inc. v. NYC Dep't of Parks & Recreation of the City of NY,* 800 N.Y.S.2d 359 (N.Y.

Sup. Ct. 2004) (enjoining demolition where environmental effects of respondent City's long-range plan were not considered); *see also Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3rd Cir. 1983) (affirming district court's order enjoining demolition until HUD conducted and reviewed environmental clearance); *Boston Waterfront Residents Assoc., Inc. v. Romney*, 343 F. Supp. 89, 91 (D. Mass. 1972) (enjoining demolition of buildings where environmental impact statement had not yet issued, because "it is clear that the act of demolition is irrevocable").

Under SEQRA, the "environment" includes "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character". ECL § 8-0105(6). *See Seawall Associates v. New York*, 134 Misc. 2d 187, 203, 510 N.Y.S.2d 434, 447 (Sup. Ct. N.Y. Co. 1986). The United States Supreme Court has found that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987). *See, also, WATCH v. Harris*, 603 F.2d 310 (2d Cir. 1979) (affirming district court's finding of irreparable injury because "demolition is generally irreparable"). "If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co.*, 480 U.S. at 544.

POINT III: THE BALANCE OF EQUITIES TIPS IN FAVOR OF PETITIONERS

In light of the clear risk of irreparable harm to Petitioners and their community if this Court were to permit demolition in the Project site to go forward, neither FCRC nor any other of Respondents can be heard to complain that they would be unduly prejudiced by being compelled to delay demolition while this action is pending. The 22-acre Project is enormous in scope,

scale, and budget. Construction of the Project is expected to go on for up to 20 years, and the Project's total cost is currently projected to be $4.2 billion.[1] While FCRC may be anxious to get started, it is difficult to imagine how a temporary stay of demolition during the pendency of this case could cause more than minimal harm to any of Respondents in the context of this Project.

Respondents have already obtained demolition permits and begun preparing buildings for demolition, *see* James Affid. at ¶8, and this Court should exercise its equitable power to prevent actual demolition until this action is resolved. As noted by a federal court addressing claims brought under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, upon which SEQRA was modeled (*see H.O.M.E.S. v. New York State Urban Dev. Corp*, 69 A.D.2d 222, 231, 418 N.Y.S.2d 827, 832 (4th Dep't 1979)), "[t]he difficulty of stopping a bureaucratic steam roller, once started ... seems to us ... a perfectly proper factor for a district court to take into account ... on a motion for preliminary injunction." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (opining that "the harm at stake in a NEPA violation is a harm to the environment, ... [which may arise as a result of] the psychology of decisionmakers not to tear down projects once they are built.") Here, the harm to Petitioners and their community that would result from proceeding with the project without adequate environmental review clearly outweighs any possible harm to Respondents that might result from an injunction. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104 at 1116 (10th Cir. 2002)(granting a preliminary injunction to enjoin demolition where the "environmental dangers at stake ... are serious" and the proposed construction [had] not yet begun).

[1] *See* Modified General Project Plan (Dec. 8, 2006), at 24-26.

POINT IV: THE COURT SHOULD EXERCISE ITS DISCRETION TO REQUIRE A NOMINAL UNDERTAKING

If the Court grants petitioners' motion for a preliminary injunction, it should exercise its discretion to require only a nominal undertaking from Petitioners, pursuant to CPLR § 6312(b). Petitioners are all non-profit community organizations dependent upon financial and other support from local residents and small businesses, and lack the means to post a substantial undertaking without extreme hardship.

In contrast, Respondent FCRC is a major real estate company which owns and operates 35 properties in the New York metropolitan area, including 4.4 million square feet of office space, and is an affiliate of Forest City Enterprises, Inc., a $7.8 billion company traded on the New York Stock Exchange.[2] The remaining Respondents are entities of the government of the State of New York. Given the significant public interests represented by Petitioners in this case and the vast disparity in resources between Petitioners and Respondents, and, further, given the minimal potential harm resulting to any of Respondents from a preliminary injunction, this Court should not require Petitioners to post more than a nominal undertaking.

CPLR § 6312(b) provides that following a determination that a preliminary injunction should issue, a plaintiff must give an undertaking "in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction. . . ." The purpose of that provision is to provide a limited remedy to a defendant who has been damaged by a preliminary injunction wrongfully issued. *See* Weinstein, Korn & Miller, § 6312.09.

---

[2] *See* New York Times/FCRC Press Release, "The New York Times Company and Forest City Ratner Companies Sign Goodwin Procter for Seven Floors in The New York Times Building" (Mar. 28, 2007), available online at http://biz.yahoo.com/bw/070328/20070328005619.html?.v=1.

While posting an undertaking is mandatory, *see, e.g.*, *Egan v. New York Care Plus Ins. Co. Inc.*, 266 A.D.2d 600, 602, 697 N.Y.S.2d 776, 778 (2d Dep't 1999), the trial court has discretion to set the amount of the undertaking. *See, e.g.*, *Schwartz v. Gruber*, 261 A.D.2d 526, 527, 690 N.Y.S.2d 641, 642 (2d Dep't 1999); Weinstein, Korn, & Miller § 6312.11. New York courts exercising their equitable powers under CPLR 6312(b) consider: (1) the financial ability of the plaintiff to post an undertaking; (2) whether the action was brought in the public interest; and (3) the damages that the defendant might incur if it is later determined that the preliminary injunction was issued in error. *See Daytop Village v. Consolidated Edison Co. of New York*, 61 A.D.2d 933, 935, 403 N.Y.S.2d 222, 224 (1st Dep't 1978); *A. Sherman Lumber Co. v. Kildare Club*, 186 A.D. 852, 854-55, 174 N.Y.S. 769, 770-71 (3d Dep't 1919); *Ziccardy v. Ciraolo*, NYLJ, Aug. 27, 1999, p.25 (Sup. Ct. Kings Co.); *McDonald v. North Shore Yacht Sales*, 134 Misc.2d 910, 917-18, 513 N.Y.S.2d 590, 595 (Sup. Ct. Nassau Co. 1987); *Modugno v. Merritt-Chapman Scott Corp.*, 17 Misc.2d 679, 680, 187 N.Y.S.2d 30, 32 (Sup. Ct. Queens Co. 1959); *see also* 67 N.Y. Jur. 2d § 158 (1999). By weighing these factors, the court ensures that a plaintiff entitled to a preliminary injunction is not left without a remedy simply because he or she cannot afford to post an undertaking, that any public purpose of the lawsuit is not lost merely because the plaintiff is of limited financial means, and that the defendant is appropriately indemnified against a preliminary injunction issued in error.

Thus, in setting the amount of the undertaking, the court may consider the financial means of the moving party. In *Daytop Village*, for example, the First Department found that because the plaintiff, a nonprofit organization, could not afford to post an undertaking in a "lump sum payment of a substantial amount" it would be "hard to justify" such a requirement. 61 A.D.2d at 933. The Court therefore reversed the trial court's imposition of a significant

undertaking and instead imposed a nominal one. *See id.* Similarly, in *Ziccardy*, the court imposed only a "nominal bond" because the plaintiff could not afford to post a more expensive undertaking. *See* NYLJ, Aug. 27, 1999, p.25. In exercising its equitable discretion, the court noted that while an undertaking was required, "this requirement should not function to bar indigent people from obtaining judicial redress" and "to require the plaintiff in this case to post anything more than a nominal bond would effectively deny him injunctive relief." *Id.*

In *Modugno*, the court rejected the defendant's request for a "substantial" undertaking from the plaintiffs, who were not wealthy, as "completely out of the question, since its imposition as a condition of the temporary injunction would result in a denial of relief to which plaintiffs show themselves to be entitled." 17 Misc.2d at 680. *See also Thompson v. Scocozza Studio Ass'n*, 86 A.D.2d 830, 830, 447 N.Y.S.2d 260, 261 (1st Dep't 1982) (affirming undertaking of only $10 where landlord's failure to make repairs denied plaintiff full use of his apartment), and at 831 (Silverman, J. dissenting) (suggesting an undertaking of only $1000 be set even though the injunction required the defendant to "furnish considerable services" to the entire building); *A. Sherman Lumber Co.*, 186 N.Y. at 854-55 (court may consider the wealth of the plaintiff to determine whether the amount of the undertaking would be "burdensome").

In addition to considering the moving party's ability to pay, the Court may consider any public purpose the injunction would serve. In *McDonald*, for example, the plaintiff was found entitled to a preliminary injunction preventing the defendant from falsely advertising in violation of the General Business Law. *See* 134 Misc. 2d at 917-18. The court declined to require a substantial undertaking because it "would be impossible for almost every consumer seeking relief under the statute" to post one. *Id.* The requirement of a large undertaking, therefore, would undermine the statute's purpose to protect consumers and assist the Attorney General in

deterring deceptive business practices. *Id.* at 914, 918 (requiring such an undertaking would render the statute "a nullity"). *See also A. Sherman Lumber*, 186 A.D. at 855 (when setting amount of undertaking court may consider the public purpose of the suit); *Modugno*, 17 Misc. 2d at 680 (plaintiffs' nuisance suit seeks to protect "human life and comfort"; undertaking set at reasonable amount).

Because an enjoined party may suffer financial injury in the event a preliminary injunction is improperly granted, courts balance the prospect of such harm against the financial resources of the movant and the public purpose of the injunction. In this way, litigants against whom an injunction is sought are protected to the degree the court deems appropriate under all the relevant circumstances. This adds to the protections inherent in the preliminary injunction standard itself, which requires a showing of a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in the moving party's favor. *See Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918, 918 (1990); *Gray v. Crew*, 699 N.Y.S.2d 408, 409 (1st Dep't 1999).

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to grant their motion for a preliminary injunction and to exercise its discretion to require them to post only a nominal undertaking, together with such other and further relief as this Court may deem just and proper.

Dated: April 4, 2007

YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC

By: _____
Jeffrey S. Baker

5 Palisades Drive
Albany, NY 12205
(518) 438-9907

BARTON BARTON & PLOTKIN LLP
By: Randall L. Rasey
420 Lexington Avenue, 18th Floor
New York, New York 10170
(212) 687-6262

Attorneys for Petitioners-Plaintiffs