STATE OF NEW YORK
SUPREME COURT NEW YORK COUNTY
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In the Matter of

DEVELOP DON'T DESTROY (BROOKLYN), INC., COUNCIL OF BROOKLYN NEIGHBORHOODS, INC., ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC., BROOKLYN BEARS COMMUNITY GARDENS, INC., BROOKLYN VISION FOUNDATION, INC., CARLTON AVENUE ASSOCIATION, INC., CENTRAL BROOKLYN INDEPENDENT DEMOCRATS, by its President Lucy Koteen, CROWN HEIGHTS NORTH ASSOCIATION, INC., DEAN STREET BLOCK ASSOCIATION, INC., DEMOCRACY FOR NEW YORK CITY, EAST PACIFIC BLOCK ASSOCIATION, INC., FORT GREENE ASSOCIATION, INC., FRIENDS AND RESIDENTS OF GREATER GOWANUS, PARK SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS ACTION COALITION, by its President Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, AND SOUTH PORTLAND BLOCK ASSOCIATION, INC.

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

EMPIRE STATE DEVELOPMENT CORPORATION, FOREST CITY RATNER COMPANIES, LLC,

Respondents.

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AFFIRMATION OF JEFFREY S. BAKER

Index No.: 114631/09
IAS Part 57

JEFFREY S. BAKER, an attorney at law duly admitted to practice before the courts of the State of New York, hereby affirms the following under penalties of perjury:

1. I am a member of the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, counsel for the petitioners in the above-captioned proceeding. I am fully familiar with the facts and circumstances of this proceeding. I submit this affirmation in support of Petitioners' Combined Motion pursuant to CPLR §2221 to (A) Renew the requests for relief set forth in the Petition based upon new evidence that Respondents omitted from the record which demonstrates that the vast majority of the Atlantic Yards project – namely Phase II – will not be completed by 2019 and is contractually not required to be completed until 2035 at the earliest; and (B) based upon the new information to reargue the Order and Decision of this Court dated March 10, 2010 which dismissed the petition. (A copy of the Order and Decision is attached hereto as Exhibit A).

2. The petition alleged that that ESDC failed to consider the details and effect of the renegotiated agreement between Forest City Ratner Companies (FCRC) and the MTA which did not require FCRC to fully acquire the Vanderbilt Yards until 2030 and that there were no penalties if FCRC sought to abandon the project.

3. The petition further alleged that as a result of the failure of ESDC to consider that fundamental factual element, its subsequent decision not to require a Supplemental Environmental Impact Statement was a violation of SEQRA (ECL Article 8) and its finding that the Modified General Project Plan constituted a "plan" for the elimination of blight, violated the Urban Development Corporation Act (McKinney's Uncons. Laws of NY §6260(c).

4. In its decision dismissing the petition, the Court noted three factors that formed the basis for ESDC's decision to project a 10-year build-out ending in 2019. The Decision notes:

> ESDC grounds the rationality of its determination in the opinion of its consultant that the market can absorb the planned units over a 10 year build-out; its intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC's financial incentive to do so.

(Decision and Order at p. 11)

5. The Court went on to determine that:

> Under the limited standard for SEQRA review, the court is constrained to hold that ESDC's elaboration of its reasons for using the 10 year build-out was supported – albeit, in this court's opinion, only minimally – by the factors articulated by ESDC.

(Decision and Order at p. 11)

6. As set forth below, ESDC did not obtain a commitment from FCRC to use commercially reasonable efforts to complete the project by 2019 and in fact signed an agreement that extends the completion of the project until at least 2035. Thus, where the Court previously found that ESDC's rational was only "minimally" supported, since one of the essential elements is demonstrably false, the Court should reconsider its decision in light of the new evidence.

Motion to Renew

7. On or about December 22, 2010, ESDC and FCRC (through its affiliated companies) entered into a Development Agreement for the Atlantic Yards Project. A copy of the Development Agreement is attached as Exhibit B.

8. The FCRC affiliates are Atlantic Yards Development Company, LLC (referred to in the agreement as "AYDC"), Brooklyn Arena, LLC (referred to in the agreement as "BALLC") and AYDC Interim Developer, LLC (referred to in the agreement as "Interim Developer").

9. Section 2.2 of the agreement states in the last sentence:

> BALLC, AYDC and Interim Developer agree to use commercially reasonable effort [sic] to cause the Substantial Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date), in each case as extended on a day-for-day basis for an Unavoidable Delay.

10. Based upon my review of the agreement, this is the only provision where the phrase "commercially reasonable effort" appears in the agreement. That term is not defined in the agreement.

11. Article 8 of the Agreement provides the various dates by which elements of the project must be commenced and completed. However, it is clear that the dates for completion of the project, especially for Phase II are far later than has been represented to the Court.

12. The term "Outside Phase II Substantial Completion Date" is defined in Sec. 8.7 of the agreement which sets forth the construction activities for Phase II. That section requires the completion of the defined elements of Phase II (the only actual obligations on the developer) as having to be completed within 25 years of the Project Effective Date.

13. The "Project Effective Date" is defined in Appendix A of the Agreement (page App. A-15) as the "earlier of (a) the date on which ESDC has acquired and delivered Vacant Possession of the First Taking Properties to BALLC, AYDC, Interim Developer or their Affiliates pursuant to the terms of the LAFPMRA, and (b) the date on which BALLC, AYDC, Interim Developer or their Affiliates delivers notice to ESDC or any other Person that BALLC, AYDC, Interim Developer or their Affiliates is waiving the requirement that ESDC deliver Vacant Possession of all or a portion of the First Taking Properties."

14. Thus the earliest possible Project Effective Date is 2010 when vacant possession of the properties for the arena is provided to the FCRC affiliates. Therefore, the earliest possible date for the Outside Phase II Substantial Completion Date is 2035.

15. There is no date by which construction of Phase II must actually commence. The only provision approaching a requirement is found in Sec. 8.5 entitled "Platform Construction and Commencement." It requires AYDC to "commence construction" or cause the

"commencement of construction" of the platform no later than the 15th anniversary of the Project Effective Date – or 2025 at the earliest. However, as defined in Sec. 8.5 it does not actually require commencement of construction since those terms are specifically defined in Sec. 8.5 to only require a completion guarantee required by the applicable Development Lease and plans for the construction of that section of the platform sufficient to support the building contemplated by the Development Lease.

16. Thus, even under this section, all that is required is a Development Lease, plans and a completion guarantee for the first building on Phase II. There is nothing that even specifies when the construction of the platform must actually commence, when that first building must commence construction and when the balance of the platform must be constructed. Nor is there any requirement that FCRC actually proceed with the acquisition of the air rights over the Vanderbilt Yards.

17. Sec. 8.6 of the Agreement only requires FCRC to substantially complete Phase I of the project within 12 years of the Project Effective Date – or 2022 at the earliest.

18. Article 17 of the Agreement provides for Events of Default and Liquidated Damages. The failure by FCRC to meet the requirements outlined above are considered Events of Default.

19. However, none of the relevant defaults pertaining to Phase II are subject to liquidated damages. Sec.17.2(a)(ii) lists the events of default subject to liquidated damages. Failure of FCRC to commence construction of the platform or to meet the Outside Phase II Substantial Completion Date are not events of default subject to liquidated damages.

20. The net result is that while ESDC could terminate the agreement, there is no penalty to FCRC in that event. Furthermore, there is nothing precluding ESDC from renegotiating the terms at that time with FCRC.

21. FCRC will not even begin to be in default with ESDC until 2025 assuming that it has not signed a development lease for the first parcel on the platform by that date. Even if does so and provides unspecified guarantees and plans, it is not required to actually commence construction on that building. And there are no dates for the subsequent parcels. As a result it could be 2035 or later, when the project is clearly not completed before FCRC will be in clear default on the project.

22. This Court relied upon ESDC 's representations regarding its assurance that it will require commercially reasonable efforts to require FCRC to *complete* the project by 2019. However, while that term is used in a general provision of the Development Agreement, the more specific requirements of Articles 8 and 17 of the Agreement control over the vague provision of Sec. 2.2. *Muzak Corporation v. Hotel Taft Corporation*, 1 N.Y.2d 42 (1956); *Lewiston-Porter Central School District v. Sobol*, 154 A.D.2d 777 (3rd Dept. 1989).

23. The Court felt it was bound to defer to ESDC regarding its determination that 2019 was a reasonable completion date for the purpose of its analysis under SEQRA. While we respectfully disagree with the level of deference that the Court afforded ESDC, the Development Agreement clearly demonstrates that the minimally sufficient rational which the Court recognized was in fact illusory. "Commercially reasonable efforts" is in itself a largely meaningless term. The Development Agreement makes it clear that ESDC defines "commercially reasonable efforts" as meaning not 2019, but in reality 2035 at the earliest and even that date is largely devoid of any penalties or incentives.

24. Based upon this clear evidence of the misrepresentation of the commitments that ESDC said it would require, the Court should reverse its decision.

Motion to Reargue

25. Based upon the foregoing it is clear that the Court was not properly informed of the actual facts governing when ESDC expected the project to be completed. With that change of facts the issues concerning the violation of SEQRA and the UDCA must be reconsidered.

26. Petitioners demonstrated that instead of taking a "hard look" at the environmental impact of the altered project, ESDC artificially constrained its review by picking the arbitrary date of 2019 for project completion despite its knowledge that it would not be completed by that date.

27. The Development Agreement makes clear that 2019 is not even a contemplated completion date for Phase I and ESDC did not consider the impacts of a far more delayed project or the prospect that it would not be completed at all. Having failed to consider a salient fact, its SEQRA analysis is *per se* inadequate and should be remanded for reconsideration. Petitioners are not arguing that the Court must order the preparation of a Supplemental EIS ,although that would be warranted. The Court need only find that the ESDC's determination not to prepare an SEIS was arbitrary and capricious and remand to the ESDC for reconsideration in light of the completion dates set forth in the Development Agreement.

28. Petitioner's also seek reargument on their first cause of action that ESDC violated the UDCA by arbitrarily finding that "the Project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto." (McKinney's Uncons. Laws of NY §6260(c).

29. The Court summarily dismissed that claim apparently finding that despite the clear language of the UDCA that there must be a plan for the alleviation of blight, that in fact a plan was not required. The Court relied upon *Neville v. Koch*, 79 NY2d 416 (1992). However, Petitioners respectfully suggest that the Court misunderstood the argument and improperly relied upon *Neville v. Koch.*

30. The entire purpose of ESDC's involvement in this project as a Land Use Improvement Project is for the elimination of blight. The UDCA requires ESDC to make two distinct findings. First, that the area is blighted and second that the project which ESDC is undertaking actually reconstructs and rehabilitates that blighted area.

31. *Neville v. Koch* had nothing to do with the UDCA or the elimination of blight. It was a SEQRA case concerning New York City's rezoning of an area. The area under consideration was being rezoned to a more intensive use and the City had undertaken a SEQRA analysis that considered the full development of the parcels to the maximum permitted by the zoning classification. The Court found that for the purposes of a SEQRA analysis in a re-zoning, it was appropriate to consider the range of development options including full build-out and a specific plan for the re-zoning was not required.

32. The instant case is completely different. This is not a re-zoning. Zoning is a long-term planning process that identifies the appropriate type and scale of land use in a district. There is nothing in the establishment of a zoning code or the amending of a district that requires that a particular development actually occur. And in fact if the market does not support those types of land uses, then there are means to obtain variances or change the zoning to conform with the marketable uses for the property.

33. However, ESDC has determined the area of Atlantic Yards is blighted. In order to exercise its extraordinary authority, it must find that it has a plan to alleviate the blight. It claimed that it did. However, Petitioners have argued, and the Development Agreement proves, that the plan is illusory and will not be completed until at least 2035 if ever. ESDC failed to consider the effect of the significantly delayed plan or the possibility that it would not be completed when it made its findings under the UDCA.

34. For the reasons set forth above, Petitioners respectfully request the Court to grant this Combined Motion for Leave to Renew and Reargue and, upon renewal and reargument to modify the March 10, 2010 Order to grant the Petition and enter an order and judgment (A) annulling ESDC's findings under UDCA §6260(c); (B) annulling ESDC's determination that an SEIS under SEQRA was not required; (C) annulling ESDC 's approval of the MGPP; (D) declaring the MGPP null and void; (E) enjoining ESDC from further pursuing the Project on the basis of the MGPP; (F) awarding Petitioners their costs and disbursements; and (G) granting such other and further relief that the Court deems just and proper.

Dated: April 7, 2010
Albany, New York

Jeffrey S. Baker, Esq.