

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, et al.

Sup. Ct. N.Y. Co.
Index No. 100686/06

Petitioners – Respondents –
Cross-Appellants,

- against -

EMPIRE STATE DEVELOPMENT CORPORATION

Respondent – Appellant –
Cross-Respondent,

and

FOREST CITY RATNER COMPANIES,

Respondent – Cross-Respondent.

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AFFIRMATION OF JEFFREY S. BAKER

STATE OF NEW YORK)

ss.:

COUNTY OF ALBANY)

JEFFREY S. BAKER, being duly sworn, deposes and says:

1. I am a member of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for the petitioners/respondents Develop Don't Destroy Brooklyn, et al. ("Petitioners") in this action. I make this Affirmation in reply to the Affirmation of Douglas M. Kraus dated July 5, 2006 submitted on behalf of Empire State Development Corporation ("ESDC" or "Respondent").

2. The gravamen of Petitioners' Motion for Leave to Appeal is to address the fundamental question of whether members of the public have the right to raise the issue of a conflict of interest for a lawyer advising a public agency which is evaluating a major project that will affect the public. As stated in my initial affirmation, there is no question that in this case as in any other that may be presented on the issue, the public will not be in an attorney-client relationship with the attorney at issue. However, there must be a means for the public to object to a conflict of interest to preserve the integrity of the process.
3. The Motion for Leave to Appeal notes that the Appellate Division decision ignored Petitioners' arguments that there are special rules governing the ethics of attorneys serving governmental entities. Those rules are set forth in an opinion of The New York State Bar Association's Committee on Professional Ethics (N.Y. Eth. Op. 629, N.Y. St. Bar Assn. Comm. Prof. Eth., 1992 WL 465631.) In that opinion the Ethics Committee reversed a long-standing rule that prohibited governmental entities from waiving potential conflicts of interest. The Committee replaced the blanket ban with a three-part test to determine if a government waiver of the conflict was appropriate and consistent with the public interest.
4. The Appellate Division (and Respondents in their Affirmations in response to this motion) failed to address the controlling ethics opinion by the State Bar's Ethics Committee and results in a holding that when an

attorney is engaged in either simultaneous or consecutive representation of a private applicant and the agency reviewing the application, the public has no standing to demand the agency employ independent counsel. Such a draconian result is inconsistent with the careful balancing directed by the Ethics Committee when it relaxed the blanket prohibition.

5. Respondent contends that Petitioners have not sought leave to appeal those portions of the Appellate Division's ruling that held that Justice Edmead was in error to disqualify Mr. Paget without allowing ESDC to submit an Answer or develop a factual record (Krauss Affirmation at ¶ 12)
6. Petitioners submit that those aspects of the Court's decision are not germane to the Motion for Leave to Appeal. The Motion goes to the fundamental question of the public's right to preserve the integrity of the process. Petitioners believe that Justice Edmead was correct and had ample evidence to make the ruling that she did. Nevertheless, should leave be granted and the Court of Appeals reverse the Appellate Division, holding that Petitioners do have the right to raise a conflict of interest, then Petitioners would not object to a remand to Justice Edmead for further proceedings and development of a factual record for a determination on the conflict of interest.
7. I am also constrained to reply the July 6, 2006 Affirmation of Jeffrey L. Braun attorney for respondent Forest City Ratner Companies ("FCRC"). Initially it must be noted that FCRC does not have standing in the disqualification issue and its strident desire to see Mr. Paget continue in

the role as ESDC's attorney underscores the inherent conflict of interest present when the applicant's counsel is also advising the reviewing agency.

8. What is most disturbing is Mr. Braun's spurious claim that Petitioners are making this motion not to preserve the integrity of the process and to settle a fundamental issue of law, but that it is being pursued for a tactical advantage and to delay the ongoing environmental review of the project. (Braun Affirmation ¶ 4). The current motion has no impact whatsoever on the pace of review for the project. Since February 14, 2006, Petitioners have withdrawn any request for the SEQRA process to be stayed pending substitution of counsel. Moreover, since March 23, 2006, ESDC retained additional counsel to assist in the review of the project to assure that the SEQRA process continues. Nevertheless, FCRC continues to portray Petitioners' desire to assure an objective review as a dilatory attack on the process. The press release from Develop Don't Destroy Brooklyn is simply a means of informing its members and the public that DDDDB is dedicated to an open and transparent review process and that it is pursuing its legal rights to further judicial review to protest what it believes is a fundamental conflict of interest.
9. Furthermore, to the extent that Petitioners continue to complain about the conflict of interest and an inherent bias and pre-disposition in the SEQRA process, that is exactly the remedy outlined by ESDC, FCRC and the Appellate Division as the primary recourse for Petitioners challenging Mr.

Paget's role. Respondents have argued, and the Court agreed, that Petitioners can make the point in the on-going review of the project and in any subsequent Article 78 Proceeding reviewing the final decision. Petitioners are doing exactly that while exercising their First Amendment rights. The present motion does not change any of that but seeks to mitigate the harm already caused by the conflict by halting its continuation.

10. Accordingly, for the reasons set forth above and in my initial affirmation dated June 23, 2006, Petitioners respectfully request that leave to appeal be granted.

Affirmed under the penalties of perjury this 6th day of July, 2006

Jeffrey S. Baker