

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

PETER WILLIAMS ENTERPRISES, INC., et al.,

Petitioners,

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

– against –

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION,

Respondent.

Index No. 100738/2010

**NOTICE OF MOTION TO
DISMISS AND FOR A
PREFERENCE**

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Philip E. Karmel, the memorandum of law submitted herewith, and all the other papers and proceedings heretofore had herein, respondent New York State Urban Development Corporation doing business as Empire State Development Corporation (“ESDC”) will move this Court at the Courthouse, Room 130, at 60 Centre Street, New York, New York on February 26, 2010 at 9:30 o’clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order (i) dismissing the proceeding under CPLR 3211(a)(7) and 7804(f) for failure to state a cause of action; (ii) dismissing the proceeding under CPLR 3211(a)(1) and 7804(f) because its allegations are inconsistent with the ESDC documents upon which they purport to be founded and the proceeding is barred by laches; (iii) granting a preference pursuant to CPLR 3403(a)(1); and (iv) granting such further and other relief as this Court may determine to be just and equitable.


PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b)

opposing papers, if any, must be served so as to be received by the undersigned counsel on or before February 19, 2010.

Dated: New York, New York
February 10, 2010

Yours, etc.

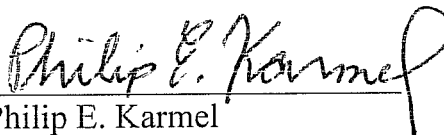
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PETER WILLIAMS ENTERPRISES, INC., et :
al., :
:
Petitioners, : Index No. 100738/2010
:
For a Judgment Pursuant to Article 78 of the : **AFFIRMATION**
Civil Practice Law and Rules, : **IN SUPPORT OF**
:
- against - : **MOTION TO DISMISS**
:
NEW YORK STATE URBAN :
DEVELOPMENT CORPORATION, :
:
Respondent. :
:
-----X

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, attorneys in this proceeding (with eminent domain counsel Berger & Webb, LLP) for respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”). I am fully familiar with the facts and circumstances set forth herein. The factual statements made herein are based principally on the ESDC documents annexed hereto. The statements not based on those documents are based on my personal knowledge. I respectfully submit this affirmation in support of ESDC’s motion to dismiss.

2. ESDC is a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation, created by the Urban Development Corporation Act (“UDCA”), codified in the Unconsolidated Laws (“Unconsol. L.”) §§ 6251-6292. *See* UDCA § 4(1), Unconsol. L. § 6254(1).

3. ESDC has authority under the UDCA to plan various types of “projects.” The two categories relevant to the Atlantic Yards Land Use Improvement and Civic Project (the “Project”) are a “land use improvement project” and a “civic project.” UDCA § 10(c)-(d), Unconsol. L. § 6260(c)-(d).

4. ESDC projects are outlined in the form of a “General Project Plan” (or “GPP”) as specified in UDCA § 16, Unconsol. L. § 6266. To proceed with a project, the UDCA requires that ESDC: (i) create and adopt the GPP (*see* UDCA § 16, Unconsol. L. § 6266); (ii) hold a public hearing on the adopted GPP (*see id.*); (iii) affirm the GPP as adopted or, alternatively, affirm a modified GPP (or “MGPP”) (*see id.*); and (iv) thereafter seek to implement the GPP (or MGPP) through business agreements with one or more developers or other participants (*see* UDCA §§ 6, 9, Unconsol. L. §§ 6256, 6259).

5. ESDC approved the Atlantic Yards Project more than three years ago, after conducting a coordinated public review process pursuant to the State Environmental Quality Review Act (“SEQRA”) (N.Y. Evtl. Conserv. Law Article 8), the UDCA and the Eminent Domain Procedure Law (“EDPL”) (EDPL Article 2).

6. On December 8, 2006, ESDC concluded the administrative processes required by these statutes by (i) adopting a Findings Statement under SEQRA;

(ii) affirming a Modified General Project Plan under the UDCA (the “2006 MGPP”); and
(iii) issuing the Determination and Findings required by the EDPL (the “Determination & Findings”).

7. A copy of the 2006 MGPP, an incomplete copy of which is annexed as Exhibit C to the Petition, is annexed hereto as Exhibit 1. A copy of the Determination & Findings is annexed as Exhibit A to the Petition.

8. In the 2006 MGPP, ESDC made the findings required for a “land use improvement project.” *See* UDCA § 10(c), Unconsol. L. § 6260(c). ESDC found, *inter alia*, that the Atlantic Yards Project site is characterized by substandard and insanitary conditions and that the Project will eliminate these conditions by redeveloping the site. (2006 MGPP at 33-35.)

9. In the 2006 MGPP, ESDC also made the findings required for a “civic project.” *See* UDCA § 10(d), Unconsol. L. § 6260(d). ESDC found, *inter alia*, that the Arena will provide a needed venue for the relocation of the New Jersey Nets to Brooklyn and for the athletic teams of local colleges and academic institutions; that the Arena will provide needed support for cultural and community events such as concerts and graduation ceremonies; that the eight acres of publicly accessible open space will be a significant public amenity; that the new subway entrance at the southeast corner of the intersection of Atlantic and Flatbush Avenues will improve access to the subway and public safety; and that the upgraded Long Island Rail Road (“LIRR”) rail yard will improve LIRR operations. (2006 MGPP at 36-37.)

10. The Determination & Findings (at page 4) found that the principal public use, benefit and purpose of the Project is to eliminate the blighted conditions on the Project Site and the blighting influence of the below-grade rail yard. It also identified (at pages 5-6) other public uses, benefits and purposes, including the construction of the civic facilities identified in the preceding paragraph.

11. Petitioners and allied Project opponents have unsuccessfully challenged the December 8, 2006 approvals in multiple venues and on multiple grounds, attacking the findings that ESDC made under the EDPL, UDCA and SEQRA. All of the challenges to these approvals have been dismissed with prejudice. More specifically, the courts have dismissed:

(i) the state court and federal court challenges to the EDPL Determination & Findings, in decisions holding that ESDC properly determined the Project site to be characterized by substandard and insanitary conditions, the elimination of which constitutes a “public use” under the state and federal constitutions, *see Goldstein v. N.Y.S. Urb. Dev. Corp.*, 13 N.Y.3d 511 (Nov. 24, 2009) (“Goldstein”), *motion for reargument pending*, and *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.) (“Goldstein v. Pataki”), *cert. denied*, 128 S. Ct. 2964 (2008);

(ii) the challenge to ESDC’s “land use improvement project” and “civic project” findings in the 2006 MGPP, *see Develop Don’t Destroy (Brooklyn) v. Urb. Dev. Corp.*, 59 A.D.3d 312 (1st Dep’t) (“DDDB”), *lv. to appeal denied*, 13 N.Y.3d 713 (2009), *motion for reargument pending*;

(iii) the challenge to ESDC’s finding that it has put into place a feasible

method for the relocation of families and individuals displaced from the project area into decent, safe and sanitary dwellings, in a decision affirming the EDPL Determination & Findings, *see* Anderson v. N.Y.S. Urb. Dev. Corp., 45 A.D.3d 583 (2d Dep't 2007), *lv. to appeal denied*, 10 N.Y.3d 710 (2008) ("Anderson");

(iv) the challenges to the Final Environmental Impact Statement for the Project, *see* DDDB and Anderson, *supra*; and

(v) the challenge to the ESDC funding agreement for the Project, *see* Anderson v. N.Y.S. Urb. Dev. Corp., Index No. 106056/08 (Sup. Ct. N.Y. Co. 2008) (Solomon, J.).

12. The petitioners to the instant proceeding were also plaintiffs or petitioners in Goldstein and Goldstein v. Pataki, in which, as noted above, the Court of Appeals and the Second Circuit upheld ESDC's determination that the Project serves important public purposes. In dismissing the constitutional challenge to the use of eminent domain in Goldstein, the Court of Appeals held that "it is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain" and "has been deemed a 'public use' within the meaning of the State's Takings Clause at least since Matter of New York City Housing Auth. v. Muller (270 N.Y. 333 [1936]) and is expressly recognized by the Constitution as a ground for condemnation." 13 N.Y.3d at 524.

13. The ESDC Directors adopted a Modified General Project Plan for the Project on June 23, 2009 (the "2009 MGPP") and authorized the publication of public hearing notices as required by the UDCA.

14. A copy of the 2009 MGPP and the related ESDC approval documents referenced in the Petition are annexed hereto as Exhibit 2.

15. On July 29, 2009 and July 30, 2009, ESDC held a duly noticed public hearing pursuant to sections 6 and 16 of the UDCA, Unconsol. L. §§ 6256, 6266, to receive comments on the 2009 MGPP and on ESDC's proposed disposition of certain parcels of real property in connection with the Project. ESDC accepted written comments through August 31, 2009.

16. On September 17, 2009, the ESDC Directors affirmed the 2009 MGPP.

17. The ESDC documents prepared in connection with its affirmation of the 2009 MGPP, which are referenced in the Petition, are annexed hereto as Exhibit 3.

18. With immaterial exceptions, the 2009 MGPP sets forth "land use improvement project" and "civic project" findings for the Project that are identical to those set forth in the 2006 MGPP. *Compare* 2009 MGPP at 34-41 to 2006 MGPP at 34-40.

19. Thus, the 2009 MGPP did not change the "land use improvement project" and "civic project" elements of the Project that have been upheld as a "public use" by the Court of Appeals in Goldstein and by the Second Circuit in Goldstein v. Pataki and that were upheld by this Court and the Appellate Division in DDDB.

20. The 2009 MGPP and 2006 MGPP are virtually identical, as they both involve:

- the same project site (2006 MGPP at 2; 2006 MGPP at Exh. A-2; 2009 MGPP at 2, 2009 MGPP at Exh. A-2);
- the same 17 buildings at the same locations (2006 MGPP at Exh. A-1; Exh. 3 at Exh. E.);
- the same uses in these 17 buildings (id.; 2006 MGPP at 3-16; 2009 MGPP at 3-17);
- the same eight acres of publicly accessible open space (2006 MGPP at 16-17; 2009 MGPP at 17-18);
- compliance with the same set of comprehensive Design Guidelines for the 17 Project buildings and eight acres of open space (2006 MGPP at 6-7; 2006 MGPP at Exh. B; 2009 MGPP at 6-7, 2009 MGPP at Exh. B);
- a new LIRR yard with a new, direct portal to the Atlantic Terminal (2006 MGPP at 12-14; 2009 MGPP at 13-14);
- a new subway entrance at the southeast corner of Atlantic and Flatbush Avenues, on the Arena Block (2006 MGPP at 10-11, 35-37; 2009 MGPP at 10-12, 30, 37-38); and
- the same private developer (2006 MGPP at 1; 2009 MGPP at 1).

21. The principal change to the General Project Plan effected by the 2009 MGPP is that the Project site properties will be acquired in phases, instead of being acquired in their entirety at one time. (2009 MGPP at 22.)

22. Such a change in the phasing of property acquisition does not trigger the need for a new Determination & Findings under the EDPL and does not re-open “public use” issues that have already been decided by the Court of Appeals, as the Appellate Division held with respect to another ESDC project in Leichter v. N.Y.S. Urb. Dev. Corp., 154 A.D.2d 258 (1st Dep’t 1989) (“Leichter”), a copy of which is annexed hereto as Exhibit 5.

23. The first phase of acquisition is comprised of (i) the air rights owned by the Metropolitan Transportation Authority (the “MTA”) over Block 1119 (to be acquired by purchase from the MTA for \$20 million) and (ii) the properties identified on page 22 of the 2009 MGPP (to be acquired by eminent domain).

24. These first-phase properties are needed for the construction of the Arena (the first Project building to be constructed), Arena parking and the permanent LIRR rail yard and other Project buildings. 2009 MGPP at 22.

25. The 2009 MGPP does not change the public purposes served by ESDC’s exercise of eminent domain – the achievement of the “land use improvement project” and “civic project” benefits described in both the 2006 MGPP and 2009 MGPP.

26. In 2006, the Determination & Findings identified the properties to be acquired by eminent domain as needed for the Atlantic Yards Land Use Improvement and Civic Project, and the same is true today. Further litigation over the Determination & Findings, which has already been upheld by the Court of Appeals and the Second Circuit in prior litigations brought by Petitioners, is wholly inappropriate.

27. This is especially true because the Petition does not identify even one change effectuated by the 2009 MGPP that supposedly altered the “public use” of ESDC’s acquisition of the Project site by eminent domain. Certainly nothing in the 2009 MGPP undermines ESDC’s finding – which has been upheld by both the Court of Appeals and the Second Circuit – that the Project site was characterized by “substandard and insanitary conditions” in 2006, as of the date of the Determination & Findings.

28. The Petition makes allegations with respect to the business arrangements between Forest City Ratner Companies and its affiliates (collectively, “FCRC”) and the MTA that the MTA Board approved on June 24, 2009. (A copy of the term sheet approved by the MTA Board is annexed as Exhibit G to the Petition.)

29. This Court has already dismissed the litigation challenge to the MTA Board’s approval of the new business terms. See Montgomery v. MTA, 25 Misc.3d 1241(A), Slip Copy, 2009 WL 4843782 (Sup. Ct. N.Y. Co. Dec. 15, 2009) (Stallman, J.), *notice of appeal filed*. In the first paragraph of his opinion, Justice Stallman noted that the new business terms did not change the basic plan for the Atlantic Yards Project that MTA (and ESDC) had approved in December 2006:

The subject 2009 resolution [*i.e.*, the MTA Board resolution of June 24, 2009] approved modification of various business terms to *essentially the same plan* approved with FCRC on December 13, 2006, when the MTA Board authorized the MTA staff to negotiate and execute binding agreements with FCRC and adopted SEQRA findings.

2009 WL 4843782, at *1 (emphasis added).

30. Justice Stallman’s observation is correct: the modified MTA business arrangements do not alter the essential terms of the 2006 MGPP. They merely provide for: (i) the upfront purchase of the MTA air rights over Block 1119 (these air rights are required for construction of the Arena, the first project building to be constructed); (ii) the phased acquisition of the MTA air rights over Blocks 1120 and 1121, with outside dates that require payment for these air rights by 2030 but allow their earlier acquisition on a schedule consistent with the 2009 MGPP; (iii) a modified design for the permanent LIRR rail yard; and (iv) contractual guarantees, including an \$86

million Letter of Credit that FCRC has already posted, requiring FCRC to construct the permanent LIRR rail yard. *See* Petition, Exh. G.

31. The MTA business arrangements have no relevance to the validity of the Determination & Findings, because ESDC's findings relate to the public purposes of the Project, which have not changed. Moreover, FCRC's obligations to ESDC are dictated, not by a transaction with MTA, but by the 2009 MGPP and the implementing agreements between FCRC and ESDC, including the Development Agreement executed on December 23, 2009, a copy of which is annexed hereto as Exhibit 4.

32. The Petition does not make any allegations as to the Development Agreement, but Petitioners' Memorandum of Law does. Their allegations (which are put forward by quoting a web site "blog") are inconsistent with the plain terms of the Development Agreement, which requires that the Project be constructed in accordance with the 2009 MGPP. *See* Development Agreement at pp. 4-5 ("Project Description"); p. 10 (requiring that the 2009 MGPP requirements be satisfied); p. 4 (requiring that FCRC use commercially reasonable efforts to complete the entire Project by 2019); p. 21 (requiring that the Project "shall have not less than the required Project Site Affordable Housing Units," a term defined at page 15 of Appendix A to mean the 2,250 affordable housing unit required by the 2009 MGPP).

33. Petitioners allege that the Project's construction timeline may be delayed, slowing the pace of construction so that it is not completed by 2019. The possibility of delay, however, was also inherent in the 2006 MGPP, and thus does not constitute a change that would warrant re-litigation of the "public use" issues already

decided by the Court of Appeals and the Second Circuit in the prior Atlantic Yards litigations. In approving the 2009 MGPP, ESDC recognized that the Project's construction could be delayed by the downturn in the real estate market. (See 2009 MGTPP at 18 n.2; Exh. 2, Attachment C at 55-63.) But the potential for delay – which can occur in any significant government project – does not change the Project's "public use," and does not open up the Project to a new round of EDPL challenges. See Leichter, *supra*.

34. Petitioners also allege that the Development Agreement should have imposed affordable housing obligations on the Project, irrespective of whether FCRC is able to participate in City and State affordable housing programs. But both the 2006 MGPP (at page 16) and the 2009 MGPP (at page 16) provide (using identical language) that "[t]he affordable units are expected to be built as part of the Mayor's New Housing Marketplace Plan and are expected to be financed through tax-exempt bonds provided under existing and proposed City and State housing programs such as the City's 50-30-20 program." Giving effect to the long-standing expectation that the affordable housing components of the Project are to be built with generally available subsidies provided under City and State affordable housing programs does not change the "public use" of ESDC's property acquisition.

35. Petitioners also cite a report of the City's Independent Budget Office (the "IBO") projecting that the State and City subsidies for the Project will not be recouped by the Arena (the first of the 17 Project buildings). Even if this prediction were accurate (*but see* Exh. 3, Exh. B at 5-6, criticizing the IBO report), the IBO's financial

projections as to the fiscal benefits of the Arena do nothing to undercut ESDC's findings – upheld in state and federal court – that the Project site is characterized by substandard and insanitary conditions that warrant the use of eminent domain.

36. Finally, Petitioners make an erroneous assertion pertaining to the indictment of Yonkers City Council Member Sandy Annabi and two co-conspirators for alleged crimes over a six-year period from 2004 through 2009. Petitioners assert that the indictment charges Annabi with having accepted a bribe from FCRC in connection with its Ridge Hill Development Project in Yonkers (*see* Pet. Mem. of Law at 2 n.2), but the indictment (posted at www.scribd.com/doc/24863550/Annabi-Sandy-Et-Al-Indictment) makes no such allegation. Petitioners' memorandum of law *purports* to cite the indictment, but instead cites a press release; even the press release, however, does not allege that FCRC paid a bribe or otherwise committed a crime.

37. Nor do Petitioners provide any explanation for their lackadaisical schedule for commencing this proceeding. Construction has been on-going for three years and has been advancing steadily throughout 2009 and this year. Yet Petitioners chose to file this proceeding on the very last day of the four-month limitations period for challenging the 2009 MGPP and then waited two additional weeks to serve the Petition on ESDC. In the interim period between ESDC's affirmation of the 2009 MGPP on September 17, 2009 and the service of the Petition on ESDC, and in reliance on the continuing validity of the Determination & Findings:

- ESDC, MTA, FCRC and other entities completed a well-publicized “Master Closing” at which the Development Agreement and several hundred other contracts were signed pertaining to the Project;
- FCRC posted multiple letters of credit totaling more than \$150 million to guarantee completion of certain Project elements;
- the Brooklyn Arena Local Development Corporation successfully completed the issuance and sale of approximately \$511 million of tax-exempt bonds for the Arena;
- FCRC completed construction of the temporary rail yard for the LIRR;
- LIRR decommissioned the permanent rail yard and allowed FCRC to begin removing the railroad tracks on the Arena block;
- FCRC has removed most of the permanent yard’s railroad tracks on the Arena block;
- FCRC has continued to construct new sewers and other utilities in the area;
- FCRC has continued to prepare buildings on the project site for demolition (to date, more than 30 buildings have been demolished to make way for the Project);
- ESDC and the City of New York have fulfilled their commitments to provide more than \$200 million in public funding for certain elements of the Project; and

- ESDC has initiated an EDPL Article 4 vesting proceeding with respect to the first-phase properties (*see* ¶ 23, *supra*) before Justice Abraham Gerges of Kings County Supreme Court, who heard argument and took ESDC's petition under advisement on January 29, 2010.¹

38. With all this taking place in plain view, and with construction of the Arena poised to begin (thereby providing hundreds of much needed union jobs) as soon as title to the first-phase properties vests in ESDC, Petitioners have bided their time. Standing idly by as the manifest progress on the Project went forward in reliance upon the continuing validity of the Determination & Findings, Petitioners deferred filing this litigation until the last possible moment and even then delayed serving the petition on ESDC. ESDC respectfully submits that their inequitable and prejudicial conduct should constitute a bar to this meritless proceeding under the doctrine of laches.

39. In the event that the Court denies this motion, ESDC requests the opportunity to interpose an Answer to the Petition.

¹ Petitioners have pleaded the same arguments made in the instant proceeding in their Answer and "Counterclaims" presented to Justice Gerges.

WHEREFORE, ESDC respectfully requests that its motion to dismiss be granted and that ESDC be granted such further and additional relief as the Court may deem just and equitable.

Dated: New York, New York
February 10, 2010



PHILIP E. KARMEL

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EXHIBIT 1: Modified General Project Plan, December 8, 2006 (3632-75¹)

EXHIBITS:

Exhibit A-1: Project Site Plan (3676)

Exhibit A-2: Project Block and Lot Map (3677)

Exhibit B: Design Guidelines (3678-786)

Exhibit C: Maximum Building Heights and Square Footage (3787)

Exhibit D: Parking Plan (3788)

Exhibit E: Property Ownership and Control (3789)

Exhibit F: Blight Study (omitted)

EXHIBIT 2: Memorandum dated June 23, 2009 to ESDC Directors from Marisa Lago (4675-82)

ATTACHMENTS:

June 23, 2009 Resolution (4975)

Attachment A: 2009 Modified General Project Plan (4683-740)

Attachment B: Block and Lot Site Plan (4741-42)

Attachment C: SEQRA Technical Memorandum (4743-827)

EXHIBIT 3: Memorandum dated September 17, 2009 to ESDC Directors from Dennis Mullen (7021-26)

EXHIBITS:

September 17, 2009 Resolution (7236-37)

¹ The numbers in parentheses refer to the document numbers at the bottom of the exhibits' pages.

- Exhibit A: Modified General Project Plan (Adopted June 23, 2009)
(7028, *see* Exhibit 2, 4683-740)
- Exhibit B: Summary of Comments and Responses (7029-65)
- Exhibit C: Public Comments; Public Hearing Transcript and
Written Comments (omitted)
- Exhibit D: Project Leases and Disposition Abstract (7067-70)
- Exhibit E: Updated Project Site Plan (7071-72)
- Exhibit F: Updated Site Control Map (7073-74)

EXHIBIT 4: Development Agreement by and among New York State Urban Development Corporation (d/b/a Empire State Development Corporation) and Atlantic Yards Development Company, LLC; Brooklyn Arena, LLC; AYDC Interim Developer, LLC (Execution Version, executed December 23, 2009)

EXHIBIT 5: *Leichter v. New York State Urban Development Corporation*, 154 A.D.2d 258 (1st Dep't 1989)