

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

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In the Matter of	:	New York County
	:	Index No. 104597/2007
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DEVELOP DON'T DESTROY BROOKLYN, INC., et al.	:	
	:	
Petitioners-Plaintiffs-Appellants	:	
	:	
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-Respondents.	:	

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**MEMORANDUM OF LAW IN OPPOSITION TO  
THE MOTION FOR A PRELIMINARY INJUNCTION  
AND IN SUPPORT OF THE CROSS-MOTION  
FOR A BRIEFING SCHEDULE AND PREFERENCE ON THE APPEAL**

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## PRELIMINARY STATEMENT

Respondent-defendant-respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) respectfully submits this memorandum in opposition to the motion of petitioners-plaintiffs-appellants (“appellants”) for a preliminary injunction and in support of ESDC’s cross-motion for a briefing schedule and preference on the appellants’ appeal.

Appellants’ application for a preliminary injunction is submitted on the same litigation papers they 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.

Their motion seeks to stop the ongoing construction work at the site of the Atlantic Yards Civic and Land Use Improvement Project (the “Atlantic Yards Project” or “Project”), a major ESDC-sponsored Project in Brooklyn that will replace a currently blighted area with a new professional sports arena, more than 6,000 residential units (including 2,250 affordable housing units), office space, eight acres of open space, and a new Long Island Rail Road (“LIRR”) train yard to serve the LIRR Atlantic Terminal. Although their motion seeks to stop all construction on this multi-billion dollar Project, their particular focus is the work required to construct the temporary rail yard that must be completed and in operation before the current LIRR yard is decommissioned and rebuilt. Specifically, the appellants seek to stop the closure and dismantlement of the Carlton Avenue Bridge, whose southern abutment must be removed to complete work on the temporary rail yard.

Appellants' perfunctory motion papers – consisting of a conclusory affirmation of counsel with no supporting memorandum of law or affidavits – fail to establish any of the elements required for the granting of a motion for preliminary injunction. ESDC's cross-motion for a briefing schedule and a preference should be granted to allow this appeal to be argued in the May term so that this litigation, which clouds the future of this important public project, can be brought to a speedy conclusion.

### POINT I

#### **THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED**

Appellants are not entitled to a preliminary injunction because they have failed to demonstrate: (i) a likelihood of ultimate success on the merits; (ii) irreparable injury absent the granting of the preliminary injunction; and (iii) a balance of the equities in their favor. *See, e.g., Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748, 751 (1988). A preliminary injunction is an extraordinary exercise of a court's equitable powers. "So drastic a remedy is not to be granted unless the moving papers establish a clear and undisputed right to relief." *Deane v. City of New York Department of Buildings*, 177 Misc.2d 687, 694 (Sup. Ct. N.Y. Co. 1998) (citing *Park Terrace Caterers v. McDonough*, 9 A.D.2d 113, 114 (1<sup>st</sup> Dep't 1959)). The party seeking a preliminary injunction has the burden of establishing its clear entitlement to such relief, based upon the facts presented in its moving papers. A "movant's rights must be certain as to the law and the facts and the burden of establishing such an undisputed right rests upon the one seeking the relief." *Current Audio, Inc. v. RCA Corp.*, 71 Misc.2d 831, 834 (Sup. Ct. N.Y. Co. 1972). *See also Peterson v. Corbin*, 275 A.D.2d 35, 37 (2<sup>nd</sup> Dep't 2000) (preliminary injunction is a "drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts

