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

In the Matter of 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.	New York County Index No. 104597/2007

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 (1st 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 (2nd 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

upon the moving papers, and the burden of showing an undisputed right rests upon the movant'" (citation omitted)). Since the appellants here fail to demonstrate that any of the factors weigh in favor of granting a preliminary injunction, such relief should be denied.

A. Appellants Have No Likelihood of Success on the Merits.

Appellants have not established a likelihood of success on the merits of their appeal. As they acknowledge, *see* Affirmation of Jeffrey S. Baker ("Baker Aff.") ¶ 17, their claims could succeed only if they overcome the deferential standard of review that courts apply in challenges to agency decisions under the State Environmental Quality Review Act ("SEQRA") and the Urban Development Corporation Act (the "UDC Act"). In such cases, judicial review is limited "to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (quoting CPLR § 7803[3]); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986).

In their motion for a preliminary injunction, appellants assert that the decision of New York State Supreme Court, New York County (Justice Joan A. Madden) dismissing all of their claims (the "Decision") was in error on three specific points. Appellants' assertions, however, are not supported by any disciplined legal analysis that suggests – much less establishes – that the appellants have any realistic prospect of success in their appeal of the Decision. Nevertheless, appellants' three arguments are specifically addressed below.

1. The Decision Correctly Concluded That the Public Authorities Control Board's Review of ESDC's Approval of the Project Was Not Subject To SEQRA.

All parties agree that the review of the Project by ESDC, the Metropolitan Transportation Authority and the City of New York was subject to SEQRA. Thus, a comprehensive environmental impact statement ("EIS") was prepared, and each of these governmental entities issued a detailed SEQRA Findings Statement pursuant to section 8-0109(8) of the Environmental Conservation Law ("ECL"). Appellants contend, however, that a fourth governmental body – the Public Authorities Control Board ("PACB") – was also required to make SEQRA Findings prior to its scrutiny of ESDC's decision to approve the Project. The Decision analyzed appellants' contentions in detail but held them to be without merit. *See* Decision at 14-17.

Appellants argue that "[t]he court below erroneously held that PACB's review was solely limited to reviewing the financial elements and guarantees of the project and it did not have discretion regarding other issues and that environmental considerations had no bearing on its determination." Baker Aff. ¶ 22. They contend that the court ignored the "inherent discretion" vested in the PACB, as well as the appellants' supposed "proof" that PACB members have on occasion considered non-statutory factors in reviewing a public authority's decision to approve a project.

The Decision begins by reviewing applicable Court of Appeals precedent interpreting the language of SEQRA, which provides that the term "actions" does not include "official acts of a ministerial nature, involving no exercise of discretion." ECL § 8-0103(5)(ii). The Decision notes that in *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993) ("*Gavalas*"), the Court of Appeals held that "'when an agency has some discretion, but that discretion is circumscribed by a narrow set of

criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements.'" Decision at 15 (quoting *Gavalas*, 81 N.Y.2d at 326).

Next, the Decision examines the language of the Public Authorities Law – the statute that created the PACB – to determine whether that statute prescribes criteria for PACB's review that bear on the sorts of environmental issues analyzed under SEQRA. The Decision correctly held that PACB's responsibility under the Public Authorities Law "is confined to reviewing the financial feasibility and impact of proposed debt-incurring projects, which bear no relationship to the environmental concerns that may be raised in an [environmental impact statement]." Decision at 17. Therefore, PACB's approval of ESDC's decision to approve the Project was not an "action" subject to SEQRA.[1]

Appellants attack the Decision's reliance on Court of Appeals precedent, arguing that it is limited to the specific type of approval (a building permit) at issue in *Gavalas*. *See* Baker Aff. ¶ 25. But appellants do not point to any language in *Gavalas* limiting the SEQRA principle articulated in that decision to building permits. Appellants fail to mention that this Court and other courts have followed the principle set forth in *Gavalas* in other contexts. *See CitiNeighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Comm'n*, 306 A.D.2d 113, 114 (1st Dep't 2003) (issuance of a certificate of appropriateness under the City's landmarks law held not an "action" subject to SEQRA), *appeal dismissed*, 2 N.Y.3d 727 (2004); *Ziemba v. City of Troy*, 37

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[1] This conclusion is not altered by the fact that, if appellants' "proof" is to be credited, individual members of the PACB, such as the Speaker of the Assembly, have allegedly on occasion made political decisions based on non-statutory factors. *See* ESDC Mem. of Law at 99 n.26, annexed as Exhibit 5 to Affirmation of Philip E. Karmel ("Karmel Aff.").

A.D.3d 68, 75 (3d Dep't) (discretionary issuance of demolition permit held not an "action" subject to SEQRA), *leave to appeal denied*, 8 N.Y.3d 806 (2006); *Lighthouse Hill Civic Assoc. v. City of New York*, 275 A.D.2d 322, 323 (2d Dep't) (City Planning Commission determination allowing modification of topography and tree removal in a Special Natural Area District held not an "action" subject to SEQRA), *leave to appeal denied*, 95 N.Y.2d 768 (2000).

2. The Decision Correctly Concluded That ESDC Properly Designated the Atlantic Yards Project as a "Civic Project" Under the UDC Act.

The Decision correctly determined that ESDC properly designated the arena portion of the Project as a "civic project" under the UDC Act. *See* Decision at 26-32. Recent ESDC-approved civic projects include the new Yankee Stadium under construction in the Bronx, the new CitiField Stadium for the Mets under construction in Queens, improvements to Ralph Wilson Stadium (home of the Buffalo Bills), and the construction of a new arena for the Buffalo Sabres. *See* Verified Answer ¶ 6 (Karmel Aff. Exh. 4). Under the UDC Act, a "civic project" requires the existence of a need for an "educational, cultural, recreational, community, municipal, public service or other civic facility." Unconsol. L. § 6260(d).[2]

Appellants allege that the Decision "ignored the clear language of the UDC Act" in reaching the conclusion that a "recreational" facility could be one at which

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[2] The Decision focused on whether the arena portion of the Project was properly designated a "civic project." *See* Decision at 27. In approving the Project, ESDC also cited other components in finding that the Project was a "civic project," including eight acres of publicly accessible open space; new subway entrances; an "Urban Room" connected to the arena that "will accommodate[e] the major flows of people to and from the transit center during the day and night ... and allow[] for a variety of public uses and programmed events throughout the year"; and an upgraded rail yard for LIRR. *See* ESDC's General Project Plan ("GPP") at 36-37 (Karmel Aff. Exh. 3).

spectators enjoy watching a professional sports team such as the National Basketball Association Nets. Baker Aff. ¶ 27. To the contrary, the Decision carefully analyzes the relevant statutory language. *See* Decision at 27-29. Noting that the term "recreational" in the UDC Act's definition of "civic project" does not have "a controlling statutory definition," *id.* at 27, the Decision considers "recreational" as "a word of 'ordinary import' which must be construed in accordance with its usual and commonly understood meaning." *Id.* at 27-28. The court looked to dictionary definitions of "recreation," and found that attending a Nets game would be a recreational activity for the spectators. Decision at 29. Appellants' motion papers cite to no legal authority for reading the ordinary meaning of the term "recreation" out of the statute.[3]

Appellants also argue that the court ignored state legislation that allegedly demonstrates that the New York State Legislature "felt special authorizing legislation was necessary" to permit ESDC to fund sports stadiums. Baker Aff. ¶ 28. Contrary to the appellants' assertion, the Decision did not ignore this legislation. Rather, the court below properly rejected the appellants' interpretation of the relevance of the law they cite, holding that the appellants "point to no language in that law indicating an intent to narrow or amend the broad terms of the UDCA." Decision at 30.[4]

Appellants also argue that the "UDCA requires that a civic project must be owned or leased to a public entity or a not-for-profit corporation." Baker Aff. ¶ 31. The

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[3] In addition to serving as the home of Brooklyn's only major league sports franchise, the arena will also host college basketball games, concerts, the circus, college graduation ceremonies, and political and religious events that would also constitute activities falling within the broad parameters of a "civic" facility under the UDC Act.

[4] To the extent it is relevant at all, the 1993 law cited by appellants indicates that sports facilities are a subcategory of "civic projects" under the UDC Act. *See* L. 1993, ch. 258 § 2 (defining the term "project" in the 1993 law as "a civic project of the [ESDC] that entails the development or modernization of a sports facility"). *See* ESDC's Mem. of Law at 42-43 (Karmel Aff. Exh. 5).

Decision carefully examined the language of the UDC Act, noting, in particular, the provisions that call for "'maximum participation by the private sector of the economy.'" Decision at 31 (quoting Unconsol. L. § 6252). The Decision held that the UDC Act "expressly authorizes" ESDC to "'sell or lease ... any civic project to the state ... to any municipality ... or to *any other entity* which is carrying out a community, municipal, public service or other civic purpose.'" Decision at 31 (quoting Unconsol. L. § 6259(1)). The Decision's analysis of ESDC's authority – and the conclusion that a professional sports facility leased to a private entity can be a civic project – is grounded squarely in the UDC Act itself. Appellants' argument that the Decision was based on authority granted under "separate statutes or special legislation" (Baker Aff. ¶¶ 30-31) is clearly without merit.

3. The Decision Correctly Concluded That ESDC Properly Designated the Atlantic Yards Project as a "Land Use Improvement Project" Under the UDC Act.

In addition to designating portions of the Project as a "civic project" under the UDC Act, ESDC also designated the Project as a "land use improvement project" under that Act. *See* GPP at 33-35 (Karmel Aff. Exh. 3). The designation of a "land use improvement project" requires a finding that "the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area." Unconsol. L. § 6260(c)(1). It is this finding that the appellants and the Decision refer to as the "blight determination." ESDC's blight finding was based on information compiled in a 378-page Blight Study that was included in the administrative record and reviewed in detail by Justice Madden.

Since appellants have not provided a copy of the Blight Study to this Court in its motion papers, they limit their arguments to generalized assertions.

Appellants contend that "the blight determination by ESDC is clearly arbitrary and capricious" and that "[t]o let that determination stand would be to condone blight determinations based solely on volumes of papers without consideration for their content and accuracy." Baker Aff. ¶ 47. Appellants also allege that ESDC "arbitrarily and capriciously included the entire three block southern section of the project area, without sufficient basis and without responding or considering the public comments that challenged the blight determination." *Id.* ¶ 4(C).[5] Appellants further allege that "the record failed to explain the basis for ESDC's determination either that individual lots were blighted or why the designated blocks or sections thereof were blighted." Baker Aff. ¶ 20.

The Decision reflects Justice Madden's careful review of the Blight Study and other relevant portions of the administrative record, as well as the applicable caselaw, in holding that ESDC properly designated the Atlantic Yards Project as a "land use improvement project" under the UDC Act. Decision at 32-40.

Appellants' contentions on appeal are the same as those asserted in their papers and in oral argument before the court below. *See* Baker Aff. ¶¶ 34-45. Notwithstanding appellants' assertions, the Decision makes clear that the court considered and rejected these contentions. The Decision examines the Blight Study and notes that it "evaluated the 73 lots comprising the entire Project Site, by presenting a detailed profile for every lot, as well as one or more photographs of the exteriors and some interiors of the properties." Decision at 36. The Decision gives particular attention

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[5] The blocks to which the appellants refer are Blocks 1127 and 1129 and a small portion of Block 1128 that are the only portions of the Project site not in the Atlantic Terminal Urban Renewal Area ("ATURA"), which the City has designated as blighted ten times, most recently in 2004. *See* Decision at 33.

to the non-ATURA portion of the Project site, observing that in "[p]rofiling the 52 lots in the non-ATURA portion, the Blight Study analyzed each lot in terms of the blight characteristic noted above, finding one or more such characteristics in at least 30 lots. Among the specific blight characteristics identified were serious structural problems, unsanitary and unsafe conditions, underutilization, vacant lots and vacant buildings." *Id.* at 37. Ultimately, the Decision held that "contrary to petitioners' assertion, the Blight Study documented well more than a 'handful' of blight characteristics on well more than a 'few' properties in the non-ATURA portion of the project." *Id.* at 37.

The Decision also held that the UDC Act "simply requires a finding of 'substandard and insanitary conditions' as to the Project site as a whole," *id.*, and that the appellants' suggestion that the non-ATURA portion of the Project site should be considered on its own "is inconsistent with the legal authorities ... holding that the focus of any blight determination should be directed at the entire area of a redevelopment project as a unit, rather than individual parcels." *Id.* at 37-38. Appellants provide no basis for their assertion (Baker Aff. ¶ 44) that the court below misapplied relevant caselaw in reaching this conclusion.

Petitioners also allege that ESDC made its determinations without responding to or considering the public comments on the Blight Study. Baker Aff. ¶¶ 4(C), 39. ESDC did in fact consider the public comments on the Blight Study, even going so far as to prepare a written analysis of these comments. *See* Verified Answer ¶ 134 (Karmel Aff. Exh. 4).

Finally, appellants claim that the court below should have held an evidentiary hearing on "blight," but they fail to disclose that: (i) they never filed a motion

requesting such a hearing and (ii) their request for a hearing was in a post-argument letter they submitted to Justice Madden more than six weeks after their petition had been fully briefed, argued and deemed submitted. As the excerpts cited above demonstrate, the Decision makes obvious that Justice Madden found such a hearing to be unnecessary since the administrative record amply documented the basis for ESDC's determination.

B. Appellants Have Not Established Irreparable Injury.

Appellants allege that the closing of the Carlton Avenue Bridge will cause irreparable injury because the bridge's closing will cause traffic congestion and affect fire department response times. Baker Aff. ¶¶ 48-52. As demonstrated below, these claims are without merit and fail to establish the requisite degree of harm.

The Carlton Avenue Bridge runs one block in a north-south direction between Pacific Street and Atlantic Avenue, spanning the below-grade LIRR yard. This one-block, northbound segment of Carlton Avenue is expected to be closed for approximately two years, while the bridge is taken down and rebuilt with supporting girders that are compatible with the new rail yard. *See* Karmel Aff. ¶ 6. The EIS carefully examined the traffic and other impacts of the reconstruction of the Carlton Avenue bridge and the associated temporary (two-year) closure of this one-block segment of Carlton Avenue. Among other things, the EIS determined that other north-south streets would remain open during the construction period, including the streets one block west and one block east of Carlton Avenue. *See* Baker Aff. Exh. B (a local street map).

The EIS construction traffic analysis concluded, as the appellants note, that there would be several intersections at which non-emergency vehicles would experience a longer wait at traffic lights during the first stage of construction, in part due

to diversions required as a result of the temporary closing of Carlton Avenue on the one block at which it traverses the Carlton Avenue bridge over the LIRR rail yard. *See* FEIS at 17-47 (AR at 11616). Notwithstanding the appellants' contentions to the contrary, a longer wait at a traffic light during the first stage of the construction period is hardly "irreparable injury" for purposes of an application for a preliminary injunction.

As Exhibit B to the Baker Affirmation shows, northbound routes between Pacific Street and Atlantic Avenue will remain open one block to the east of the Carlton Avenue Bridge on Vanderbilt Avenue and one block to the west over the Sixth Avenue Bridge, which will be converted to a two-way street. *See* Baker Aff. ¶ 49 & Exh. B; *see also* FEIS at 17-43 (AR at 11604); Karmel Aff. Exh. 6 (map). Moreover, the Carlton Avenue Bridge closure has been carefully coordinated with the NYCDOT, which has required a series of measures to reduce adverse traffic impacts during the bridge closure pursuant to a stipulated Maintenance and Protection of Traffic ("MPT") Plan for the work. *See* Karmel Aff. ¶ 7 & Exh. 6.

Furthermore, ESDC, in the EIS and its SEQRA Findings, carefully considered the potential impacts of the Project's construction on the provision of community services such as fire protection and concluded that the construction work, including the two-year closure of the Carlton Avenue Bridge, would not significantly affect emergency response times or the delivery of police or fire protection services. SEQRA Findings at 54 (Karmel Aff. Exh. 2); FEIS at 17-32 (AR at 11593). This conclusion was based in part on the fact that any lane closures would be coordinated with NYCDOT and that there are other north-south streets in the neighborhood that would remain open to traffic. *See id.* In addition, the EIS took into account that the Project site

and surrounding area are well-served, from all directions, by New York City Fire Department ("FDNY") protection services. The EIS also noted that the City is implementing an automatic vehicle location system in all ambulances and FDNY vehicles to allow for accurate real-time information as to the location of the vehicles; the use of this technology is expected to further reduce emergency response times. *Id.* In addition, FDNY vehicles are not bound by standard traffic controls and are therefore less affected by traffic congestion. EIS at 5-11 (AR at 10841). Measures implemented in accordance with the MPT Plan will also assure that emergency response times are not significantly affected. *See* MPT Plan (Karmel Aff. Exh. 6). Traffic enforcement agents at four intersections in the vicinity of the Project site will be able to direct traffic to allow the passage of emergency vehicles, and no standing zones will be posted and enforced on the Sixth Avenue Bridge to ensure that all of its lanes will be available for traffic flow.

Appellants have not submitted any affidavits or other competent evidence in support of their contention that the SEQRA Findings Statement and EIS erred in concluding that there would be no significant adverse impact to FDNY response times as a result of the temporary closure of the Carlton Avenue Bridge. Appellants' contention is also well outside the pleadings, since they never challenged this SEQRA finding in their Article 78 Petition.

C. The Balance of the Equities Weighs Against Enjoining Construction.

The preliminary injunction sought by the appellants would stop all work on the Project for many months and thus would delay the ultimate completion of the Project by at least as many months, and probably more, given the time needed for remobilization of the construction crews once they have left the construction site. In addition to depriving the construction workers of their jobs during this period, the

injunction is against the public interest because it would delay the significant public benefits of the Project, most of which cannot be realized until the Project, or at least significant portions of it, are completed.

In approving the Project, ESDC concluded that the Project offers many significant benefits and should proceed, subject to a comprehensive program of mitigation measures imposed by ESDC in connection with the approval. The benefits ESDC identified in coming to this conclusion include the construction of a new arena in Brooklyn and return of a professional sports team (the New Jersey Nets) to the borough, the elimination of blight from the Project site, the construction of 2,250 affordable housing units and thousands of units of market rate housing, the construction of new office space, the design and construction of the new buildings as certified "green buildings," the location of development at a major transit hub, the creation of eight acres of publicly accessible open space, significant subway station improvements, a new and more efficient LIRR rail yard, thousands of new jobs and billions of dollars of new tax revenues over the life cycle of the facility for City and State governments. *See* SEQRA Findings Statement at 18-20 (Karmel Aff. Exh. 2).

In light of these important public benefits, the balance of equities weighs heavily against granting the preliminary injunction. Far from preserving the status quo, the preliminary injunction sought by appellants would change the status quo by disturbing existing construction contracts and interrupting the work taking place at the Project site. The work that will take place at the Project site over the course of the next few months is crucial to the progress of the overall Project, since the reconstruction of the LIRR rail yard is "on the critical path" for Project completion. Karmel Aff. ¶ 8. Thus,

stopping the ongoing work would delay the realization of the significant public benefits summarized above. Furthermore, the cessation of the work would be of no significant benefit to the appellants, who have not established that they will be materially harmed by this construction work.

POINT II

AN EXPEDITIOUS SCHEDULE SHOULD BE ESTABLISHED FOR PERFECTION AND ARGUMENT OF THE APPEAL

In its cross-motion, ESDC requests that this Court establish a briefing schedule that would require the appellants to file the record on appeal and their merits brief by February 19, 2008 so as to allow the argument to take place during the May term. In the alternative, ESDC requests that an alternative briefing schedule be established that would schedule the argument of the appeal during the May term. Pursuant to CPLR § 5521 and 22 N.Y.C.R.R. § 600.12(a)(2), ESDC also requests a preference to ensure that the appeal is argued in the May term.

The timely conclusion of this litigation is very much in the public interest. The Atlantic Yards Project is a multi-billion dollar construction project that involves multiple complex components, including public and private financing, construction of a new rail yard, ESDC's exercise of the power of eminent domain, and the construction of an arena and 16 other buildings. ESDC approved the Project on December 8, 2006, and its early stages have been underway since that time. Given the extraordinary complexity of the Project, it is important that it be cleared to proceed free of the "cloud of litigation" that exists so long as the appellants' claims remain pending before this Court. This is particularly important given the significant public investments in the Project that are contemplated by the GPP. *See* GPP at 26-28 (Karmel Aff. Exh. 3).

Appellants will not be unfairly prejudiced by establishing a reasonable briefing schedule for their appeal. The issues have been thoroughly briefed in the court below. Since new arguments cannot be made on appeal, all that is required is that they be recast to focus on Justice Madden's decision. The schedule proposed by ESDC still leaves the appellants with ample time to brief their appeal. Indeed, it is the very schedule that the appellants' principal litigation and appellate counsel provisionally agreed to as reasonable, before his client persuaded him that additional time should be requested to string out the appellate process throughout all of 2008. *See* Karmel Aff. ¶ 13.

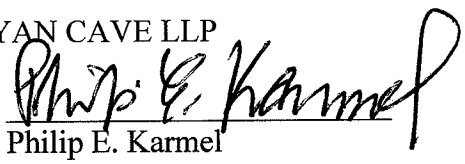
CONCLUSION

For the foregoing reasons, the Court should deny the motion for a preliminary injunction and grant the cross-motion for a briefing schedule and preference.

Dated: New York, New York
January 25, 2008

Respectfully submitted,

BRYAN CAVE LLP

By: 

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