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

In the Matter of	:	New York County Index No. 104597/07
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.	:	

REPLY AFFIRMATION IN SUPPORT OF THE CROSS-MOTION TO COMPEL APPELLANTS TO EXPEDITE THEIR APPEAL

JEFFREY L. BRAUN, an attorney admitted to practice before the courts of the State of New York, affirms under penalty of perjury as follows:

1. I make this reply affirmation on behalf of FCRC (a) in further support of ESDC's cross-motion for an order that establishes an expedited briefing schedule for this appeal, and (b) in response to the opposing affirmation of petitioners' attorney, Jeffrey S. Baker, dated January 31, 2008.[1] This affirmation is not intended to be a sur-reply on petitioners' motion for a stay pending appeal and only addresses ESDC's cross-motion.

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[1] Unless otherwise indicated, the abbreviations and references in this reply affirmation are the same as those that are used in my prior affirmation, dated January 25, 2008. Citations to "Baker Opp. Aff." refer to Mr. Baker's opposing affirmation.

2. The issue presented by ESDC's cross-motion is straightforward: Is the public interest in the Atlantic Yards project of sufficient importance to compel the parties to brief this appeal on an expedited schedule that will allow this Court to hear the appeal this spring? The answer to this question is, resoundingly, yes. Mr. Baker's opposing affirmation relegates petitioners' motion for a stay pending appeal to an after-thought at the end, and devotes all of its attention to petitioners' Plan B, which is to defer adjudication of this appeal in the hope that intervening events, unrelated to the merits of the litigation, will undermine the ability to proceed with the Atlantic Yards project.

3. Petitioners make no commitments as to when they will perfect this appeal. Instead, all that they say is this: "Currently, it is anticipated that the appeal will be perfected approximately three to four months after the Notice of Appeal was filed on January 18, 2008" (Baker Opp. Aff. ¶ 4). Even if this equivocal non-commitment is viewed as a commitment, it would mean that, at the earliest, the appeal would be heard by this Court during its September 2008 term, which is approximately seven months from now. This case should not be treated in such a lackadaisical manner.[2]

4. The important public interests that the Atlantic Yards project is intended to serve have been recognized repeatedly by ESDC, the MTA, the City of New York and other public agencies during the extensive public reviews of the project. Significantly, the United States Court of Appeals for the Second Circuit has now endorsed that conclusion. On February 1, 2008, the Second Circuit rendered its decision in *Goldstein v. Pataki*, No. 07-2537-cv,

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[2] Petitioners' casual approach to this appeal belies their prior assertions, both on the present motion and on their numerous prior applications for injunctive relief, that construction-related work at the project site is subjecting them to irreparable harm. If petitioners truly believed that the work was causing irreparable harm, they would be perfecting this appeal expeditiously and pressing for a prompt determination. Instead, petitioners have changed course and now are seeking to prolong this appeal's pendency.

unanimously affirming the decision by Judge Nicholas G. Garaufis dismissing the complaint in that action for failure to state a claim for relief. *Goldstein v. Pataki*, 488 F.Supp.2d 254 (E.D.N.Y. 2007).[3] In that case, the plaintiffs' principal contention was that the use of eminent domain by ESDC in furtherance of the Atlantic Yards project in reality was intended to further the private benefit of FCRC and its principals rather than any public purpose, and that the condemnation of their properties therefore violated the public use clause of the Fifth Amendment to the United States Constitution. The District Court granted defendants' motion to dismiss the complaint for failure to state a claim for relief.[4]

5. In affirming that decision, the Second Circuit opened its decision with the observation that "the well-publicized, multi-billion dollar development project [plaintiffs] challenge would result, *inter alia*, in a new stadium for the New Jersey Nets, a public open space, the creation of affordable housing units and the redevelopment of an area in downtown Brooklyn afflicted for decades with substantial blight" (slip op. at 3). The court summed up its analysis of the project with a similar statement that "the Atlantic Yards Project will target a long-blighted area, result in the construction of a publicly owned (albeit generously leased) stadium, create a public open space, increase the quantity of affordable housing, and render various improvements to the mass transit system" (*id.* at 23-24). The Second Circuit also stated that, "viewed objectively, the Project bears at least a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing,

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[3] I understand that ESDC is submitting a copy of the Second Circuit's decision to this Court as part of its reply papers in support of its cross-motion. Therefore, I am not providing an additional copy with this reply affirmation.

[4] Further confirmation of the link between *Goldstein v. Pataki* and this case lies in the fact that petitioners' counsel in this case, Mr. Baker, was a co-signatory of the complaint in the *Goldstein* case.

the creation of a public open space, and various mass-transit improvements" (*id.* at 13-14). The court also observed that, "[a]t the end of the day, we are left with the distinct impression that the lawsuit is animated by concerns about the wisdom of the Atlantic Yards Project and its effect on the community," but that "such matters of policy are the province of the elected branches" (*id.* at 24).

6. Although the present appeal is not, technically, a proceeding under EDPL § 207 and therefore is not entitled by statute to a preference, it does involve a major public-private project that entails the use of eminent domain. Therefore, it should be treated with the same degree of expedition that would be required of a proceeding under EDPL § 207. Petitioners have not articulated any reason that would support a contrary conclusion. If anything, their papers confirm that this appeal should be expedited. In particular:

- Petitioners' counsel, Mr. Baker, does not dispute that, personally, he was willing to agree to a briefing schedule under which petitioners' opening brief would be served and filed thirty days after the notice of appeal (Baker Opp. Aff. ¶ 3). Instead, it was unnamed "clients and co-counsel" who have insisted on a different and more extended schedule (*id.* at ¶ 3).

- Petitioners have applied for a stay pending appeal. While there is no merit to that application, petitioners had to understand that, were a stay to be granted, this Court would require them to prosecute the appeal on an expedited basis. However, even without a stay, in view of the overwhelming public interest in this matter, petitioners should be required to proceed on a similarly expedited basis.

- Petitioners complain, on the one hand, that, in the motion court, they "had only one week to file the reply papers and had oral argument before Justice Madden on the next day," in consequence of which they "did not have an opportunity to present their arguments in a concise and persuasive manner as they would have desired" (Baker Opp. Aff. ¶ 6). By contrast, on the next page they assert that they "have the right to comb through the record and present to the Court the clear evidence supporting their arguments" (*id.* at ¶ 8). If petitioners' difficulty before the motion court was insufficient time to prepare reply papers in a "concise" manner,

then it makes no sense to suppose that they need three or four months to "comb through the record" to prepare their opening brief in this Court.

- Furthermore, the representatives of the lead petitioner, DDDB, including their attorney, participated actively in all of the extensive public proceedings that culminated in ESDC's adoption of the FEIS and its SEQRA findings, the General Project Plan and the condemnation determination and findings required by the EDPL. Petitioners are fully familiar with the record – and fully familiar with the legal arguments that they intend to pursue on this appeal – and do not need three or four months to "comb through" the record for further support.[5]

7. Petitioners' actual agenda is revealed by a reported exchange with Daniel Goldstein, DDDB's spokesman and the lead plaintiff in *Goldstein v. Pataki*, in one of the two articles annexed to Mr. Baker's opposing affirmation; this article is only quoted selectively in the affirmation. According to the article:

> Daniel Goldstein, a spokesman for develop Don't Destroy Brooklyn, a coalition of civic groups opposed to Atlantic Yards, chuckled when asked if the full-court legal press by the anti-Ratner forces has serendipitously dragged on long enough to give the credit crisis time to make Forest City's financing a few levels more difficult. Opponents of the project are also appealing last year's dismissal of a federal eminent domain lawsuit.
>
> "It's always been a high-risk project, and with the state of the credit, housing and stock markets, it's even more high-risk," Goldstein said.
>
> "It didn't need to be. But it's not news to anyone that a firm that is so reliant on credit is having a problem."

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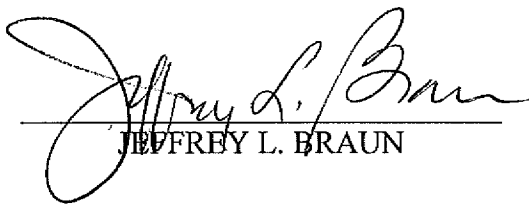
[5] Petitioners' assertions that "ESDC and FCRC illegally rushed the public review period of this project ... to gain approval before the end of the Pataki Administration," that "[t]here was no opportunity for meaningful public comment and the ESDC was not interested in considering those comments," and that ESDC and its consultants did not even bother to respond or consider the hundreds of pages of comments demonstrate that the southern half of the project site was not blighted" (Baker Opp. Aff. ¶ 9) are ludicrous. However, petitioners hardly need three or four months to develop this contention.

(Baker Opp. Aff. Ex. A.) Clearly, having had no success in pursuing the merits of their claim in this lawsuit and the parallel federal court action, and having been unable to obtain any sort of injunction or stay halting construction work at the site, petitioners' agenda now is to prolong this appeal in the hope that outside events, such as the state of the financial markets, will impede progress on this project.[6]

8. We are not seeking to prejudice petitioners on this appeal or to prevent them from presenting their case in an effective manner. We simply believe that, in view of the compelling public interests at stake in this matter, petitioners should be required to prosecute their appeal expeditiously so that it can be heard this spring.

Dated: February 4, 2008
New York, NY



JEFFREY L. BRAUN

[6] Mr. Baker correctly points out that my statement in my prior affirmation that the "environmental impact statement for the project estimates that the project will create ... $4.4 billion in net tax revenues for the City and the State over 30 years" is mistaken, because "[t]here is simply no projection at all regarding the net tax revenues contained in the EIS" (Baker Opp. Aff. ¶ 21). The $4.4 billion figure is in the report of a consultant who had been retained by FCRC and does not appear in the FEIS. It remains true, however, that the Atlantic Yards project has been approved by ESDC and the other involved agencies on the basis of the significant public benefits that it is expected to generate, which include substantial additional tax revenues. The General Project Plan that ESDC adopted concluded that, "[o]n a present value basis, the Project will generate $652.3 million of City tax revenues and $745.3 million of State tax revenues," and that "the project will generate $944.2 million in net tax revenues in excess of the public contribution to the Project." A copy of the General Project Plan's discussion of the economic impact of the project is annexed hereto as Exhibit A.

Exhibit A

~~constructed. Such declarations shall also include obligations on the owners of the surrounding~~ Project properties to (1) perform maintenance and operation in the event the Conservancy or not-for-profit entity defaults on its obligation to maintain and operate, (2) fund maintenance and operation at a sufficient annual level, and (3) provide adequate assurances satisfactory to ESDC and the City that the publicly accessible open spaces will be maintained and operated. The Conservancy or other not-for-profit entity will be governed by a board, which will include representatives of the Project Sponsors, civic group(s) active in park matters, the owners of surrounding properties and, on an ex officio basis, the local community boards and the New York City Department of Parks and Recreation ("DPR"). The initial program and planning for the open space will be subject to the reasonable approval of ESDC, consistent with the Design Guidelines and any material modifications thereto will be subject to the reasonable approval of the City.

The open space will be accessible to the public from dawn to dusk or at hours consistent with the practices of DPR for comparable public parks.

6. Transferability

The agreements with the Project Sponsors will provide that until the applicable building or improvement within Phase I is substantially completed, the applicable portion of each Parcel may not be transferred by the Project Sponsors, without the consent of ESDC and the City, except to affiliates of FCRC and in connection with financing transactions and/or the enforcement of rights of lenders under these financing transactions. In addition, in the event the Nets professional basketball franchise is sold to another entity prior to the completion of the Arena, Project Sponsors may transfer their interest in the Arena to the purchasing entity or its affiliate, provided ESDC and the City are reasonably satisfied that such entity can satisfactorily complete the development of the Arena or if such entity retains the Project Sponsors to develop the Arena.

G. Economic Impact

ESDC has performed an independent economic impact analysis of the Project.[4] ESDC has projected that the Project will have the following impacts during construction and for the first 30 years of operations:

(i) Construction of the project will generate 12,568 new direct job years and 21,976 total job years (direct, indirect, and induced);

(ii) Direct personal income related to construction activities will be $590.0 million and total personal income will be $1.2 billion (direct, indirect, and induced);

(iii) Total construction employment will generate $42.1 million in City tax revenues and $89.9 million for New York State;

(iv) Operations at the Arena and mixed-use development will support an annual average 4,538 new jobs in New York City (direct, indirect, and induced) and an annual average 5,065 jobs (direct, indirect, and induced) in New York State, (inclusive of New York City);

(v) On a present value basis, the Project will generate $652.3 million of City tax revenues and $745.3 million of State tax revenues. Thus the project will generate $944.2 million in net tax revenues in excess of the public contribution to the Project.

In addition, the Project will produce an estimated $554 million in public improvements and infrastructure including improvements for the LIRR and for New York City Transit.

~~II. Project Purpose – Basis for Land Use Improvement Project and Civic Project Findings~~

The primary purposes of ESDC's participation in the Project are (i) to transform an area that is blighted and underutilized into a vibrant, transit-oriented, mixed-use and mixed-income community with significant publicly accessible open space and community facility amenities that has appropriate density close to Brooklyn's largest Transportation Hub; (ii) to provide a state-of-the-art Arena to accommodate the long awaited return of a major-league sports franchise to Brooklyn while also providing a first-class athletic facility for the City's colleges and local

[4] The economic impact analysis set forth herein may vary from that set forth in the FEIS due to the use of different financial models and assumptions applied to the Project. The analysis set forth herein is based upon the residential variation of the Project.