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.	:	

AFFIRMATION OF JEFFREY S. BAKER

JEFFREY S. BAKER, an attorney duly admitted to practice before the Courts of the State of New York, hereby avers, under penalty of perjury, as follows:

1. I am a member of the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for petitioners-plaintiffs-appellants Develop Don't Destroy (Brooklyn), Inc., *et al.* ("Appellants") in this action.

2. I respectfully make this Affirmation in support of Appellants' motion for leave to appeal to the Court of Appeals this Court's Decision and Order dated February 26, 2009 (the "Decision"), a true copy of which is attached hereto as Exhibit 1. By that Decision, this Court affirmed Supreme Court Justice Joan Madden's dismissal of the Appellants' combined Civil Procedure Law and Rules ("CPLR") Article 78 petition and complaint for declaratory judgment, by which Appellants challenged respondent-defendant-respondent Urban Development

Corporation d/b/a Empire State Development Corporation's ("ESDC") approval of the proposed Atlantic Yards Arena and Redevelopment Project (the "Project") in Brooklyn.

3. In this case, Appellants have pointed out the substantial evidence in the record that ESDC exceeded the bounds of its legislative mandate and violated its statutory obligations in order to push through the Project in the form promoted by its private developer. As Justice Catterson of this Court noted in his concurring opinion,[1]

> the obvious point raised by petitioners and dismissed by ESDC is that if the non-ATURA properties were in the midst of an economic revival, it would be counter to ESDC's mandate to step in, stop all productive development, and, in partnership with a private enterprise, develop the neighborhood according to its own vision of urban utopia, complete with professional basketball for the masses.

4. Nevertheless, Justice Catterson felt compelled to join the majority in upholding ESDC's findings and determinations regarding the Project, despite his belief that ESDC's analysis did not provide a rational basis for its finding that the entire Project area is "blighted",[2] based on a perceived standard of review under which courts would be compelled to defer to ESDC's findings and determinations as long as ESDC can provide any arguably plausible justification for them, regardless of how contrary they may be to the clearly stated purposes and plain language of ESDC's enabling statutes and the environmental laws which ESDC is obliged to follow.

5. Appellants respectfully submit that the Courts of this State are not so impotent in the face of ESDC's willful abdication of its plainly enumerated statutory obligations as this Court has perceived, and that the Court of Appeals should review this case to determine the boundaries of judicial review of ESDC's determinations under the applicable provisions of the

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[1] Decision at 36 (Catterson, J., concurring).

[2] Decision at 26 (Catterson, J., concurring).

Urban Development Corporation Act ("UDCA") and State Environmental Quality Review Act ("SEQRA"), and the scope of ESDC's discretionary authority under those Acts.

6. More specifically, Appellants seek to present to the Court of Appeals the following issues, all of which are of vital importance to New York State and involve questions of first impression to the Courts of this State:

(a) Whether the standard of review of an agency action under CPLR Article 78 is the same as the standard of review in a taxpayer action under section 51 of the General Municipal Law.

(b) Whether ESDC's purposeful denial and mischaracterization of the uncontroverted economic conditions and trends in the Project area, and its knowing misrepresentations of other facts to support its "blight" determination, demonstrate a degree of bias and corruption on the part of ESDC which warrants invalidation of its determination that the area is "substandard and insanitary" for purposes of designating the Project a "land use improvement project" under the UDCA.

(c) Whether ESDC's purposeful denial and mischaracterization of the uncontroverted economic conditions and development trends in the Project area, in order to justify its rejection of project alternatives, demonstrate a degree of bias and corruption on the part of ESDC which warrants invalidation of its rejection of Project alternatives under SEQRA.

(d) Whether ESDC was required to consider the economic conditions and development trends in the Project area in order to exercise its authority to designate and undertake the Project as a "land use improvement project" under the UDCA.

(e) Whether a sports arena leased for one dollar per year to a private, for-profit entity to be operated as a professional sports facility, with *de minimus* civic benefits, may nevertheless be designated a "civic project" under the UDCA.

The Standard of Review of ESDC's Blight Determination

7. There is no genuine dispute that in determining that the entire Project area was "blighted", ESDC purposely disregarded economic conditions and development trends in and around the non-ATURA portion south of Pacific Street;[3] misrepresented the effect of the Vanderbilt Rail Yards on the non-ATURA portion as impeding development, while the undisputed record showed the non-ATURA portion and adjacent areas were enjoying substantial, desirable private redevelopment and rapidly rising property values;[4] misrepresented the crime rate in the non-ATURA portion as higher than surrounding areas, while ESDC's own data showed just the opposite;[5] designated some properties as "blighted" simply because they were not built out to the full "floor area ratio" (FAR) permitted under applicable zoning regulations,[6] and others based on minor building code violations;[7] and disregarded hundreds of pages of written comments from the public that contradicted ESDC's purported factual findings.[8]

8. In upholding ESDC's "blight" determination and its consequent designation of the Project as a "land use improvement project" under the UDCA, this Court relied heavily upon *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478 (1975), *Kaskel v. Impellitteri*, 306

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3 *See* Brief for Petitioners-Plaintiffs-Appellants dated July 7, 2008 ("App. Brf.") 61-67, 72-74, 77-78; Reply Brief for Petitioners-Plaintiffs-Appellants dated August 22, 2008 ("Reply Brf.") 4-8; Record on Appeal ("R.") 14035-43, 14178-81, 14185-87, 15494-97, 15502-06; Reply Appendix ("RA.") 28; *see also* Decision at 35 (Catterson, J., concurring).

4 *See id.*

5 *See* App. Brf. 74-76; R. 487, 19228-32, 19926, 20280.

6 *See* App. Brf. 80, 82, 85-87; Reply Brf. 8-15.

7 *See* App. Brf. 85-87; Reply Brf. 8-15.

8 *See* App. Brf. 78-82; R. 20280.

N.Y. 73 (1953), and *Jo & Wo Realty Corp., v. City of New York*, 157 A.D.2d 205 (1st Dep't 1990), for its view that it was compelled to afford a high level of deference an agency's designation of an area as "substandard or insanitary" in the context of an urban renewal project.

9. However, *Kaskel* and *Jo & Wo Realty* were both taxpayer actions under section 51 of the General Municipal Law, which requires a different level of judicial review than under Article 78 of the CPLR. As the Court noted in *Kaskel*,

> [t]he decisions under section 51 make it entirely clear that redress may be had only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes. Although the plaintiff here complains of the choice of this site for clearing and redevelopment as being 'arbitrary and capricious', we must keep in mind that this is not an 'Article 78' proceeding dealing with a situation wherein it might be claimed that public officials, although acting within their powers, are doing so in a way that is arbitrary or capricious. The substance of plaintiff's contention in this respect is simply that this whole project is illegal because, according to him, the chosen site or area is not in fact substandard or insanitary.

306 N.Y. at 79 (emphasis added).

6. Nevertheless, the Court acknowledged the "hypothetical case in which the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary". *Id.* at 80.

7. Similarly, in *Jo & Wo Realty*, also a taxpayer action, this Court did not review the City's finding that the old Coliseum site at issue in Kaskel was "substandard and insanitary" under the "arbitrary and capricious" standard which would have been applicable in an Article 78 proceeding. Rather, this Court relied upon the prior determinations at issue in *Kaskel* to hold that the City was within its discretion to find the building obsolete and outmoded, and that the City had the authority under the original urban renewal plan to market the property through a Request for Proposals. *Jo & Wo Realty* was limited to the authority of the City to redevelop the site

without going through public bidding and did not involve a new determination that the area was blighted or that new properties should be included in the urban renewal area or taken by eminent domain.

8. In *Yonkers,* the plaintiffs did not challenge the city agency's blight determination at all, but, rather, challenged whether the purpose of the condemnation, which was to permit Otis Elevator Company to expand its facility, was a permissible "public purpose" under Federal and State Constitutions and applicable laws. Thus, the Court of Appeals stated that, while the city agency had offered no more than general statements to support its blight determination, and "courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases", the plaintiffs in that case had failed to raise the validity of the agency's blight determination in their pleadings. 37 N.Y.2d at 485-87.

9. In the case at bar, this Court found ESDC's proffered basis for its "blight" determination sufficient despite the indisputable, multiple fallacies in its published bases for that determination, and despite ESDC's failure to respond to the numerous public comments pointing out its errors. Rather than applying the highly deferential standard of a taxpayer challenge in *Kaskel* and *Jo & Wo Realty*, this Court should have looked to *Yonkers* and recognized that, while ESDC proffered more than the mere conclusion supplied by the city agency in that case, ESDC's analysis and conclusions still failed to meet the standard of review necessary to withstand the "arbitrary and capricious" standard applicable in an Article 78 challenge.

10. Indeed, as this Court noted in its Decision, even in *Kaskel* the Court of Appeals stated that an agency may not make its blight findings "corruptly or irrationally or baselessly". [9]

[9] Decision at 17.

Kaskel, 306 N.Y. at 78 (emphasis added). Here, ESDC made its blight determination by, among other things, purposefully disregarding the contrary economic conditions and development trends which it asked its own consultant, AKRF, to study; knowingly misrepresenting the effect of the Vanderbilt Rail Yards on the non-ATURA portion as impeding development, while the non-ATURA portion and adjacent areas were enjoying substantial, desirable private redevelopment and rapidly rising property values; and knowingly misrepresenting the crime rate in the non-ATURA portion as higher than surrounding areas, while its own data showed just the opposite. Plainly, there is evidence of corruption in ESDC's blight study.

11. Simply put, New York law requires ESDC to do more than simply throw out a number of purported justifications for its "blight" determination without regard to truth, accuracy, or logic, secure in the knowledge that as long as any one of its proffered justifications can be called "rational", its blight determination will not be disturbed by judicial review. To the contrary, where, as here, an agency blatantly misrepresents its factual findings, disregards contrary evidence, and purposely misrepresents conditions in the relevant area, the court should find the agency's ultimate determination irremediably tainted, regardless of whether a few of its proffered justifications might arguably be valid.

12. Otherwise, this Court becomes nothing more or less than the "rubber stamp" which the Court of Appeals cautioned against in *Yonkers*. It is not a question of the courts substituting their judgment for the agency's; rather, it is matter of the courts requiring an agency to be truthful and unbiased in making its judgment.

The Standard of Review of ESDC's
Consideration of Project Alternatives Under SEQRA

13. By the same token, ESDC's indisputable reliance on its own demonstrably false conclusion, that desirable residential development in the non-ATURA portion of the Project area

would not occur without the Project, demonstrates a level of blatant bias which irremediably taints its rejection of those alternatives to the Project that did not call for inclusion of the non-ATURA blocks in the Project area.

14. Under SEQRA, ESDC was required to undertake "reasonable consideration of alternatives" to the Project. *Dryden v. Tompkins County Bd. of Representatives*, 78 N.Y.2d 331, 334 (1991). ESDC's substantial bias in its analyses of Project alternatives, evidenced by its purposeful disregard and misrepresentation of the development trends and economic conditions in the non-ATURA area, amply demonstrates that rather than engage in reasonable consideration of alternatives, ESDC simply justified *post hoc* its predetermined rejection of them.

15. This is not a matter of simple error or misjudgment on the part of ESDC. To the contrary, there is no dispute that ESDC contracted with AKRF for a study of the development trends in and around the Project area, even though it later chose to ignore development trends and denied that they are relevant to its blight determination. Nor is there any dispute that the non-ATURA blocks and surrounding areas were undergoing well documented, substantial, desirable residential redevelopment both before and after the announcement of the Project and ESDC's blight study. The record in this case leaves no room for any reasonable doubt that ESDC knew very well that its claims that, without the Project, "significant new development" of the non-ATURA area "is considered unlikely given the blighting influence of the rail yard and the predominance of low-density manufacturing zoning on the project site",[10] and that the non-ATURA area "would remain blighted"[11] without the project, were unsupported by any evidence, and were false when they made them.

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[10] R. 11793.

[11] R. 11847.

16. Nevertheless, this Court upheld ESDC's rejection of Project alternatives on the ground that ESDC had other, less impeachable justifications for doing so. While that may be so, SEQRA requires more than just that there be at least one arguable justification for an agency's rejection of an alternative to a project. SEQRA requires the agency to undertake a "reasonable consideration of alternatives", and ESDC's purposeful misrepresentation of development trends in and around the Project area amply demonstrates that it did not do so.

Consideration of Economic Conditions and
Development Trends in the Context of the UDCA

17. One of the stated purposes of the UDCA is to address areas which are "slum or blighted, or which are becoming slum or blighted areas . . . all of which impair or arrest the sound growth if the area, community or municipality, and the state as a whole." UDCA § 6252. Thus, under section 6260(c) of the UDCA, ESDC's designation of a project as a "land use improvement project" requires findings that, among other things, the project area "is a substandard or insanitary area, or is in danger of becoming substandard or insanitary and tends to impair or arrest the sound growth and development of the municipality". (emphasis added)

18. Appellants respectfully submit that this Court failed to consider the emphasized language of the UDCA when it held that the standard for finding "blight" for purposes of designating a project a "land use improvement project" under the UDCA is no different than the applicable standard in the context of condemnation. The UDCA expressly requires a finding that the perceived "blight" impairs sound growth and development, and, therefore, ESDC was required to make such a finding here.

19. As Justice Catterson noted, ESDC's blight study purposely disregarded economic trends and clear evidence of substantial private investment in and around the non-ATURA blocks, despite having contracted with its consultant, AKRF, for a broader analysis of economic

and development trends in the area which ESDC never disclosed. Such conduct by ESDC is, as Justice Catterson described it, "ludicrous",[12] and therefore is not rational.

20. By failing to apply the requisite "arbitrary and capricious" standard to its review of ESDC's "blight" determination under the UDCA, this Court failed to require that the ESDC make the finding required by UDCA § 6260(c)(1) that not only is the area substandard and insanitary or in danger of becoming so, but also that it tends to impair sound development.

21. Indeed, like the city agency in *Yonkers* which the Court of Appeals found had failed to justify its blight determination, ESDC proffered nothing more than unsupported, conclusory statements that the non-ATURA blocks would not experience sound development due to the supposedly insurmountable "blighting influence" of the Vanderbilt Rail Yards – despite ample, indisputable evidence to the contrary. Under *Yonkers*, that is *per se* irrational.

A "Civic Project" Under the UDCA

22. While this Court acknowledged that the federal appellate court's holding in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), that a sports arena may serve a "public purpose" under the takings clause of the US Constitution does not preclude plaintiffs' challenge to ESDC's designation of the Project as a "civic project" under the UDCA, it nevertheless proceeded to conflate the two issues, finding an "evidently anomalous disparity" between finding that a sports arena is a "public purpose" under the takings clause and the argument that, in the particular circumstances of this case, it still may not qualify as a "civic project" under the UDCA.

23. Petitioners do not dispute that ESDC might rationally determine, under appropriate circumstances, that a privately operated sports arena serves a public purpose.

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[12] Decision at 35 (Catterson, J., concurring).

Unfortunately, this Court took its analysis of petitioners' arguments no further than that general principle, and failed to address the statutory limitations on which persons or entities may lease a "civic project" under the UDCA.

24. The Court of Appeals' decision in *Murphy v. Erie County*, 28 N.Y.2d 80 (1971), which the panel cited for the point that a sports arena operated privately for profit may still serve a "public purpose", illustrates the correct statutory analysis. In that case, the petitioners challenged the county's plan to lease a publicly funded stadium to a private, for-profit operating company, which they alleged violated the act authorizing the county to build the stadium by effectively converting the stadium into a "private use" for the that the operating company's benefit. *See id.* at 87.

25. The relevant takeaway point of *Murphy* is that the Court of Appeals looked to the language of the enabling statute itself, which the Court noted "specifically empowers the county to 'enter into contracts, leases, or rental agreements with, or grant licenses, permits, concessions, or other authorizations, to <u>any person or persons</u>'", in order to conclude that the State legislature intended to give the county "the broadest latitude possible in the operation of the stadium." *Id.* (emphasis added).

26. In contrast to the governing statute in *Murphy*, the UDCA permits ESDC to lease a civic project only to a narrowly prescribed set of persons:

> Subject to any agreement with noteholders or bondholders, the corporation may sell or lease for a term not exceeding ninety-nine years any civic project <u>to the state or any agency or instrumentality thereof, to any municipality or agency or instrumentality thereof, to any public corporation, or to any other entity which is carrying out a community, municipal, public service or other civic purpose</u>.

UDCA § 6259(1) (emphasis added).

27. Had the State legislature intended to permit ESDC to lease a "civic project" to anyone it deemed appropriate to operate it, then it could have used language in the UDCA similar to the broad language it used in the governing statute in *Murphy* authorizing the county to lease a project to "any person or persons." Or, the legislature could have simply omitted the entire second half of § 6259(1).

28. Instead, the legislature expressly limited the persons to whom ESDC may lease a civic project to three general categories: (1) a state or municipal government, or agency or instrumentality thereof; (2) a public corporation; or (3) "any other entity which is carrying out a community, municipal, public service or other civic purpose." Construing the third category to mean the same thing as "any person or persons" renders the entire second half of §6259(1) superfluous, in violation of the well settled principle of statutory construction that reading a statute so as to render a provision meaningless should be avoided. *See Hernandez v. Barrios-Paoli*, 93 N.Y.2d 781, 787 n.2 (1999); McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98(a).

29. Nor does the general statement of legislative findings and purposes of the UDCA encouraging "maximum participation" of the private sector in ESDC's projects (UDCA § 6252) obviate the legislature's explicit limitations of the type of entities to which a "civic project" may be leased or sold. The rule is well settled that "a general provision of a statute applies only where a particular provision does not." *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 198 (1979). *See* McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 238.

30. Nevertheless, the lower court read § 6259(1) to "impose no restrictions on the amount or type of private participation" in a "civic project", thereby construing it no differently than the Court of Appeals construed the phrase "to any person or persons" in *Murphy*. *Develop*

Don't Destroy (Brooklyn) v. Urban Dev. Corp., 2008 N.Y. Misc. LEXIS 551, 51-52 (Sup. Ct. N.Y. Co. 2008). In effect, the court determined that the private, for-profit FCRC subsidiary to which ESDC would lease the Barclays Center Arena would be engaged in a "public service or other civic purpose" under § 6259(1) merely because the Barclays Center Arena has already been designated a "civic project".

31. This Court, by focusing on the public purpose of the Barclays Center Arena rather than on the purpose of the private, for-profit entity to which ESDC intends to lease it (for a rent of one dollar per year), repeated the motion court's error, simply disregarding the entire second half of § 6259(1).

32. Justice Catterson, in his concurring opinion, accurately decried the abuse of the UDCA as a tool of the private developer to displace and destroy neighborhoods under the guise of remedying "blight", and the same concern arises from the mischaracterization of a professional sports franchise facility as a "civic project" under the UDCA. ESDC plans to lease the Barclays Center Arena to FCRC's subsidiary for one dollar per year, and all profits from the arena would accrue to FCRC, including the $400 million for which FCRC has already sold the naming rights to Barclays Bank, and the court below correctly found that the purported civic benefits of the Barclays Center Arena are "*de minimus*" compared to its intended primary, profit-making use.[13]

33. Regardless of whether the State legislature or an instrumentality thereof may rationally determine that such a facility serves a "public purpose", the legislature has not authorized UDCA to pursue it as a "civic project" under the UDCA. FCRC's subsidiary, on its face, is not an "entity which is carrying out a community, municipal, public service or other civic

[13] R. 40a.

purpose," as expressly required in the second half of § 6259(1) for the "civic project" designation.

Conclusion

34. By its Decision herein, this Court has clouded the "arbitrary and capricious" standard of review of ESDC's determinations with the more deferential standard of a taxpayer action, and incorrectly conflated constitutional requirements applicable to condemnation issues with the specific statutory requirements of the UDCA and SEQRA. Appellants respectfully submit that the Court of Appeals should address and clarify these issues, by recognizing that the proper focus of the courts' review of ESDC's conduct and determinations herein is not simply public policy or what constitutes a "public purpose" under constitutional standards, but, rather, whether ESDC was within its legislatively proscribed authority, and whether it acted arbitrarily and capriciously, when it decided to demolish and rebuild a thriving urban neighborhood without taking an unbiased, objective, and rational look at the evidence before it.