

STATE OF NEW YORK
SUPREME COURT NEW YORK COUNTY

DEVELOP DON'T DESTROY (BROOKLYN), INC.,
COUNCIL OF BROOKLYN NEIGHBORHOODS, INC.,
ATLANTIC AVENUE BETTERMENT ASSOCIATION,
INC., BROOKLYN BEARS COMMUNITY GARDENS,
INC., BROOKLYN VISION FOUNDATION, INC.,
CARLTON AVENUE ASSOCIATION, INC.,
CENTRAL BROOKLYN INDEPENDENT DEMOCRATS,
by its President Lucy Koteen, CROWN HEIGHTS NORTH
ASSOCIATION, INC., DEAN STREET BLOCK
ASSOCIATION, INC., DEMOCRACY FOR NEW YORK
CITY, INC., EAST PACIFIC BLOCK ASSOCIATION, INC.,
FORT GREENE ASSOCIATION, INC., FORT GREENE
PARK CONSERVANCY, INC., FRIENDS AND
RESIDENTS OF GREATER GOWANUS, PARK
SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS
ACTION COALITION, by its President Patricia Hagan,
PROSPECT PLACE OF BROOKLYN BLOCK
ASSOCIATION, INC., SOCIETY FOR CLINTON HILL,
INC., SOUTH OXFORD STREET BLOCK ASSOCIATION,
AND SOUTH PORTLAND BLOCK ASSOCIATION, INC.

Petitioners,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION,
FOREST CITY RATNER COMPANIES, LLC,

Respondents.

JEFFREY S. BAKER, an attorney at law duly admitted to practice before the courts of
the State of New York, hereby affirms the following under penalties of perjury:

1. I am a member of the law firm Young, Sommer, Ward, Ritzenberg, Baker &
Moore, LLC, counsel for the petitioners in the above-captioned proceeding, and the facts set

**AFFIRMATION OF
JEFFREY S. BAKER**

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forth herein are based upon my personal knowledge gained from my representation of petitioners in this and related matters, and my review of the case files.

2. I respectfully make this affidavit and submit the annexed documents in support of petitioners' Verified Petition (the "Petition") for judgment, pursuant to New York Civil Procedure Law and Rules ("CPLR") Article 78, annulling the September 17, 2009 decision of respondent Empire State Development Corporation ("ESDC") to approve a Modified General Project Plan ("MGPP") for the Atlantic Yards Land Use Improvement and Civic Project ("Atlantic Yards" or the "Project").

3. The MGPP was given preliminary approval by the ESDC on June 23, 2009 and approved without modifications on September 17, 2009. A copy of the MGPP is attached as Exhibit A.

4. On June 22, 2009, the day before the MGPP was presented to the ESDC Board, the Metropolitan Transportation Authority ("MTA") commenced its review of a new agreement for the purchase of MTA's Vanderbilt Yards by Forest City Ratner Companies ("FCRC") for the development of Atlantic Yards with the submission of a staff summary to the MTA Finance Committee.

5. On June 24, 2009, the day after ESDC gave preliminary approval of the MGPP, the full MTA Board approved the new agreement for the sale of Vanderbilt Yards. A full copy of the Staff Summary memo to the MTA, including a transaction points chart and the resolution of the MTA Board, is attached as Exhibit B.

6. This was not the first time the MTA had approved the sale of the Vanderbilt Yards to FCRC. When MTA first approved the sale of the Vanderbilt Yards to FCRC in 2005, the terms included a cash payment of \$100 million for all of the property and rights and the

requirement that FCRC construct a replacement yard for the Long Island Rail Road consisting of 9 tracks with the capacity of 76 rail cars. The terms in the new 2009 agreement reduced FCRC's cash payment from \$100 Million to \$20 Million covering only the MTA property on Block 1119, and extended the payments for the acquisition of the MTA air rights on Blocks 1120 and 1121 to the year 2030. It also reduced the size of the replacement yard from nine tracks with a 76 car capacity to seven tracks with a 56 car capacity. The proposed agreement also limited the security for FCRC's commitment to build the transit improvements to an \$86 Million letter of credit.

7. During the public comment period on the 2009 MGPP, numerous comments were submitted highlighting the fact that the projected completion date for the Project of 2019 was *per se* inaccurate as it did not address the feasibility of the project or recognize that the terms with MTA did not require FCRC to complete the purchase until 2030. Included in those comments was a letter your affirmitant wrote on behalf of petitioner Develop Don't Destroy Brooklyn, Inc. ("DDDB") which specifically noted the change in terms with the MTA and how those terms would materially affect both the SEQRA review and the determination that the project would alleviate blight, since it was unrealistic to expect that the project would be completed until decades later than forecast. (A copy of said comment letter dated August 31, 2009 is attached as Exhibit C.)

8. Petitioner Council of Brooklyn Neighborhoods ("CBN") submitted an expert report prepared by Kahr Real Estate Services which reviewed the financial feasibility of the Project and the likelihood that the Project could be completed by 2019. (A copy of the Kahr Report is attached as Exhibit D.)

9. The Kahr report found, *inter alia*, that there was currently a relatively high level of vacancy in Brooklyn for luxury and market rate housing and that, given population and economic trends, it was unrealistic to project that the project would be completed by 2019. Kahr also noted that the 2006 feasibility analysis prepared for ESDC by KPMG relied upon an internal rate of return of 9% which was low for projects of this type and that, given the reduction in rental and sale rates due to the recession, the return on investment was now likely far less and raised serious questions about the projects' viability and ability to obtain financing.

10. The Kahr report also noted that the new terms between FCRC and MTA was the prime indication that FCRC had taken measures to limit its exposure and structured the transaction to recognize the decades long time frame for the market to absorb a project of this magnitude.

11. At the ESDC meeting on September 17, 2009, ESDC Staff presented a summary memo to the Board which included a summary of the project, a resolution approving the MGPP without changes and approving a determination that no supplemental review under SEQRA was required, and a Project Leases and Disposition Abstract. (Copies of the summary memo, resolution and abstract are attached as Exhibit E.)

12. Also provided to the ESDC Board that day was a document prepared by staff that purported to summarize and respond to the public comments submitted on the MGPP. (A copy of that summary document is attached as Exhibit F.)

13. In the presentation to the ESDC Board, the staff made reference to a report prepared by KPMG that allegedly reviewed the feasibility of the project and supposedly concluded that the market could absorb 6,430 units of new housing and be completed by 2019.

The KPMG report was not released to the public until several weeks later. (A copy of the report is attached as Exhibit G.)

14. Despite the numerous comments submitted by the public on the MGPP, which highlighted the new terms with MTA and the clear evidence that the project would not be completed until after 2030, there is no reference in any of the documents prepared for the ESDC Board to the new MTA terms nor a recognition that the project would not be completed until 2030.

15. Moreover, the summary prepared by ESDC staff misrepresented many of the public comments. For instance, your affirment's comment letter (Exhibit C hereto) noting that the delay in the project would actually increase blight rather than alleviate it was mischaracterized and dealt with in a conclusory fashion. The entire comment and response were presented as:

Comment 26: Without commitments to build Phase II, the Project fails to meet the basic elements of the findings necessary for a Land Use Improvement Project or a Civic Project.

Response: The Project documentation will obligate the developer to complete the entire Project in accordance with the MGPP. (Exhibit F, p. 14)

16. More significantly, neither the Response to Comments nor the KPMG report (which was not made available to the public until more than three weeks after the ESDC's September 17th meeting) made any reference to the Kahr report and there is no evidence that the Kahr report was ever even considered.

17. Although he did not make the statements to the full ESDC Board, at the same meeting ESDC Senior Counsel Steve Matlin, Esq., admitted to the press that the Project would take decades to complete. A video of his statement to the press is available at

<http://www.atlantiyardsreport.com/2009/10/esdc-still-hasnt-shared-kpmg-report-on.html> and at http://www.youtube.com/watch?v=xUlWn3BOM30&feature=player_embedded (Shortened web address **for video:** <http://tinyurl.com/matlinvideo>)

18. ESDC stated (§ 15, *supra*) that completion of the Project would be assured and blight avoided because there would be contractual guarantees provided by FCRC. Mr. Matlin also stated there would be unspecified incentives to FCRC to complete the project. (§ 17, *supra*) However, those guarantees were not then and have never been identified, and the term sheet appended to the Staff Summary only generally discusses guarantees without any reference to timing for project completion; even then, ESDC apparently is only seeking a guarantee for two-thirds of the Project.

19. At their meeting on September 17, 2009, the ESDC Board never discussed those supposed guarantees and never considered the blighting impacts of an abandoned or incomplete project. The Board also ignored the incongruity of permitting Block 1129 to be used as a long-term surface parking lot for the Barclays Arena while it had previously determined that surface parking lots are underutilized resources and constitute evidence of blight.

20. In other words, the ESDC made a conscious decision to ignore material and salient facts concerning FCRC's plans to acquire the Vanderbilt Yards and by ignoring those facts, ESDC's analysis and decisions were fatally flawed.

21. Therefore, ESDC's refusal to consider material salient facts concerning the timing of the completion of the project and its conscious mischaracterization of the timing of the project, must be determined to be *per se* arbitrary and capricious and the Petition should be granted and ESDC's September 17, 2009 resolution be annulled.

Dated: October __, 2009

Albany, New York

JEFFREY S. BAKER