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

In the Matter of	
DEVELOP DON'T DESTROY BROOKLYN, et al,	Index No. 100686/06
Petitioners - Respondents	AFFIRMATION IN REPLY TO OPPOSITION TO CROSS-APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION
For a Judgment Pursuant to Article 78 of the CPLR an Declaratory Judgement	
- against-	
EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES	
Respondents - Defendants	

JEFFREY S. BAKER, an attorney duly admitted to practice before the Courts of the State of New York hereby affirms under the penalty of perjury and states:

1. I am a member of the law firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for Petitioners-Plaintiffs-Cross-Appellants ("Petitioners") in the above referenced appeal. I make this affirmation in reply to the affirmation of Jeffrey Braun, Esq., attorney for the Respondent-Defendant Forest City Ratner Companies ("FCRC") submitted in opposition to the Petitioners' Motion for a Preliminary Injunction pursuant to CPLR §5518, pending the resolution of the appeals filed in this action. I am fully familiar with the facts and circumstances set forth in this Affirmation.

2. Initially it must be noted that the only papers submitted in opposition to the Petitioners' Motion for a Preliminary Injunction are those submitted by FCRC. Respondent

Empire State Development Corp. ("ESDC") has not submitted any papers in opposition to the Motion.

3. While on its face and standing alone, the argument made by FCRC in opposition to the motion is persuasive, the problem which undermines all of its claims is the fact that it is acting in its own interests and is not in a position to state the interests of ESDC, nor is it the party to determine the adequacy of ESDC's actions and the purpose of the environmental review process it is required to undertake. Moreover, FCRC has inappropriately placed the burden on the petitioners to suggest what might be in the ESDC's files, and what damaging effect its disqualified counsel could have had on the process, when the burden should rest on the ESDC in both instances.

4. The purpose of the environmental review process required under SEQRA is to study all environmental impacts of the proposed development, to identify the negative impacts, and to propose mitigation of these negative impacts to the greatest extent possible. Then, and only once this entire process is completed, is ESDC permitted to make a decision on whether it will authorize the project to go forward.

5. In attempting to support its argument that demolition of buildings in the footprint of the proposed project will not irreparably harm the petitioners, the FCRC completely ignores the purpose of the process – to identify the negative impacts of the proposed project, and to mitigate those impacts to the extent necessary. The logical outcome of the process is that the proposed project might, and very possibly will have to, look quite different at the end of the process than it does now – that the configuration could change, the number of buildings could change, the size and scale of the buildings within the project could change. In fact, SEQRA expressly requires that alternatives be explored [6 NYCRR §

617.9(b)(5)(v)] and that the final decision choose from amongst the alternatives the one which has the least impact on the environment balancing other relevant considerations. [6 NYCRR § 617.11(d)]

6. By arguing that the demolitions will not irreparably harm the petitioners, FCRC improperly presumes the outcome – that the project will either be approved or disapproved in exactly the form as it has been proposed. That is not surprising since that is FCRC's limited purpose. But that is simply not the purpose of the process or its most likely, or even most meaningful, outcome. By engaging in this long and tedious environmental review process, the ESDC should be working toward identifying a project that comports with the needs of the public, and negatively impacts the public to the greatest extent possible. By allowing the developer to demolish buildings before the approval process has begun, the ESDC is eliminating from consideration many meaningful modifications to the current plan, and the alternatives that it is required to investigate. It will simply no longer be possible to consider an alternative that includes these buildings – six buildings[1] covering 11 property tax lots, clearly a significant portion of the footprint – because they will be destroyed.

7. Certainly, then, the petitioners, residents and property owners in the proposed footprint, and community organizations representing the neighborhoods that immediately border on the footprint, will be irreparably harmed by the elimination from consideration of a less destructive means to develop the area in question. By permitting these demolitions, the

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[1] Throughout its papers, the ESDC continually refers to five buildings in a transparent attempt to minimize the apparent impact of the demolitions; however, as set forth in paragraph 8(d) of Mr. Braun's affirmation, there are two structures on the address known as 463 Dean Street, resulting in six buildings, not five, slated for demolition.

ESDC assists the FCRC in predetermining the outcome – that only this project, as proposed, will be viable in the area still left standing.

8. This irreversible alteration of the environment is exactly what SEQRA prohibits: "A project sponsor may not commence any physical alteration related to an action until the provision of SEQRA have been complied with." 6 NYCRR § 617.3(a) And even in those situations where physical alteration is required because of an emergency, SEQRA requires that the alterations "are performed to cause the least change or disturbance practicable under the circumstances, to the environment."

9. Apparently, as an afterthought, Rachel Shatz acknowledges the existence of this second half of the provision on which the FCRC relies, but gives it nothing more than lip service, literally. Ms. Shatz states in paragraph 20 of her affidavit that to require less extreme measures would be "pointless and wasteful", but makes no suggestion, much less provides any evidence, that any alternatives to the extreme step of the complete demolition of six buildings were even considered by the agency.[2]

10. This court does not need an expert to make the suggestion that, even presuming that the LZA report is completely sound and its conclusions beyond reproach, there are other means to stabilize buildings which have structural problems, which certainly would cause less "change or disturbance" to the environment than the demolition of six buildings in a five block radius. In fact, as set forth in paragraph 8(d) of Mr. Braun's

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[2] Ms. Shatz attempts to justify the failure of the agency to consider alternatives less radical than demolition by suggesting, without any proof or support, that they have no historical significance. However, nothing in the relevant provision requires that the buildings be of such significance before the least disturbing alternative is considered or utilized.

affidavit, even according to LZA, only two of the six buildings (608-620 Atlantic Avenue, a/k/a the Underberg building), and the three-story structure [at the back of the lot] at 463 Dean Street are "extremely dangerous and could collapse at any time". Certainly, there are other means to shore or stabilize a support system that is "compromised", as described by LZA.

11. Mr. Braun in his Affirmation and earlier papers submitted by ESDC below make much of the reputation of LZA. When Petitioners pointed out that the even to this day there is no affidavit from an engineer stating that the buildings pose an imminent threat, FCRC and ESDC point to the resume of Mr. Feuerborn. However, while Mr. Feuerborn may have presented the power-point presentation to ESDC, there is no representation or statement anywhere that he is the one who either inspected the buildings or prepared the report. His name does not appear anywhere in the November 7, 2005 LZA report. Therefore it is of very limited probative value.

12. Moreover, the petitioners submitted to the court below the affidavit of Jay Butler, a physical and structural engineer. Having reviewed LZA's report and inspected the exteriors of the buildings, Mr. Butler attested that the conditions of these buildings "appear to be consistent with conditions found at countless other buildings in New York City", the defects in which "can be safely stabilized with commonly-used repair measures."

13. The failure or refusal of the ESDC to even consider any alternatives to the demolition of six buildings within the proposed project environment, as expressly required by the "exception to the rule" on which it relies, deprives its determination of the rational basis required by law, and requires a determination by this court that its actions were arbitrary and capricious and cannot stand.

14. Moreover, it is exactly this willingness on the part of the ESDC to ignore an entire section of the provision on which it relies which calls into question the loyalties of David Paget, the attorney which the lower court disqualified.

15. It was admitted by the defendants that Mr. Paget told FCRC (his former client) how it could demolish the buildings in question, despite the express prohibition against physical alteration of the environment contained in §617.3(a). (See paragraph 9 of the Meyers affidavit, annexed to the petitioners' moving papers as Exhibit D). Wasn't it therefore Mr. Paget's responsibility to advise ESDC (his current client) of its obligation to demand that the developer address the structural integrity problems it claimed to have (not only in buildings it owned, but also in buildings it had and has yet to purchase) by utilizing means that would "cause the least change or disturbance" to the environment?

16. Nowhere in the papers submitted here or in the court below does either ESDC or FCRC suggest that Mr. Paget advised them to consider alternative action to the complete demolition of al six buildings. This is despite the fact that it is obvious from the pictures submitted by the ESDC that the buildings are certainly not all in the same condition..

17. Consequently, the apparent divided loyalty of Mr. Paget resulted in his apparent failure to advise his current client of its obligations under the controlling regulations. Mr. Paget's admitted and necessary involvement in the decision making process regarding the issuance of the Declaration of Emergency has clearly and negatively impacted on the decision made by his client, the ESDC, and therefore cannot stand.

18. As for the ESDC's contention that the petitioners can point to nothing that might be missing from the Record, the argument is simply ludicrous. Amusingly, in paragraph 11 of Mr. Braun's affirmation in opposition, he states that "there is no evidence

that these [the earlier LZA] reports were submitted to or considered by ESDC". However, there is no question that Mr. Paget had these reports. (See paragraph 10 of the Meyers affirmation, Exhibit D to the petitioners' moving papers.) Does ESDC seriously claim that there is no conflict, but then deny that their own attorney disclosed these reports to them, because he may have not formally been its counsel at the time he received these earlier reports?

19. In any event, it is not the petitioners' burden to guess what might have been before the agency when it reached its determination to issue the Declaration of Emergency. Neither this nor any other court can determine whether the decision rendered by the agency has a rational basis if the entire record on which the decision was based is not before it. Nowhere in any of the papers submitted to this court does the ESDC admit what was in the Record, or claim that this Court has the entire record which was considered by the ESDC in rendering its determination. In the absence of the entire record, no court is able to render a decision that the agency acted rationally on the facts before it.

20. Finally, in considering the equities in determining whether to temporarily enjoin the demolition of the six buildings until such time as this court determines the pending appeals, which are currently scheduled to be argued March 23, the balance tips in favor of the petitioners. Despite knowing of the buildings' purported emergency status for nearly a year, FCRC has taken no action to secure the sites, except for asbestos removal in anticipation of demolition. ESDC asks this court to simply ignore this embarrassing fact by asserting that "the pace at which FCRC proceeded does not affect the structural stability of these buildings." (paragraph 12 of Braun's affirmation in opposition)

21. However, given the length of time that has passed since FCRC determined to demolish these buildings, now over one year ago, and the minor delay until the appeals are determined by this court, there will be little if any additional negative impact to the respondents or to the public. [3] the safety of the sites in question. However, demolition of the buildings will lead to their uncurable loss. An impartial, independent review leading to a determination of the least drastic action necessary to protect public safety while preserving the integrity of the SEQRA process is an insignificant burden for Respondents to bear. All parties will benefit from greater public confidence in the ESDC's fulfillment of its obligations as a Public Authority.

Dated: February 28, 2006

Jeffrey S. Baker

[3] Your affirmant was informed today that no demolition permits have been obtained from the Department of Buildings for any of the six buildings, and the asbestos removal for 461-463 Dean Street cannot continue until a variance is obtained, which could take approximately two weeks, meaning that only one building, the Underberg, is presently available for demolition.