

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of

DEVELOP DON'T DESTROY BROOKLYN; Index No.
DANIEL GOLDSTEIN;
ATLANTIC AVENUE BETTERMENT ASSOCIATION; RJI No.
FORT GREENE ASSOCIATION;
BOERUM HILL ASSOCIATION;
FIFTH AVENUE COMMITTEE;
EAST PACIFIC BLOCK ASSOCIATION;
PROSPECT HEIGHTS ACTION COALITION by its President PATTI HAGAN;
PRATT AREA COMMUNITY COUNCIL;
SOCIETY FOR CLINTON HILL;
DEAN STREET BLOCK ASSOCIATION (4th to 5th Ave.) by its President JUDY SACKOFF;
PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL;
ELISELLE ANDERSON
DAVID SHEETS
KEN DIAMONDSTONE; and
PACIFIC CARLTON DEVELOPMENT CORP.

Petitioners - Plaintiffs

For a Judgment Pursuant to Article 78 of the CPLR and
Declaratory Judgement

- against -

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES

Respondents - Defendants

AFFIRMATION OF JEFFREY S. BAKER

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

1. I am a member of the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC attorneys for Petitioners/Plaintiffs in the above- captioned action. I am fully familiar with the facts and circumstances set forth in this Affirmation.

INTRODUCTION

2. This proceeding concerns the issuance by the Empire State Development Corporation (“ESDC”) of an “Emergency Declaration” to allow Forest City Ratner Companies (“FCRC”) to demolish buildings located at 608-620 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street and 620 Pacific Street on the claim that the disrepair of the buildings presents an imminent threat to public health and safety.
3. The demolition of the buildings will not occur in a vacuum but in the context of the ongoing consideration of the proposed Atlantic Yards Arena and Redevelopment Project (“Atlantic Yards” or the “Project”). FCRC is the applicant and project sponsor of Atlantic Yards. ESDC is considering approving and funding Atlantic Yards pursuant to the New York State Urban Development Corporation Act. ESDC is acting as Lead Agency under the State Environmental Quality Review Act (SEQRA), ECL Article 8, for the review of Atlantic Yards.
4. This proceeding also raises the question whether there is an impermissible conflict of interest where the reviewing agency (ESDC) retains as special counsel the same attorney who represents the project sponsor (FCRC) on other matters and represented FCRC on the instant application. Petitioners contend that such representation presents an obvious perception of a conflict of interest, if not an outright conflict and the public’s right to the integrity of the process requires the disqualification of the law firm.

BACKGROUND

5. To my knowledge Atlantic Yards represents one of, if not the largest, mixed use redevelopment projects proposed by a single developer in New York City. The project comprises 22 acres of land of which only 8 acres are used by the Metropolitan Transportation Authority for its Vanderbilt Rail Yards. The balance of the area is a mix of residential, commercial, industrial and vacant lots. The project as presently proposed includes 9 million square feet of residential, office and commercial space located in approximately 16 high-rise towers. Included therein is the approximately 850, 000 gross square foot arena accommodating up to 20,500 persons, 7,300 residential units, 4,000 parking spaces and a 180 room hotel.
6. To my knowledge, ESDC has never undertaken or reviewed a project of this size sponsored by a single developer.
7. ESDC has enormous authority under state law to override local laws and the local approval process. Upon making the necessary findings, ESDC can approve a project far larger and different than would otherwise be permitted under New York City's zoning regulations. ESDC can approve the project without referral to the New York City approval process, particularly the Uniform Land Use Review Process (ULURP).
8. In light of the extraordinary authority vested in ESDC it is critically important that its review and consideration of the project be transparent and objective as it fulfills its obligations as a state agency to work for the public interest. Its deliberations and actions must be beyond criticism and immune from allegations that it is biased or infected with a conflict of interest.

9. David Paget, Esq., a partner with the firm of Sive, Paget & Riesel, P.C. serves as special counsel to ESDC for the Atlantic Yards Project. Mr. Paget also serves as counsel on a regular basis to FCRC. Mr. Paget also served as counsel to FCRC on this project when it was proposed to ESDC.
10. Mr. Paget's representation of ESDC presents, at a minimum, an appearance of a conflict of interest, if not an outright conflict. Given ESDC's public obligations it cannot be perceived that it is receiving legal advice from an attorney who has an on-going business relationship with the project sponsor.

DEMOLITION OF THE BUILDINGS

11. On September 16, 2005, ESDC released a Notice of Public Scoping and a "Draft Scope of Analysis for an Environmental Impact Statement" for the Atlantic Yards Project. A public scoping hearing was held on October 18, 2005 and written comments were received by ESDC until October 28, 2005. That began the public review portion of the SEQRA process.
12. ESDC is in the process of reviewing those comments and will issue a Final Scoping Document responding to the comments and establishing the final outline for what must be considered in the environmental impact statement. It is my understanding that ESDC is on the verge of releasing the Final Scoping Document. Sometime thereafter, a Draft Environmental Impact Statement will be released for public comment.
13. Upon information and belief, in or about the first week of December 2005, FCRC met with staff at ESDC to propose the demolition of the instant buildings. FCRC presented a November 7, 2005 report prepared by LZA Technology and entitled "Summary

Report of the Existing Structural Condition Surveys” (LZA Report, annexed to the Complaint/Petition as Exhibit A).

14. The LZA Report is a summary of inspections of various properties owned or controlled by FCRC or its subsidiary entities. The LZA report concluded that the properties located at 608-620 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street and 620 Pacific Street are in imminent danger of collapse or present a risk of falling masonry or otherwise present an imminent threat to public safety and require immediate demolition.
15. The LZA Report indicates that the November 2005 inspections were not the first time that LZA did a survey of the buildings. The LZA report refers to previous inspections in May and November 2004.
16. On December 15, 2005, Rachel Shatz of ESDC wrote a memo to the project file stating that ESDC had reviewed the LZA report and confirmed that the buildings present an imminent threat to public health and safety and the need for the demolition constituted an emergency which is a Type II action under SEQRA (the “Emergency Declaration”, annexed to the Complaint/Petition as Exhibit B).
17. ESDC did not conduct an inspection of the buildings and to the best of my knowledge did not have an engineer review the LZA report. It also does not appear that ESDC requested copies of or information regarding the prior inspections of the buildings by LZA.
18. The footer at the bottom of the ESDC memo indicates that it was initially drafted on December 5, 2005.

19. On December 16, 2005 FCRC issued a press release announcing its plans to demolish the buildings located at 608-620 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street and 620 Pacific Street. The FCRC press release also announced that 622 Pacific Street would be demolished. (A copy of the press release is annexed to the Complaint/Petition as Exhibit C.)
20. During the week of December 19, 2005, lead plaintiff Develop Don't Destroy-Brooklyn, Inc. ("DDDB") obtained a copy of the LZA report.
21. Also during the week of December 19, 2005, DDDB and various local politicians requested an opportunity to inspect the buildings with the assistance of an independent engineer.
22. Initially, FCRC agreed to the request and an inspection was scheduled for Tuesday, December 20, 2005 to include, among others, representatives of DDDB, Councilwoman Letitia James, and an independent engineer retained by DDDB, Jay Butler, P.E..
23. That inspection was cancelled by FCRC without explanation, and a subsequent inspection was scheduled for December 21st or 22nd. However, FCRC informed DDDB that it would not be permitted to be present at the inspection and it informed Councilwoman James that she would not be permitted to bring an engineer to the inspection.
24. Since Councilwoman James is not an engineer, she declined to do the inspection without having a professional engineer with her to determine the extent of the alleged threat to public health and safety.

25. Mr. Butler has reviewed the LZA report and conducted an external inspection of the buildings to the extent practicable without gaining access to the properties. Mr. Butler has sworn an affidavit in this proceeding, submitted herewith, which recounts his inspection of each building and his opinion that the buildings are not an imminent threat to public health and safety. In Mr. Butler's opinion, the buildings are similar to many buildings in New York City and can be protected and stabilized so that they do not pose a threat to the public with reasonable measures.
26. Mr. Butler notes, and Petitioners agree, that a definitive determination as to the integrity of the buildings cannot be made without an interior inspection. An inspection that was not requested by ESDC and which was denied by FCRC when requested by DDDDB.
27. It should be noted that to the best of my knowledge, and as reflected on its website, the New York City Department of Buildings has not issued an order to vacate any of the buildings nor has it commenced an Unsafe Building Proceeding against any of the buildings, despite several inspections by Department of Buildings of the buildings in recent years.
28. Demolition of the buildings begins the process of clearing the project site and changes the physical environment before the SEQRA process has been completed. It raises the potential that future uses of the project area will be pre-determined as the lots will be cleared and the restoration and renovation of existing buildings will be precluded.
29. Equally important, commencement of the clearing of the Project site leaves the public with the perception that the Project is inexorably progressing and is destined for approval regardless of the environmental concerns raised by the public. Members of

the public are likely to be discouraged from participating in the process if they believe their participation is pointless and that the project is being approved.

30. Obviously if there is a legitimate threat to public safety then appropriate measures must be taken to prevent such a threat. However, before sanctioning the action, ESDC has an obligation under SEQRA to take a “hard look” at the issue and determine if demolition is appropriate to solve the problem in the least intrusive manner. In this case ESDC has clearly failed to meet its obligation. ESDC did not undertake any independent assessment of the validity of FCRC’s claims and did not even bother to inspect the buildings. Nor did ESDC request any of the background documents on the inspection including the results of the prior inspections.
31. The veracity of FCRC’s claims about the buildings is further questioned by its refusal to allow Petitioner’s engineer to inspect the building. Presumably if FCRC was confident in its engineer’s conclusions, it would have permitted the inspection to avoid the controversy and litigation.

THE CONFLICT OF INTEREST

32. In the Fall of 2004, I was retained by lead plaintiff Develop Don’t Destroy- Brooklyn, Inc. to represent them in the review of the Atlantic Yards Project. I have known David Paget for almost 20 years and knew he regularly represented FCRC. I spoke with Mr. Paget around that time and he confirmed that he was representing FCRC on Atlantic Yards and we had a brief discussion about the case.
33. Thereafter, I saw Mr. Paget at the public scoping hearing for the project in October 2005. Mr. Paget and I spoke and I was still under the impression that he was

representing FCRC and was attending the hearing for the project sponsor.

34. Subsequently, in or about early December 2005 my clients received copies of letters from Charles Gargano, Chairman of ESDC, to various public officials, which mentioned that Mr. Paget was serving as counsel to ESDC for the review of Atlantic Yards.
35. I was surprised to learn this and called Mr. Paget about that time and asked who he was representing. He replied ESDC. I asked when he stopped representing FCRC on this project and his response was vague, stating to the effect that it was some time ago. I commented that it appeared to be a conflict of interest, to which he disagreed.
36. I next spoke with Mr. Paget on or about December 22nd with respect to the instant demolition. Mr. Paget informed me that ESDC had reviewed the LZA report and confirmed the need to demolish the buildings. I asked if there was a written determination and he confirmed that there was and agreed to send me a copy.
37. I also asked Mr. Paget if ESDC had inspected the buildings. He said they did not. I also asked if an engineer for ESDC had reviewed the LZA report, and he was vague and noncommittal in his response. I was left with the impression that they had not.
38. I also commented to Mr. Paget that FCRC was refusing our request for an engineer to inspect the buildings. Mr. Paget did not find that position unusual and commented to

the effect that is it not enough to rely upon the report of a respected engineering firm like LZA. I responded that it is normal to request a second opinion whether you are a community organization or a governmental agency reviewing the action.

39. I have tremendous respect for Mr. Paget and his legal abilities in the field of environmental law. However, I am very concerned that his service as counsel to ESDC on the review of such a major project which has and will continue to engender significant controversy presents a clear perception of a conflict of interest. As attorneys we must strive to avoid the perception of a conflict of interest and when our clients are public bodies, the obligation is heightened to assure public faith in the process and the integrity of the system. I am constrained to support my client's request that Mr. Paget and his firm be disqualified from representing ESDC on this matter given his past and continuing representation of FCRC.

Dated: January 17, 2006
Albany, New York

JEFFREY S. BAKER