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	
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	

PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Petitioners/Plaintiffs by their attorneys Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC submit this Memorandum of Law in support of the motion for a preliminary injunction pursuant to CPLR § 5518 pending the resolution of the cross-appeals for which the Court has already granted a preference and an expedited schedule. The instant motion seeks to preserve the status quo while the appeals are being heard and to stay the demolition of buildings located on 5 lots that are proposed to be demolished as the first stage of the construction of the Atlantic Yards Project. As set forth below, petitioners respectfully submit that the court below erred (1) when it found that the Empire State Development Corporation (ESDC) had a rational basis for determining that the subject buildings presented an imminent threat to public health; (2)

when the court made that determination without having received a certified transcript of the record before the ESDC; and (3) ignoring the fact that ESDC's decision was hopelessly tainted by the involvement of and legal advice rendered by disqualified counsel.

In fact, even considering the absence of a record submitted to the court, it is evident from the documents that have been produced, that Forest City Ratner Companies (FCRC) always planned to demolish the buildings and had completed plans for the demolition in February and March of 2005. The events from March 2005 until December 2005 when ESDC issued its declaration were nothing more than an attempt to create a record to support the emergency declaration without any effort by ESDC to make even a rudimentary inquiry as to the claimed emergency. Even since the emergency declaration, the dilatory efforts of FCRC to proceed with demolition belies the claim that the buildings present an imminent threat to public health and safety.

STATEMENT OF FACTS

The relevant facts related to the primary issue of the rationality of the ESDC's decision are set forth in the accompanying Affirmation of Jeffrey S. Baker dated February 21, 2006. (Baker Aff.) Mr. Baker's affirmation sets forth the discrepancies in the documents provided by ESDC and FCRC to the court and which demonstrate that the alleged emergency situation was a sham orchestrated to avoid SEQRA's prohibition against changing the physical environment in connection with an action while such action is undergoing environmental review.

ARGUMENT

In a motion for a preliminary injunction the burden is upon the moving party to demonstrate (1) a likelihood of success on the merits of its claim, (2) irreparable injury absent the

granting of the preliminary injunction, and (3) a balancing of the equities which favors the issuance of injunctive relief. St. Paul Fire and Marine Ins. Co. v. York Claims Serv. Inc., 308 A.D.2d 347, 765 N.Y.S.2d 573 (1st Dept. 2003). Petitioners-Appellants satisfy each of those requirements.

POINT I

PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

The primary issue on the appeal is whether ESDC had a rational basis for determining that the subject buildings posed an imminent threat to public health and safety to warrant permitting their demolition outside the normal context of the environmental impact review provided by SEQRA. Given the complete lack of inquisitiveness by ESDC in making the determination, it is evident that Petitioners are likely to succeed on the merits (see Baker Aff. ¶ ¶ 9-10).

There are certain facts and principles of law that are agreed to among the parties to this litigation. First, ESDC has declared itself Lead Agency for the review of the project under SEQRA (ECL Secs. 8-0101 et. seq.). Second, the Atlantic Yards Project is a Type I action under SEQRA.

Third, SEQRA prohibits an applicant from making changes to the environment while the project is still undergoing SEQRA review (Baker Aff. ¶ 16). The SEQRA regulations make it clear that an agency or an applicant may not commence physical changes related to the action until the SEQRA process is completed:

> No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with. The only exception to this is provided under paragraphs 617.5(c)(18), (21) and (28) of this Part.

6 NYCRR § 617.3(a)

Fourth, certain actions are classified as Type II actions under SEQRA and are therefore not subject to SEQRA either because the action is too small, too routine, or as is applicable in this case, constitutes an emergency. 6 NYCRR § 617.5(c)(33) of the SEQRA regulations provides:

> emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency *and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment*. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part. [Emphasis added]

There is no question that ESDC issued its December 15, 2005 declaration based upon § 617.5(c)(33) and the determination that the situation with the buildings constituted an emergency.

The standard of review of the agency decision in an Article 78 proceeding is whether the decision was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was an abuse of discretion. CPLR § 7803(3). An action is arbitrary and capricious if it is "without sound basis in reason and . . . without regard to the facts". Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 231 (1974). A court may not substitute its judgment for that of the decision-maker unless the decision was arbitrary or capricious. Id. In the present case, that threshold has been crossed.

A. The Court Below Erred By Not Requiring a Complete Record

Justice Edmead erred in denying Petitioners' motion for a preliminary injunction and granting Respondents' motion to dismiss when she did not have certified transcript of the record as required by CPLR § 7804(e). Instead she only add selective documents presented by Respondents that purported to support the determination. (Baker Aff. ¶ 9) Justice Edmead considered that the record before the court provided a sufficient basis upon which to uphold ESDC's decision. However, as set forth in detail in Mr. Baker's Affirmation, there are numerous gaps and omissions in the record, not the least of which is the absence of the previous reports on the buildings prepared by LZA. Where there are omissions and gaps in the record and those gaps are not insignificant, it has been held to be an error to review a matter based upon an incomplete record. Captain Kidd's Inc. v. New York State Liquour Authority, 248 A.D.2d 791, 669 N.Y.S.2d 721 (3rd Dept. 1998); Matter of Petty v. Sullivan, 131 A.D.2d 762; 517 N.Y.S.2d 60; Matter of Gilbert v. Endres, 13 A.D.3d 1104, 787 N.Y.S.2d 554 (4th Dept. 2004) (matter remitted for failing to file a certified transcript including any findings of fact underlying the determination appealed from.)

B. Even Without a Record, It Is Clear That ESDC's Determination Lacked A Rational Basis

While ESDC failed to provide the required certified transcript the documents that were produced demonstrate that rather than a rational determination, ESDC did its best to avoid any any meaningful inquiry and simply looked to have the bare minimum necessary to support its decision. ESDC did not consider all of the facts that were before it or should have been with a minimal effort and simply rubber-stamped the presentation provided by ESDC's consultant.

The most relevant facts completely overlooked by ESDC were the previous reports on the conditions of the buildings that were never examined and therefore never considered by the ESDC in making their determination (Baker Aff. ¶ ¶13-14, 20). Those reports presumably contained more detailed information on the conditions of the buildings and probably contained an assessment of alternatives to demolition, such as securing the buildings or stabilization. While those reports were provided to ESDC's attorneys, they apparently were not provided to ESDC (Baker Aff. ¶ ¶ 13-14, 20).

It is also known that FCRC had fully completed demolition plans for most of the buildings by March 2005 (Baker Aff. ¶ 15). However, ESDC never took this into account when considering if in fact there was an imminent threat.

While ESDC may have believed that LZA was an experienced engineering firm, it did not undertake any inquiry on its own, including having any qualified person review the report or inspect the buildings (Baker Aff. ¶ 25). In fact, no one on ESDC's behalf ever inspected the buildings (Baker Aff. ¶ 25). Demolition of buildings is not an unheard of circumstance in the context of an on-going project review and at least one court has interpreted the above provision in that context. Historic Albany Found. v. Breslin, 282 A.D. 2d 981 (3rd Dept. 2001); appeal after remand 296 A.D. 2d 813 (3rd Dept. 2002). There the court noted that demolition is an extreme remedy and absent a factual basis indicating that it is 'reasonably necessary' or 'practible under the circumstances,' it will not be allowed to go forward as the preferred remedy. Breslin, 282 A.D. 2d at 986. By failing to make any inquiry, including any inquiry into less drastic steps, ESDC acted per se arbitrarily and capriciously.

Nor is it a relevant distinction that in Historic Albany, the buildings were within an historic district. Whether a building is a landmark or has a historic designation is not the determining factor. In this case it is conceded that SEQRA applies to the demolition because the properties are part of a Type I action actively undergoing review under SEQRA. Therefore the only exception is for an emergency and by the terms of that exception that action taken under the emergency should cause the least change to the environment as is practicable. As evidenced in the affidavit of the decision-maker, Rachel Shatz, she did not even bother making that inquiry (Baker Aff. ¶ ¶ 19-24).

The final and possibly most compelling evidence of the arbitrariness of the determination that an emergency existed and that the public faced imminent harm, is the extended period of time these buildings have apparently been on the verge of collapse, yet FCRC has done nothing to mitigate any alleged potential threats and has done virtually nothing to demolish them (Baker Aff. ¶ ¶ 10, 28, 29). FCRC first planned to demolish the buildings in early spring 2005. Then, notwithstanding the supposed threat posed by the buildings and the worries these caused FCRC, FCRC was content to wait throughout the Summer while MTA was undertaking the bid review process. Apparently that process was more important than the supposed emergency presented by the buildings. Even after that, FCRC did not meet with ESDC until November and even now, nearly four months after the presentation to ESDC, the buildings have not been demolished and warning signs were only posted this week. (Baker Aff. ¶ ¶ 28-29).

In sum, Rachel Shatz, the ESDC decision-maker, knew that FCRC had been seeking to demolish the buildings since at least the Spring of 2005. She new or should have known that previous LZA reports existed. She ignored her legal obligation under SEQRA to authorize an

emergency action that caused "*the least change or disturbance, practicable under the circumstances, to the environment*". 6 NYCRR § 617.5(c)(33). Finally she made no effort to secure the advice or opinion of technically qualified persons who could review the LZA report and/or inspect the buildings. A decision-maker who consciously avoids the facts which may be inconsistent with her preferred course of action is acting *per se* irrationally.

C. The Participation In The Decision-Making By Counsel With A Clear Conflict Of Interest Impermissably Tainted The Decision

The participation of David Paget, Esq, in the decision-making presents the whole issue in a skeptical light potentially clouded by a conflict of interest (Baker Aff.¶ ¶ 14, 15, 16, 21). As noted, by Justice Edmead, his participation advising ESDC presents an unacceptable conflict of interest. The affidavits demonstrate that he identified for FCRC and ESDC a means to avoid the prohibition on demolishing the buildings by using the emergency exception and essentially invited FCRC to submit a rationale upon which ESDC could rely (Baker Aff. ¶ ¶ 14, 15, 16, 21).

It would appear that Mr. Paget counseled ESDC that it could simply rely upon the November LZA report without inquiring about the earlier reports, without subjecting the LZA report to an independent analysis and without conducting an inspection of the buildings. Finally, he apparently did not advise about the question of less drastic means of addressing the situation. Throughout the majority of this period he was working directly for FCRC, only "switching" to ESDC on October 1st. During that interim period he and his law firm had access to and reviewed the previous LZA reports. (Baker Aff. ¶ 14). Given the lack of a record we do not know whether those reports were provided to ESDC, if they were not and ESDC was not informed about their

existence, the conflict of interest of Mr. Paget was manifested in the starkest terms. If they were presented, the irrationality of ESDC's decision was similarly evident.

Clearly, at a minimum, Mr. Paget saw his role and that of ESDC as to work collaboratively with FCRC to meet its goals, to demolish buildings that were a bother to maintain. He did not see his role as one to advise on the requirements of SEQRA and to seek an emergency action that had the least effect on the environment. Mr. Paget's presence and advice tainted the entire process and in and of itself is sufficient basis to annul the determination.

POINT II

PETITIONERS WILL SUFFER IRREPARABLE HARM IF THE BUILDINGS ARE DEMOLISHED

If these buildings are demolished pending resolution of this appeal, they will be permanently removed from the landscape and the neighborhood. While they are not located in a historic district and they are not designated landmarks, they nevertheless contribute to the streetscape and the sense of community. Once they are demolished, they will not return. Instead, there will be empty lots attracting garbage and presenting the neighborhood with gaping holes indicative of blight - but blight caused by the project sponsor. SEQRA presumes that an area under review as part of a larger action, will not have the physical characteristics changed while the review is underway. Thus there is a legal presumption that the status quo should be maintained. To demolish the buildings is to permanently alter the neighborhood and to do so without any environmental review. That is an irreparable harm that should not be tolerated.

POINT III

THE BALANCE OF THE EQUITIES FAVORS PETITIONERS

Respondents have already been granted a preference and an expedited appeal so this case will be decided in a relatively short time. Considering how long FCRC has allowed the buildings to remain without taking steps to protect the public from the alleged dangers, it appears clearly equitable to keep the buildings standing pending a decision on the appeal. Petitioners do not object to FCRC continuing with asbestos abatement, a necessary precondition to demolition. Given the time required to complete that work, there would be a minimal if any delay in the demolition schedule to allow the court to hear the appeal. Further, any delay in staying the demolition will not prejudice the respondents. Petitioners simply request that there be an independent evaluation of the stability of the buildings prior to demolition and further assert that it was arbitrary and capricious to not require such. Any minimal prejudice that may result to the respondents from a delay is minor compared to the irreparable injury that will result if the Court affirms the lower court's decision to deny the motion for a preliminary injunction. The equities strongly favor the appellants because Develop Don't Destroy Brooklyn has communicated with a qualified engineer who is ready to inspect the buildings whenever he is given an opportunity by the respondents. Such an evaluation can be completed in a very short time period and will insure that the adequate evaluation under SEQRA has been complied with, therefore preventing any permanent change to the landscape, environment and community of Brooklyn.

CONCLUSION

For the foregoing reasons, the Court should grant the requested relief and grant such other and further relief as this Court deems just and proper.

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