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

DEVELOP DON'T DESTROY BROOKLYN, et al.,	:	New York County Index No. 100686/06
Petitioners-Plaintiffs-Respondents-Cross-Appellants,	:	
For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment	:	
- against -	:	
EMPIRE STATE DEVELOPMENT CORPORATION,	:	
Respondent-Defendant-Appellant-Cross-Respondent,	:	
- and -	:	
FOREST CITY RATNER COMPANIES,	:	
Respondent-Defendant-Cross-Respondent.	:	

AFFIRMATION IN OPPOSITION TO MOTION BY PETITIONERS-PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS FOR A STAY OF DEMOLITION PENDING APPEAL

JEFFREY L. BRAUN, an attorney admitted to practice law in the courts of the State of New York, affirms under penalties of perjury as follows:

1. I am counsel to the law firm of Kramer Levin Naftalis & Frankel LLP, the attorneys for Forest City Ratner Companies ("FCRC"), a respondent-defendant in this combined Article 78 proceeding and declaratory judgment action and a cross-respondent on the cross-appeal by petitioners-plaintiffs ("petitioners"). The cross-appeal is from so much of the decision and order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on February

15, 2006, as (1) "dismissed the Article 78 proceeding which challenged the issuance by respondent Empire State Development Corporation of the Declaration of Emergency dated December 15, 2005," and (2) "denied the injunction against demolition of certain enumerated buildings in Brooklyn" by FCRC. The language quoted in the preceding sentence is from petitioners' notice of cross-appeal, which is dated February 20, 2006, and a copy of which is annexed hereto as Exhibit A. A copy of Justice Edmead's decision and order is annexed hereto as Exhibit B.[1]

2. I make this affirmation in opposition to the motion by petitioners for a stay pending appeal that would restrain FCRC from proceeding with the demolition of five vacant buildings that have been determined by FCRC's consulting outside structural engineers and respondent defendant New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), to be structurally unstable and to pose an immediate danger to the public safety. On February 21, 2006, petitioners applied to this Court for an immediate emergency stay of the demolition, which was denied by Justice David Friedman, who, however, directed that the motion for a stay pending appeal be expedited. A copy of this Court's "Summary Statement on Application for Expedited Service and/or Interim Relief," with Justice Friedman's endorsement, is annexed hereto as Exhibit C.

3. The five buildings at issue are entirely vacant, and an FCRC affiliate is either the owner or contract vendee of each of the buildings. Asbestos abatement, which must be completed before a demolition permit can be obtained and demolition can proceed, has been

[1] At the same time, the motion court granted petitioners' third cause of action, which sought, on the basis of a purported conflict of interests, the disqualification of ESDC's special outside environmental lawyers, David Paget and his law firm, Sive Paget & Riesel, P.C. ESDC is appealing from this aspect of the motion court's decision. This Court has established an expedited briefing schedule for ESDC's appeal and petitioners' cross-appeal, and has scheduled oral argument on the appeal and cross-appeal for March 23, 2006.

completed in one of the buildings and has commenced in a second one. The buildings are not landmarks, are not located in a historic district, and have no historic significance. The buildings are located within the footprint of the proposed Atlantic Yards Arena and Redevelopment Project (the "Project"), a major project for a 22-acre site near downtown Brooklyn. The Project is now undergoing environmental review by ESDC pursuant to the State Environmental Quality Review Act, ECL § 8-0101, *et seq.* ("SEQRA"). Because the buildings are within the Project's footprint, ESDC's position is that, unless an exception applies, the State's regulations implementing SEQRA – in particular, 6 NYCRR § 617.3(a) – prohibit the building's demolition prior to completion of the environmental review of the Project.

4. On December 15, 2005, ESDC made a written determination that, under the regulations implementing SEQRA, demolition of the five buildings constituted an emergency action within the meaning of 6 NYCRR § 617.5(c)(33) and therefore is exempt from SEQRA. This determination allows the demolition to proceed upon the issuance of demolition permits by the New York City Department of Buildings. The Court is respectfully referred to the affidavit of Rachel Shatz, ESDC's Director of Planning and Environmental Review, who is the ESDC executive who issued the emergency declaration. On the present motion, a copy of her affidavit, which was submitted to the motion court, is annexed to the moving affirmation of Jeffrey S. Baker, counsel to petitioners, as Exhibit B. The Court also is respectfully referred to the emergency declaration itself (Baker Aff. Exhibit A) and to the letter by which it was transmitted by ESDC to FCRC (Exhibit D hereto).

5. On January 19, 2006, petitioners made an *ex parte* application to the motion court for a temporary restraining order that would enjoin FCRC from demolishing the buildings. After reading petitioners' papers and hearing oral argument, Justice Edmead denied

the application for a TRO. The Justice then established a briefing schedule pursuant to which papers in opposition to the motion for a preliminary injunction (and in support of cross-motions by ESDC and FCRC to dismiss) were submitted to the motion court on February 9, 2006. On February 14, 2006, Justice Edmead heard extensive oral argument. At the conclusion of the hearing, she released her written decision and order (Exhibit B hereto). By that decision and order, insofar as relevant to the present motion, the Justice dismissed the causes of action on which the motion for a preliminary injunction against demolition of the buildings was premised.

6. The present motion in effect seeks a preliminary injunction against demolition. The requested injunction is identical to the injunctive relief that Justice Edmead twice denied – *i.e.*, at the January 19 hearing on the TRO, and at the February 14 hearing on the preliminary injunction – and that Justice Friedman of this Court denied on February 21. On the present motion in this Court for the same relief, petitioners cannot satisfy *any* of the prerequisites for injunctive relief *pendente lite*. First, there is no likelihood that petitioners will prevail on their cross-appeal. Second, petitioners will suffer no harm – let alone irreparable harm – if the buildings are demolished. Third, the balance of the equities overwhelmingly favors denial of the requested injunction. Fourth, the public interest requires that demolition proceed so as to eliminate a genuine threat to public safety.[2]

---

[2] Asbestos abatement at the first building to be demolished, 608-620 Atlantic Avenue, required several weeks and was recently completed. Asbestos abatement must be completed before an application for a demolition permit may be filed with the City's Department of Buildings. FCRC expects to obtain the necessary demolition permit for 608-620 Atlantic Avenue toward the end of the week beginning February 27, 2006, and to begin demolition promptly thereafter. Demolition of this building, which faces a busy public sidewalk and a bus stop, will take several weeks to complete. Asbestos abatement has commenced at a second building, and FCRC expects to have it commenced shortly at a third building. In the case of some of the five buildings, asbestos abatement must include removal of the building's roof, which will increase the building's exposure to the elements and lead to further deterioration of the building's structure.

A. Petitioners Have No Likelihood of Ultimate Success on Their Cross-Appeal

7. The ultimate issue before Justice Edmead – and before this Court on the cross-appeal – was the rationality of ESDC's emergency determination. *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 20, 466 N.Y.S.2d 668, 671 (1983) (on judicial review of a determination that an action is exempt from SEQRA as emergency action, the question "is not whether [the court] would conclude that a limited emergency exists," but "rather whether the determination by the [agency] that such an emergency exists was irrational or arbitrary or capricious"). *See also, e.g., Silver v. Koch*, 137 A.D.2d 467, 469-70, 525 N.Y.S.2d 186, 188-89 (1st Dep't), *app. dsmssd.*, 71 N.Y.2d 889, 527 N.Y.S.2d 771 (1988); *Greenpoint Renaissance Enterprise Corp. v. City of New York*, 137 A.D.2d 597,601, 524 N.Y.S.2d 488, 491 (2d Dep't 1988); *New York State Thruway Authority v. Dufel*, 129 A.D.2d 44, 47, 516 N.Y.S.2d 981, 983 (3d Dep't 1987). In fact, in *Silver v. Koch*, this Court held that the IAS court had "abused its discretion in ordering a hearing to determine whether an emergency exists." 137 A.D.2d at 469, 525 N.Y.S.2d at 188.

8. ESDC's emergency determination was amply supported by evidence that was before the agency when the determination was made:

(a) FCRC engaged a prominent outside firm of consulting engineers specializing in structural engineering, LZA Technology ("LZA"), to examine those buildings that appeared to FCRC's personnel to be potentially dangerous. LZA recommended the prompt demolition of six buildings that FCRC either owned or was in contract to purchase. Due to difficulties with the owner of one of these buildings (622 Pacific Street), FCRC decided not to seek an immediate emergency declaration as

to this building, and instead limited its request to five buildings. There are ten other vacant buildings that FCRC owns or is in contract to purchase that FCRC is not seeking to demolish prior to completion of SEQRA review, because FCRC is satisfied – on the basis of its own personnel's examination of the buildings or LZA's recommendations – that these ten buildings do not pose an immediate danger.

(b) The resume of the engineer who headed this engagement for LZA, James W. Feuerborn, Jr., P.E., was before the motion court (*see* Exhibit E hereto). It shows that Mr. Feuerborn has extensive expertise in the structural failure and collapse of buildings.

(c) On November 2, 2005, Mr. Feuerborn made an extensive oral presentation to lawyers and other representatives of ESDC (including Ms. Shatz) and the Metropolitan Transportation Authority. The presentation contained more than 70 Power Point slides. A copy of Mr. Feuerborn's slide presentation is Exhibit F hereto. At the end of this presentation, there was a long question-and-answer period during which the representatives of ESDC and the MTA asked questions, and Mr. Feuerborn responded. The presentation and the question-and-answer period lasted at least 90 minutes and possibly as long as two hours. At the end of the presentation, those present agreed that the case for demolition

was very persuasive, and ESDC asked FCRC to instruct LZA to prepare a comprehensive written report.[3]

(d) LZA then prepared a comprehensive written report dated November 7, 2005 (Exhibit G hereto), which FCRC sent to ESDC on November 8, 2005.[4] The LZA report recommended that each of the five buildings here at issue "be demolished because they pose an immediate threat to the preservation of life, health, and property" (Exhibit G hereto, at pp. 1, 8, 14, 18, 20, 28). As to these buildings, the LZA report observes, among other things, (i) that "a major structural support system of the building [at 608-620 Atlantic Avenue] is substantially compromised" (*id.* at 35), (ii) that "the major structural support system of the building [at 461 Dean Street] is substantially compromised" (*id.* at 37), (iii) that the building at 463 Dean Street contains a three-story structure that is "extremely dangerous and could collapse at any time" and a four-story structure that also is severely compromised (*id.* at 38), (iv) that "a major structural support system of [the building at 585-601 Dean Street] is substantially compromised" (*id.* at 39), and (v) that the building at 620

---

[3] First-hand accounts of Mr. Feuerborn's presentation and the question-and-answer session that followed it appear in Rachel Shatz's affidavit (Baker Aff. Exhibit B, at ¶¶ 11-13) and in the affidavit of Melanie Meyers, a partner in the law firm of Fried Frank Harris Shriver & Jacobson LLP and former counsel to the New York City Planning Commission and Department of City Planning (Baker Aff. Exhibit D, at ¶¶ 14-15).

[4] Although a copy of the LZA report is an exhibit to the Shatz affidavit and therefore is part of Exhibit B to Mr. Baker's moving affirmation, the photographs in the copy that is annexed hereto as Exhibit G are reproduced in color, unlike the copy that is annexed to the Baker affirmation.

Pacific Street "is extremely dangerous and could collapse at any time" (*id.* at 42).

(e) Rachel Shatz and an ESDC Senior Planner had "toured the project site" and "were aware that [it] contained a number of vacant, boarded-up, and deteriorated buildings" (Shatz Aff. ¶ 15). Furthermore, although she is not an engineer, Ms. Shatz has "more than twenty years' professional experience in the field of urban planning, development and environmental review" (*id.* ¶ 3), and has held her present position as ESDC's Director of Planning and Environmental Review for more than ten years (*id.* ¶ 4). Therefore, Ms. Shatz was entitled to use her own experience and judgment in evaluating the condition of the buildings at issue, the presentation by Mr. Feuerborn and the LZA report.

(f) At the time that the emergency declaration was under consideration, Ms. Shatz was aware of the fact that only a few months earlier, in May 2005, the side of a vacant building in the nearby Fort Greene section of Brooklyn had collapsed, killing a woman and injuring six other persons, including a City fire fighter (Shatz ¶ 15). Ms. Shatz also recognized the fact that winter increases the stress on structurally unsound vacant buildings due to the further deterioration caused by freezing and thawing, the extra structural load created by snow and ice accumulations, and the risk that teenagers or homeless people will enter a building for shelter and start a fire that will increase the risk of a building collapse and

endanger the lives of fire fighters and other emergency personnel (*id.* at ¶¶ 15-16).

(g) Ms. Shatz also recognized that it would be "pointless and wasteful" to try to stabilize or shore these buildings, and that, even if the Project is not approved, FCRC "has clearly expressed its desire to demolish these buildings, which is an action that a property owner in New York City is entitled to take as of right, for any reason or for no reason at all" (Shatz Aff. ¶ 20).

(h) Before issuing the emergency declaration, Ms. Shatz consulted with the ESDC Senior Planner who, like her, had toured the site, and also with several other ESDC executives – *i.e.*, ESDC's General Counsel, ESDC's Project Attorney for the Project, ESDC's Senior Vice President for Real Estate and ESDC's Chief Operating Officer – and all of the people with whom she consulted agreed that issuance of the emergency declaration was appropriate (Shatz Aff. ¶ 18).

Given this extensive evidence supporting the emergency declaration, petitioners have no realistic possibility of prevailing on their cross-appeal.[5]

9. Furthermore, in transmitting the emergency declaration to FCRC, Ms. Shatz cautioned FCRC that in accordance with 6 NYCRR § 617.5(c)(33), "FCRC must cause the least change or disturbance to the environment that is practicable under the circumstances," and

[5] FCRC reserves the right to argue an alternative theory for sustaining the motion court's determination – *i.e.*, that demolition of the buildings never was subject to ESDC review, because the demolition was not related to the Project, and the issuance by the New York City Department of Buildings of a demolition permit is a ministerial act that is exempt from SEQRA.

that "any *additional* physical activities at the Project site are fully subject to SEQR and its implementing regulations" (Exhibit D hereto) (emphasis added).

10. There is no merit to petitioners' basis for challenging the emergency determination and asserting that they have a likelihood of success on the merits of this cross-appeal. As the cases previously cited make clear (*see* ¶ 7, *supra*), the test is rationality, and the courts may not second-guess ESDC's emergency determination or substitute their judgment for that of ESDC.

11. First, petitioners complain that the record is incomplete due to the election by ESDC and FCRC to respond to their pleading with a motion to dismiss pursuant to CPLR 7804(f) and CPLR 3211(a). Nevertheless, the only purported "gap" in the record before the motion court that petitioners can identify is the omission of earlier LZA reports on the buildings, but there is no evidence that these reports were submitted to or considered by ESDC.

12. Second, petitioners suggest that FCRC has not proceeded as diligently as possible to obtain ESDC's approval and demolish the buildings, which supposedly suggests that in fact there is no emergency. However, while FCRC believes that it has proceeded in a diligent and responsible manner, the pace at which FCRC proceeded does not affect the structural stability of these buildings or make an unsafe building a safe one. It is undisputed that the outside structural engineers who examined these buildings – and who are well regarded experts – have opined that the buildings are dangerous and have recommended that they be demolished.

13. Third, petitioners have accused ESDC of "rubber stamping" LZA's recommendations without conducting its own investigation. This contention mischaracterizes the record, which shows that ESDC gave careful scrutiny to the engineering evidence that was presented to it and made its own determination as to what was proper. There is no legal

requirement – and petitioners have cited none – that ESDC retain its own engineers to conduct an independent investigation of the condition of the buildings.

14. Finally, petitioners assert that the purported conflict of interests of ESDC's outside environmental counsel, David Paget, and his law firm, somehow taints ESDC's emergency declaration. FCRC does not agree that Mr. Paget and his firm had a conflict of interests. In any event, however, "merely alleging bias is not sufficient to set aside an administrative determination." *Yoonessi v. State Board for Professional Medical Conduct*, 2 A.D.3d 1070, 1071, 769 N.Y.S.2d 326, 328 (3d Dep't 2003). *See also Sunnen v. Administrative Board for Professional Medical Conduct*, 244 A.D.2d 790, 791, 666 N.Y.S.2d 239, 241 (3d Dep't 1997), *lv. to app. denied*, 92 N.Y.2d 802, 677 N.Y.S.2d 72 (1998). Instead, the administrative decision should be sustained unless there is "a factual demonstration supporting the allegation" that the "outcome flowed from" the alleged bias. *Maglione v. New York State Department of Health*, 9 A.D.3d 522, 523, 779 N.Y.S.2d 319, 321 (3d Dep't 2004). *See also Partition Street Corp. v. Zoning Board of Appeal of City of Rensselaer*, 302 A.D.2d 65, 69, 752 N.Y.S.2d 749, 752 (3d Dep't 2002). Here, ESDC's emergency declaration is amply supported by the evidence that was before ESDC when the determination was made, and petitioners have not shown – and cannot shown – that Mr. Paget and his law firm somehow are responsible for procuring a result that is irrational or arbitrary and capricious.[6]

---

[6] It is undisputed, moreover, that Mr. Paget and his firm were not the decision makers but instead were outside environmental counsel to the decision maker, ESDC, at the time of the emergency declaration. It also is clear that ESDC was completely aware of, and approved, the relationship that Mr. Paget and his firm had had with FCRC in connection with the Project.

B. Petitioners Will Not Suffer Irreparable Harm If These Buildings Are Demolished

15. Petitioners cannot show that they will suffer any harm – let alone irreparable harm – if the five buildings are demolished. None of the petitioners lives in the buildings (which are vacant), and only one petitioner lives in a building that adjoins one of the buildings that is to be demolished (*see* Exhibit H hereto). Most petitioners are located outside the Project's footprint (*see* Exhibit I hereto). Petitioners oppose the demolition, because they oppose the Project and purportedly fear that demolition would create a "psychological" advantage for FCRC as the Project's developer. However, petitioners' speculation about the "psychological" impact of the demolition is not legally cognizable under SEQRA or any other body of law and cannot constitute the sort of harm that would justify the issuance of an injunction.

16. Furthermore, demolition of these five buildings will not affect ESDC's final decision on the Project. The Project still is in the early stages of environmental review under SEQRA. During this environmental review, opponents of the Project will have ample opportunities to express their views – orally and in writing – to the decision makers, other public officials and members of the public. If, at the end of that process, they consider themselves aggrieved by the final determination, they will have the ability to commence an Article 78 proceeding at that point to challenge ESDC's final decision.

17. Finally, demolition of the buildings here at issue is inevitable, regardless of the final determination that ESDC makes with respect to the Project, because the buildings' terrible condition makes their preservation and rehabilitation unfeasible. If the Project is approved the parcels on which these buildings are situated will be incorporated in the Project. If,

on the other hand, the Project is not approved, the parcels will be redeveloped in some other manner.

C. The Balance of the Equities Overwhelmingly Favors Denial of an Injunction

18. Sound property management requires the demolition of these buildings, which highly qualified structural engineers have identified as posing a serious danger. While the denial of an injunction will not subject petitioners to any genuine harm, the issuance of an injunction would subject FCRC to substantial continuing financial exposure due to the risk that one or more of these buildings will collapse. Such a collapse could cause death or serious injury to innocent members of the public, or substantial property damage, or both.

19. Petitioners lack the means and the inclination to post a bond in an amount sufficient to protect FCRC to the financial exposure that such a catastrophe would cause. Petitioners' inability to protect FCRC from the potentially catastrophic financial consequences of the issuance of an injunction is itself sufficient reason to deny the injunction.

D. The Public Interest Compels Denial of an Injunction

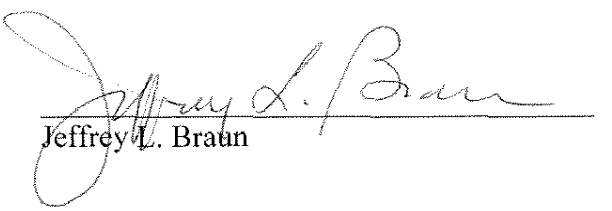
20. The public interest is a relevant consideration that courts should take into account on a motion for an injunction. *See, e.g., Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 628 N.Y.S.2d 375 (2d Dep't 1995); *DePina v. Educational Testing Service*, 31 A.D.2d 744, 745, 297 N.Y.S.2d 472, 474 (2d Dep't 1969). Furthermore, health and safety obviously are important components of the public interest on injunction motions. *See, e.g., Seitzman v. Hudson River Associates*, 126 A.D.2d 211, 215, 513 N.Y.S.2d 148, 150 (1st Dep't 1987); *Delaware County Board of Supervisors v. New York State Department of Health*, 81 A.D.2d 968, 439 N.Y.S.2d 741 (3d Dep't 1981); *Barney v. City of New York*, 83 A.D. 237, 241, 82 N.Y.S. 124 (1st Dep't 1903).

21. On the present motion, petitioners are deliberately placing at risk the lives and safety of the innocent members of the public who live and work in the buildings that adjoin the five buildings whose demolition is at issue, who walk on the public sidewalks in front of these buildings, and who stand at the bus stop in front of one of these buildings (608-620 Atlantic Avenue). Petitioners' reasons for doing so are purely tactical ones relating to their efforts to mobilize public opinion in opposition to the Project. Petitioners have legitimate tools available to them to fight the Project. The present motion is not one of them.

Conclusion

22. For the foregoing reasons, petitioners' motion for a stay pending appeal is without merit and should be denied.

Dated: New York, N.Y.
February 24, 2006



Jeffrey L. Braun