SUPREME COURT OF THE STATE OF NEW
COUNTY OF NEW YORK

In the Matter of DEVELOP DON'T DESTROY BROOKLYN, et al., Petitioners-Plaintiffs, For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment - against - EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, Respondents-Defendants.	Index No. 100686/06 IAS Part 35 Justice Edmead

MEMORANDUM OF RESPONDENT-DEFENDANT FOREST CITY RATNER COMPANIES IN OPPOSITION TO THE MEMORANDUM OF THE *AMICI CURIAE*

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Preliminary Statement

Respondent-defendant Forest City Ratner Companies ("FCRC") does not oppose the motion by Council Member James, Congressman Owens and State Senator Montgomery to appear in this case as *amici curiae* and submit a memorandum of law. FCRC submits this memorandum in response to the *amici*'s memorandum.

The motion by the *amici* makes clear that these three elected officials oppose the proposed Atlantic Yards Arena and Redevelopment Project (the "Project"). However, numerous other elected officials as well as important community leaders in Brooklyn enthusiastically support the Project. To demonstrate that support, FCRC submits the affidavits of Brooklyn Borough President Marty Markowitz, United States Congressman Edolphus Towns, State Senator Carl Andrews, State Assembly Member Roger L. Green, Rev. Herbert Daughtry and Bertha Lewis. The Court is respectfully referred to these affidavits for the compelling reasons why these affiants favor the Project and oppose any delay in ESDC's review of the Project. FCRC also respectfully refers the Court to letters of support attached as exhibits to the Borough President's affidavit. FCRC's papers demonstrate that the elected officials who support the Project include, in addition to the affiants, Governor Pataki, Mayor Bloomberg, Senator Schumer (who lives in Park Slope) and City Comptroller Thompson. FCRC also respectfully refers the Court to the papers submitted by it and by the Empire State Development Corporation ("ESDC") on the other motions.

The *amici*'s real concern appears to be that demolition of the buildings supposedly will create the appearance that the Project already has been approved, thereby discouraging further opposition and public participation in the ongoing environmental review process. The *amici* express concern that the Project itself – not the demolition – will have a

negative impact on the community. As shown in FCRC's other papers, these concerns are not legally cognizable and do not provide a basis to enjoin demolition.

The State Quality Environmental Review Act ("SEQRA") establishes a comprehensive and elaborate process that mandates that the public be given opportunities at multiple points in the process to review and comment on the Project, and to present concerns or objections to ESDC. Neither ESDC nor FCRC takes its obligations under SEQRA lightly. Demolition will not in any way prevent ESDC from conducting a thorough environmental review of the Project. Furthermore, FCRC's only intention in demolishing these buildings is to eliminate terribly deteriorated vacant structures that, according to FCRC's respected consulting structural engineers, pose a serious danger to public safety.

Statement of the Case

FCRC respectfully refers the Court to the accompanying affidavits and the papers submitted by ESDC and FCRC on the other motions for a complete statement of the pertinent facts.

Argument

I.

DEMOLITION WILL NOT CAUSE HARM OR PREVENT PETITIONERS OR THE PUBLIC FROM FULLY PARTICIPATING IN THE SEQRA PROCESS

The *amici* claim that if FCRC is not enjoined from demolishing the buildings, petitioners and the public will suffer irreparable harm. (*See* Am. Mem. at 6.)[1] This claim has no merit. First, there is simply no showing that the "public" will be harmed by the demolition.

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[1] Citations in this memorandum to "Am. Mem." refer to the memorandum of law submitted by Council Member James on behalf of the *amici*.

Second, as shown in FCRC's other papers, petitioners will not suffer from irreparable harm, as they cannot and do not allege that they will suffer an environmental injury that is within the zone of interests SEQRA is intended to protect. Speculation that demolition may "signal that the Project is moving forward" or will "frustrate" the legal rights of the petitioners or the public (Am. Mem. at 7) is not an environmental injury and no basis for an injunction.

Petitioners' allegations are about the Project, not the demolition, and therefore do not provide standing to challenge the demolition. This deficiency is even more apparent from the papers submitted by the *amici*. *See* James Aff. ¶ 10 (residents believe the Project would have a detrimental impact on the community), ¶ 11 ("I have many serious reservations about the process, scope, and scale of the Project"); Owens Aff. ¶ 2 ("I share the concerns Letitia James expresses in her affidavit about the impact of the Project on our Districts"). To the extent that the *amici* claim that the Project would harm petitioners, or even the community as a whole, the claim has no merit because, even if they were correct, there can be no harm unless and until there has been a final determination by ESDC approving the Project. *See Hell's Kitchen Neighborhood Ass'n v. New York City Dep't of City Planning*, No. 112368/04, 2004 WL 3218419, at *5. (Sup. Ct. N.Y. Cty. Sept. 21, 2004) (Cahn, J.). *See also* FCRC Mem. at pp. 26-28.[2]

The *amici* claim that demolition will "intimidate" petitioners and "discourage them from exercising their legal rights" (Am. Memo. at 7). These are not environmental injuries. SEQRA specifically requires that the public be kept apprised of steps in the environmental review process and be given the opportunity to review and provide comments and input at

[2] Citations in this memorandum to "FCRC Mem." refer to the memorandum submitted by FCRC in opposition to petitioners' motion for a preliminary injunction and in support of FCRC's cross-motion to dismiss.

various stages of the process. For example, scoping – which is the means by which the lead agency focuses on potentially significant adverse impacts – "must include an opportunity for public participation. The lead agency [here, ESDC] must provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means." 6 NYCRR § 617.8(e). After the draft environmental impact statement ("EIS") has been prepared, ESDC must file and publish a notice of completion, provide public access to the document, and provide a minimum of at least 30 days for public comment. *See* 6 NYCRR § 617.9(a)(3). ESDC also will hold a public hearing, which will be held not less than 15 days and no more than 60 days after filing the notice of completion of the draft EIS. *See* 6 NYCRR § 617.9(a)(4). Finally, the final EIS must contain copies or a summary of all substantive comments received on the draft EIS and ESDC's responses to those comments. *See* 6 NYCRR § 617.9(b)(8).

It is difficult to imagine a more transparent and open public process. Thus far, ESDC has only issued a draft scoping document. Petitioners and other members of the public will have ample opportunities to exercise their rights to be heard in the future. The *amici*'s assertion that the environmental review process is "closed" or "bilateral" (Am. Mem. at 3) is baseless – and, actually, insulting.

Furthermore, unlike the buildings in the case cited by the *amici* (Am. Mem. at 6), the buildings to be demolished by FCRC manifestly are *not* designated historic landmarks or in a historic district. The *amici* cite *Montgomery v. State Dep't of Mental Hygiene*, 43 A.D.2d 552, 552-53, 349 N.Y.S.2d 719, 720 (1st Dep't 1973), for the proposition that demolition of these buildings by FCRC is irreparable harm to petitioners, but *Montgomery* does not support that position. Unlike here, that case involved designated landmarks. Furthermore, the petitioners

there already had obtained an injunction preventing the landmarks' demolition, and the decision considered whether the *status quo* should continue to be maintained where two years had elapsed and an appeal had not been diligently prosecuted.

The *amici* also make the general argument that denial of "due process" or "frustration of legal rights" can constitute irreparable harm (Am. Mem. at 7). Here, however, no one's "due process" rights or other "legal rights" has been violated or is being violated. The cases that *amici* cite are completely inapposite. For example, *Szal v. Pearson*, 289 A.D.2d 562, 562, 735 N.Y.S.2d 200, 201 (2d Dep't 2001), involved a preliminary injunction to "overturn the tax lien of the [petitioner's] home."[3]

Thus, the *amici* do not advance any argument or legal theory that shows that petitioners will suffer any harm if the injunction does not issue.

II.

ESDC'S DETERMINATION THAT DEMOLITION IS AN EMERGENCY ACTION EXEMPT FROM SEQRA IS RATIONAL AND SUPPORTED BY THE RECORD AND WAS NOT AFFECTED BY ANY PURPORTED CONFLICT OF INTEREST

The *amici* claim that the injunction preventing demolition should issue because ESDC did not fulfill its obligations under SEQRA (*see* Am. Mem. at 3). As discussed in FCRC's other papers (*see* FCRC Mem. at 13-22), petitioners have no likelihood of success on this claim, because ESDC's emergency declaration was rational and supported by ample

[3]The remaining cases cited by *amici* are even further off the mark. In *Trauernicht v. Bd. of Cooperative Educ. Serv.*, 95 Misc. 2d 394, 395, 407 N.Y.S.2d 398, 399 (Sup. Ct. Nassau Cty. 1978), the petitioner brought an Article 78 to compel production of a report, and the court refused to compel production of the document because it would impair "imminent contract awards or collective bargaining negotiations." In *Crowe v. Kelly*, 9 Misc. 3d 1111(A), 806 N.Y.S.2d 444 (Sup. Ct. N.Y. Cty. 2005), the court merely ordered the *in camera* review of N.Y.P.D. personnel records that were sought by a police officer who was challenging his termination.

evidence, not arbitrary and capricious, an abuse of discretion or tainted by any purported conflict of interests. Furthermore, even if ESDC's approval of the demolition was defective in some respect (which it was not), FCRC could demolish the buildings as a matter of right, because issuance of a demolition permit is a ministerial act and therefore exempt from SEQRA. The *amici* do not say anything new or different on this issue.

On an Article 78 proceeding, the court must uphold an agency's determination unless it is irrational or arbitrary and capricious. *See Pell v. Bd. of Educ. of Union Free School District*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974). *See also Lee v. Chin*, No. 3113028/03, 2003 WL 22888395, at *16 (Sup. Ct. N.Y. Cty. Oct. 29, 2003) (Edmead, J.). The court must give the agency's determination great weight and deference where the determination involves factual evaluation within the agency's area of expertise and is supported by the record. *See Flacke v. Onondaga Landfill Systems, Inc.*, 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 693 (1987); *Lee*, 2003 WL 22888395, at *13 (recognizing that experts' interpretations are entitled to deference).

Here, contrary to the conclusory assertion by *amici* (Am. Mem. at 4-5), ESDC did not "rubber stamp" the emergency declaration. ESDC did not rely on representations by FCRC (*see* Am. Memo. at 2), but on an extensive presentation by a respected outside professional engineering firm, an extensive question-and-answer session with the responsible engineer, an extensive written report, and ESDC's own familiarity with the buildings and knowledge and experience in the dangers posed to public safety by buildings that are in the condition of the ones here at issue.

The engineers recommended that demolition was immediately necessary, because the buildings "pose an immediate threat to the preservation of life, health and property." FCRC

Ex. M at 3. Contrary to the *amici*'s assertion (Am. Mem. at 5), ESDC was not required to consult its own engineer or evaluate the feasibility and expense of an alternative to demolition. Neither petitioners nor the *amici* point to a case or statutory provision that requires the retention of an additional engineer. These buildings are not designated historic structures or in a designated historic district such that ESDC must determine whether the façade or other important structures may be saved. Doing so would serve no purpose.

The *amici* and the petitioners make much of their allegation that there is a conflict of interests caused by David Paget's representation of ESDC. Even if this was correct, no one has shown any defect in the environmental review, or in the emergency declaration, that is attributable to this purported conflict. As set forth more fully in the memoranda submitted by FCRC and ESDC on the preliminary injunction motion and the accompanying affidavits, there is no conflict of interests. Contrary to the assertion of the *amici*, Paget was not "on both sides," because the relationship between ESDC and FCRC is not adversarial but collaborative when it comes to SEQRA compliance, and ESDC and FCRC always have had separate counsel and always agreed that Paget and his firm would be retained by FCRC to start working on environmental review but eventually would be retained by ESDC at FCRC's expense.

The cases cited by the *amici* do not support the proposition that outside environmental counsel retained to work on SEQRA compliance is adverse to the developer whose project requires SEQRA review. Instead, the *amici* actually cite three cases in which the courts refused to find conflicts of interests. In *In re English*, 182 A.D.2d 185, 587 N.Y.S.2d 36 (2d Dep't 1987), the respondent attorney who was censured was *not* the Village Attorney. Instead, the respondent's father and a partner in respondent's firm held this position, and the respondent's representation of a client before the village zoning board was found not to be

objectionable. Similarly, in *Parker v. Town of Gardiner Planning Board*, 184 A.D.2d 937, 938, 585 N.Y.S.2d 571, 572 (3d Dep't 1992), the court affirmed as "rational and entitled to considerable weight" the determination of the Town Board of Ethics that there was *no* conflict of interests despite a financial relationship between an applicant before the planning board and a member of the board. Finally, in *Heustis v. Town of Ticonderoga Planning Board*, 11 A.D.3d 868, 784 N.Y.S.2d 187 (3d Dep't 2004), the court affirmed the dismissal of an Article 78 proceeding against two members of the town's planning board on the ground that "the mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance." *Id.* at 870, 784 N.Y.S.2d at 188 (quoting *Parker*, 184 A.D.2d at 938, 585 N.Y.S.2d at 573).[4] In sum, the *amici* have failed to demonstrate any legal basis for their contention that there is a conflict of interests.[5]

Finally, even if ESDC's determination that demolition is an emergency exempt from SEQRA were defective, petitioners still have no likelihood of success. FCRC can demolish the buildings as of right without complying with SEQRA, whether the buildings are dilapidated or in pristine condition, because the issuance of demolition permits in New York City is expressly exempt from review under SEQRA (FCRC Mem. at 18-20). *See, e.g., Herald Square*

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[4] In *Heustis*, the court did not dismiss a claim against a third member of the board, but held that additional inquiry was warranted to determine whether the board member's company would benefit from approval of the application. 11 A.D.3d at 870, 784 N.Y.S.2d at 189. Here, by contrast, the Sive Paget firm will be compensated pursuant to the terms of the Cost Letter regardless of the outcome of the SEQRA process, so no additional inquiry is necessary.

[5] There only case that does not involve a finding – implicit or explicit – that there was no conflict of interest is *MacFarlane v. Budine*, 86 A.D.2d 731, 446 N.Y.S.2d 592 (3d Dep't 1982). This case merely permitted an Article 78 petition to be amended on the theory that a town attorney "may" be an "employee" under section 800 of the General Municipal Law. In the present case, however, Mr. Paget and his firm were not functioning as general counsel to ESDC but as special environmental counsel. At all times, ESDC had its own counsel, and FCRC had separate counsel at an outside law firm other than Sive Paget.

South Civic Assoc. v. Consolidated Edison Co. of New York, No. 101667/03, 2003 WL 24132999 (Sup. Ct. N.Y. Cty. 2003) (Faviola, J.).[6]

III.

THE PUBLIC INTEREST COMPELS DENIAL OF THE REQUESTED INJUNCTION

The *amici* oppose the Project and contend that their constituents, the residents and business owners in District 35, "believe that the proposed Project would have a substantially detrimental impact on the community environment" (Am. Mem. at 1). However, as shown by the affidavits submitted with this memorandum, there is significant and substantial support for the Project from both elected officials and the public. These individuals recognize that the Project, if approved, will significantly benefit the public by providing affordable housing, new construction and permanent jobs, billions of dollars in tax revenue for the City and State, and revitalize an area in downtown Brooklyn that is currently underutilized and underdeveloped. *See* Markowitz Aff. ¶ 2; Green Aff. ¶ 3; Daughtry Aff. ¶ 3; Andrews Aff. ¶¶ 3-4.

The Community Benefits Agreement entered into in connection with the Project obligates FCRC to provide numerous benefits to the community, including job training programs

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[6] The cases cited by *amici* for their assertion that ESDC's determination was arbitrary and capricious (Am. Mem. at 3-4) are irrelevant. In *Merson v. McNally*, 90 N.Y.2d 742, 747, 665 N.Y.S.2d 605, 607 (1997), the Court held that modifications to a project after issuance of a "negative declaration" were permissible adjustments where the agency determination was reasonable, and the SEQRA process had been conducted openly and deliberatively. In *Halperin v. City of New Rochelle*, No. 2004-02193, 2005 WL 3543612, at *5 (2d Dep't Dec. 27, 2005), the court held that the lead agency had fulfilled its SEQRA responsibilities where it had taken a "hard look" at all of the potential environmental impacts, which had been fully analyzed in a final EIS. In *Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 72, 644 N.Y.S.2d 252, 258 (1st Dep't 1996), the court held that a protocol for removing lead paint from the City's bridges was not exempt from SEQRA as "routine maintenance," but was a policy determination establishing guidelines and procedures for major projects, such as remediation of hazardous waste spillages, that had major potential environmental impacts.

and hiring, contract assurances to minority and women owned businesses, affordable housing and relocation benefits. This Agreement has enforcement mechanisms to ensure that FCRC is in compliance, and is strong evidence of FCRC's commitment to the development and growth of the community in and around the Project. *See* Daughtry Aff. ¶¶ 3-4; Towns Aff. ¶ 3; FCRC Ex. F at 2. Enjoining demolition or the environmental review process would frustrate and delay the benefits to be reaped from the Community Benefits Agreement and the Project. As the accompanying affidavits make clear, it is difficult to imagine a project where there has been greater attention given by a developer to the needs of the surrounding community. It would be extremely unfortunate – and legally unsupportable – if the ongoing review of this Project, which is required by law, were to be halted at this early stage.

Furthermore, demolition of the five buildings at issue is necessary to protect the public safety from the very real danger that these badly deteriorated and unsound structures present. The public interest requires demolition, not preservation of these dangerous hulks to provide some perceived tactical advantage to the Project's opponents.

Conclusion

For the foregoing reasons, notwithstanding the assertions made by the *amici curiae*, the motion for a preliminary injunction should be denied, and the cross-motions to dismiss this litigation should be granted.

Dated: New York, New York
February 10, 2006

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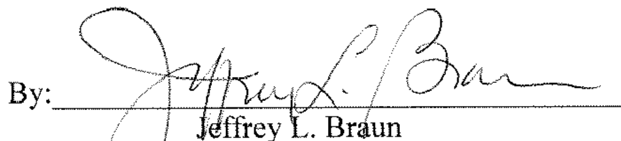

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