

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

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| DEVELOP DON'T DESTROY BROOKLYN, et al., | : | Index No. 100686/06 |
| | : | IAS Part 35 |
| Petitioners, | : | Justice Edmead |
| For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment | : | |
| | : | |
| EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, | : | |
| | : | |
| Respondents. | : | <u>AFFIDAVIT</u> |

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STATE OF NEW YORK)
 : ss.:
COUNTY OF KINGS)

JAMES P. STUCKEY, being sworn, states:

1. I am Executive Vice President and Director of Commercial and Residential Development of Forest City Ratner Companies (“FCRC”), a respondent in this proceeding. I make this affidavit in opposition to petitioners’ motion for a preliminary injunction, and in support of FCRC’s cross-motion to dismiss. The requested injunction would enjoin FCRC from demolishing five buildings that have been determined by FCRC’s outside professional consulting engineers and respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation (“ESDC”), to pose an immediate danger to public safety. This litigation concerns the proposed Atlantic Yards Arena and Redevelopment Project (the “Project”) and its ongoing environmental review.

2. I am the senior FCRC executive with over-all responsibility for the Project. Except as otherwise expressly indicated, I make this affidavit on the basis of first-hand knowledge. I have been employed in private-sector real estate development for more than fifteen years, including, for the last twelve years, by FCRC. For thirteen years prior to that, I was employed in the public sector, working mostly on economic development projects for the City of New York. My last position in municipal government was President of the New York City Public Development Corporation, a public benefit corporation now known as the New York City Economic Development Corporation (“EDC”). EDC is a creature of the City of New York, and its function for the City is similar to that of ESDC’s function for the State of New York.

A. The Project

3. The Project is sponsored by two affiliates of FCRC, Atlantic Yards Development Company, LLC and Brooklyn Arena, LLC. The sponsors propose to construct a major mixed-use development project in Brooklyn’s Atlantic Terminal area, which already is the third largest public transit hub in New York City. The Project would occupy an area of approximately 22 acres, roughly bounded by Atlantic Avenue to the north, Flatbush and Fourth Avenues to the west, Dean Street to the south and Vanderbilt Avenue to the east. A map that depicts the Project’s site – and that shows the location of the petitioners who live in the footprint of the Project’s site – is being submitted to the Court as FCRC Exhibit A, and a map of the surrounding area that shows the locations of the petitioners who are outside the Project’s site is FCRC Exhibit B.

4. The Project would redevelop this underutilized and underdeveloped area near the heart of downtown Brooklyn with a new 20,500-seat arena, 7,300 new residential units (at least 2,250 of which would be reserved for affordable

rental housing), a new hotel containing approximately 180 rooms, about 628,000 gross square feet of new commercial office space, about 256,000 gross square feet of new retail and community facility space, approximately 4,000 parking spaces and more than seven acres of publicly accessible open space. The new arena will be the home of the National Basketball Association's Nets basketball team, which affiliates of FCRC and its partners have acquired, and which now plays in New Jersey, and also is expected to be the venue for other events such as local college and high school athletic programs, circuses and other family entertainment events, periodic tournaments, concerts and community events such as high school and college graduations.

5. A substantial portion of the northern half of the Project's site, corresponding to most of the area bounded by Atlantic Avenue to the north and Pacific Street to the south, is owned by the Metropolitan Transportation Authority (the "MTA"), which operates the site as its Vanderbilt Yards and stores buses and Long Island Railroad rail cars there. The yards are several feet below the grade of the surrounding streets and open to the air, and they are functionally antiquated. While performing an important public function, the yards are old and inefficient and create a wide and deep trench that is an enormous gouge near the heart of downtown Brooklyn, and a substantial barrier isolating the neighborhoods to the south of the site from those on all other sides. The Project would close this gouge through the construction of a new state-of-the-art rail yard for the Long Island Railroad and permanent platform over the yards, on top of which buildings and public space will be constructed.

B. Government Approvals and SEQRA Review

6. To be built, the Project will require several discretionary government actions and approvals. Although the MTA and the project's sponsors

already own a substantial portion of the site, assemblage of the entire site will require ESDC to acquire, by purchase or eminent domain, those portions of the site that the sponsors are unable to acquire, as well as city streets that are within the project area and will be closed. The necessary discretionary governmental actions also include, among other things, the following: (a) the adoption by ESDC of a General Project Plan for the Project, which will include the override by ESDC of the City's Zoning Resolution and certain other local laws, as well as ESDC's override of portions of the City's Atlantic Terminal Urban Renewal Plan and portions of the City Map; (b) approval of the Project by the State's Public Authorities Control Board; and (c) the MTA's disposition of an interest in the Vanderbilt Yards and its approval of related transit improvements. Furthermore, although ESDC, as a public benefit corporation of the State of New York, has the power to override City laws and condemn City property, as a practical matter ESDC never exercises that power without the City's agreement, which means that the City, too, will review the Project.

7. All of the foregoing approvals and actions are "actions" within the meaning of the State Environmental Quality Review Act ("SEQRA") and therefore cannot be done without the comprehensive environmental review required by that statute. Furthermore, in light of the scope of the Project, this environmental review inevitably will include all of the successive stages contemplated by SEQRA, including, eventually, the preparation and study of a Final Environmental Impact Statement. Therefore, it has been clear to us at FCRC since the earliest stages of our work on the project that FCRC would need the assistance of an experienced team of environmental consultants and

specialists, including environmental legal counsel, expert in the area of SEQRA environmental review.

C. FCRC's Relationship with David Paget

8. In late 2003, FCRC began to give serious thought to the outside environmental specialists that would be needed to work on the Project. As of that time, the City recently had promulgated a major rezoning of downtown Brooklyn, and it was my belief that outside specialists who had worked on that rezoning represented the best choice for the Project's environmental team. Due to their work on this recent rezoning, I thought that their familiarity with all of the environmental issues relating to development in downtown Brooklyn, the environmental studies that recently had been performed and the data that had been collected would enable them to provide the soundest advice available, and to do so with the greatest efficiency – *i.e.*, in the shortest possible time, and at a cost that was most reasonable under the circumstances for high-quality environmental review.

9. David Paget of the law firm of Sive, Paget & Riesel, P.C., which is a leading environmental boutique firm, had played an important role in connection with the downtown Brooklyn rezoning. I have known Mr. Paget since 1978 or 1979, when I was a project manager with the Mayor's Office of Development, and Mr. Paget and I worked together on the South Street Seaport redevelopment project. In the years since then, Mr. Paget and I have worked together on several other projects; sometimes he has been my organization's counsel, and sometimes he has been counsel to another participant in a project. FCRC has worked with Mr. Paget or other lawyers at his firm on several occasions, and in fact at this time is working with other lawyers at Mr. Paget's firm on two matters unrelated to the Project.

10. I hold Mr. Paget in very high regard and consider him to be the preeminent environmental lawyer practicing in New York today. He is an extremely intelligent, articulate, capable and conscientious lawyer, and a former Assistant United States Attorney for the Southern District of New York. I believe that Mr. Paget's integrity is beyond reproach. The hallmark of Mr. Paget's work is his insistence that his clients and other project participants comply with all requirements of SEQRA. Mr. Paget accomplishes this objective by guiding his clients and their outside environmental consultants through a careful and thorough identification of all potentially relevant environmental issues, and the conduct of a comprehensive and honest assessment of the project's potential impact on those issues. Mr. Paget's style is to examine critically what his clients and their environmental consultants tell him and submit to him, and to carefully probe all proposals for environmental studies, and all results and analyses generated by those studies, to be confident that the environmental analysis is comprehensive and correct.

11. At the same time that FCRC decided that Mr. Paget was the best choice as environmental counsel for the Project, we understood that eventually ESDC would likely want to hire him as its own environmental counsel. We anticipated that, if we continued to make progress in advancing the Project, ESDC would declare itself the "lead agency" for purposes of SEQRA compliance in connection with the Project, and at that point would commence its formal review of the Project, including its environmental review under SEQRA. We also anticipated that, in accordance with normal practice in ESDC projects, FCRC would be called upon to agree to reimburse ESDC for the fees and costs of its outside lawyers and consultants. We knew that ESDC often uses Mr. Paget as

its environmental lawyer, and therefore we anticipated that Mr. Paget would become ESDC's lawyer, and we would be obligated to reimburse ESDC for his fees. Nothing about these contemplated developments troubled us. We were happy to have Mr. Paget as the senior environmental lawyer working on the Project, regardless of whether he was acting as FCRC's counsel or as ESDC's counsel.

12. In fact, in a letter agreement dated February 18, 2004 (the "Cost Letter"), between FCRC and ESDC, I confirmed to ESDC's Chairman and Chief Executive Officer, Charles A. Gargano, that FCRC would "pay certain costs incurred by [ESDC] with respect to the proposed Atlantic Yards-Brooklyn Arena Mixed Use Development Project (the 'Project')." A copy of the Cost Letter is FCRC Exhibit C. The Cost Letter specifically confirmed that FCRC had "requested that [ESDC] authorize and/or oversee ... services to be performed in connection with the Project," and it specified that these services included "[l]egal services to be provided by Sive, Paget & Riesel, P.C. in connection with the environmental analysis of the Project ..."¹

13. At FCRC, we understood the Cost Letter to mean that Mr. Paget really was representing ESDC, although FCRC was obligated to pay his firm's fees. This is customary practice in virtually every public-private transaction we have been a party to and was customary when I worked in government as well. Furthermore, as shown in the accompanying affidavit of Jane Marshall, an FCRC Senior Vice President, when the Cost

¹ The Cost Letter also confirmed that ESDC "shall not be deemed to have approved any FCR proposal concerning the Project until ... such approval is set forth in writing signed by ESD and approved by the Board of Directors of ESD and by any other required public authorities." In the Cost Letter, FCRC also confirmed that ESDC "has not made any representations whatsoever concerning" the "outcome" of the work provided for in the Cost Letter, or the "approval" of the Project by ESDC's Board of Directors or any other "required public authorities."

Letter was finalized in February 2004, we anticipated that the Project would move forward to the point where ESDC would formally retain Mr. Paget much more rapidly than turned out to be the case.

14. Compliance with SEQRA in connection with the consideration and potential approval of a major development project is a collaborative process. Although there may be disagreements as to particular issues from time to time, the project's proponents and the relevant government agencies must work together to come to a common understanding of what SEQRA requires with respect to the project, and to achieve their mutual objective of compliance with SEQRA. The Cost Letter – and FCRC's solicitation of ESDC's approval of its retention of the Sive Paget firm as environmental counsel in connection with the Project – demonstrate the collaborative approach that is appropriate.

15. Furthermore, since an early stage of our work on the Project, FCRC has had separate counsel, Stephen Lefkowitz of Fried Frank Harris Shriver & Jacobson LLP, who generally has represented FCRC in connection with the Project. The Fried Frank firm's representation of FCRC has included, among others, the representation of FCRC in all negotiations with ESDC, the City of New York and the MTA, in our financings for the Project and in the acquisition of various private parcels necessary for the Project. Neither Mr. Paget nor anyone else from his firm represented FCRC in any business or other negotiations with ESDC or any other public agency. Mr. Lefkowitz has always been FCRC's primary outside counsel in connection with the Project. At all times prior to his actual engagement by ESDC in connection with the Project, FCRC regarded Mr. Paget and his law firm as special environmental counsel

with a narrow role – SEQRA compliance – that was distinct from Fried Frank’s role as FCRC’s primary outside counsel, and not in any way adversarial with respect to ESDC or other relevant governmental agencies.

16. In February 2005, which was one year after execution of the Cost Letter, FCRC, ESDC, the City and EDC entered into two Memoranda of Understanding (the “MOU’s”) regarding the respective roles of the signatories in connection with consideration of the approvals that are necessary for the Project. Copies of the MOU’s FCRC Exhibits D and E. In one of these MOU’s, FCRC specifically agreed, among other things, that it would reimburse ESDC, the City and EDC for “third-party legal fees and expenses incurred by” them (Exhibit E, ¶ 19).

17. In any event, to eliminate any possible doubt on the matter, I want to state unequivocally that FCRC has no objection whatsoever to the representation of ESDC by Mr. Paget and his firm in connection with the Project.

D. Demolition of Derelict Buildings

18. In 2004, FCRC began to enter into contracts for the acquisition of properties within the Project’s site, and then actually to close the acquisitions of those properties. Some of the buildings that FCRC acquired or contracted to acquire appeared to be in derelict condition, and at the direction of Andrew Zlotnick, a Senior Vice President of Commercial Development, FCRC retained outside consulting engineers to examine those buildings that appeared to us to be unsafe. Eventually, some of the buildings that appeared to us to be unsafe were determined by the engineers to not pose any immediate danger, while other buildings that FCRC had acquired or had contracted to acquire were determined by the engineers to pose a genuine threat to safety.

19. For reasons set forth in Mr. Zlotnick's accompanying affidavit, FCRC was not in a position to begin asbestos abatement and demolition at these buildings until the fall of 2005, by which time our engineers had identified five buildings that FCRC owned or had contracted to acquire that, in their opinion, should be demolished. Although Melanie Meyers of the Fried Frank firm advised FCRC that it was entitled as a matter of right under New York City law to demolish those buildings upon compliance with the City's legal requirements applicable to asbestos abatement and building demolition, Mr. Paget took the position that the State's regulations under SEQRA prohibited FCRC from demolishing those buildings at that time without ESDC's consent. I understand that the two lawyers disagreed about this issue during numerous conversations in 2005. Eventually, however, FCRC decided that, as a practical matter, there was nothing to be gained by insisting on its position over ESDC's objection, and that it should acquiesce in Mr. Paget's interpretation of SEQRA and submit the proposed demolition to ESDC for approval. More detailed descriptions of the proposed demolition and the contradictory views of Mr. Paget and Ms. Meyers are set forth in the accompanying Zlotnick and Meyers affidavits.

E. Balance of the Equities and Public Interest

20. I understand that, in considering whether to issue a preliminary injunction, a court should consider the balance of the equities and the public interest. For the reasons set forth below, both of these considerations weigh overwhelmingly in favor of the denial of an injunction in this case.

21. As demonstrated by the maps that are being submitted as FCRC Exhibits A and B, none of the petitioners resides in or adjacent to any of the buildings that are to be demolished. In fact, some of the individual petitioners and all of the

community group petitioners are located outside the Project's site. Therefore, the petitioners really will suffer no harm as a result of the proposed demolition.

22. I am convinced that the requested injunction in actually is merely an attempt by opponents of the Project to stop the Project on the basis of pretexts that in reality have no impact on petitioners. However, a halt of the Project's progress will have a severe adverse impact on FCRC and on the public.

(1) Public Interest

23. The Project Cost MOU (FCRC Exhibit E) provides that “[t]he Public Parties [*i.e.*, ESDC, the City and EDC] and FCRC are dedicated to furthering the participation of minority and women-owned businesses and the hiring of minorities, women and local residents with respect to the Project and agree to establish a mutually acceptable program to facilitate that goal” (§ 14). FCRC takes that commitment to the community very seriously and, in furtherance of it, caused the Project's sponsors (*i.e.*, its affiliates Atlantic Yards Development Co. LLC and Brooklyn Arena LLC) to enter into a Community Benefits Agreement dated as of June 27, 2005, with a broad coalition of non-profit Brooklyn community groups and community action organizations – *i.e.*, All-Faith Council of Brooklyn, the New York Association of Community Organizations for Reform Now (“ACORN”), Brooklyn United for Innovative Local Development, Inc. (“BUILD”), the Downtown Brooklyn Neighborhood Alliance, the Downtown Brooklyn Educational Consortium, the First Atlantic Terminal Housing Committee, the New York State Association of Minority Contractors, Public Housing Communities, the Downtown

Brooklyn Advisory & Oversight Committee and the Wyckoff Gardens Association. A copy of the Community Benefits Agreement is submitted as FCRC Exhibit F.²

24. The Community Benefits Agreement is the first such agreement ever entered into by a development in a major development project in New York City. We believe that the Community Benefits Agreement may set the standard for all future major development projects in the City, and FCRC is the first developer to have – and the Project is the first development project – to have undertaken such far-reaching and extensive commitments to the community. The Community Benefits Agreement is a major, legally binding commitment on the part of FCRC, and is path-breaking. It sets forth carefully articulated and detailed commitments by the Project’s sponsors to the local communities. The agreement not only commits the Project’s developers to assuring that a percentage of the construction contracts for the Project are awarded to minority or women-owned businesses, but it obligates the Project’s sponsors to establish, in consultation with the other parties to the agreement, programs to hire and train for permanent employment residents from the surrounding communities who are members of minorities, women or people of low or moderate-income (§ IV(A)). It also requires that priority for employment opportunities be given to residents of public housing and low-income residents of the neighboring communities (§ IV(A)(3)). The agreement also obligates the Project’s developers to “make 50% of the residential rental units built at the Project affordable to low- and moderate-income families” in accordance with a program established by ACORN, which is a signatory to the agreement and a well-known

² The leaders of these Brooklyn community organizations include Rev. Walter J. Morris, Bertha Lewis, Len Britton, Freddie Hamilton, James Caldwell, Rev. Dr. Herbert Daughtry, Bill Howell, Delia Hunley-Adossa and Charlene Nimmons.

community and housing activist group (§ VI(B)). The agreement also commits the Project's developers to "provide all residential tenants currently renting and legally occupying a legal residential dwelling unit as their primary residence with the Project site," and who are in good standing under their leases and have resided in their current residence for at least one year as of the date of the agreement, with "reasonably comparable living space in a new unit within the Project, at their then current rent," plus "a reasonable relocation allowance" (§ VI(D)(1)).

25. The Community Benefits Agreement also has teeth in the form of substantial legally enforceable penalties for the failure by FCRC to meet its obligations thereunder, which were negotiated by the signatories during many months of negotiation. The preceding paragraph of this affidavit summarizes only a handful of the commitments that are contained in the Community Benefit Agreement. These commitments are intended to address in a very serious manner the problems of unemployment and underemployment, lack of affordable housing and other serious issues that have plagued communities within Brooklyn. The requested injunction would delay the implementation of these programs and hurt some of Brooklyn's most disadvantaged residents. Therefore, it would be detrimental to the public interest.

26. If approved and built, the Project also will serve as a powerful engine of economic growth in other respects as well. We estimate that the Project will create 15,000 construction jobs and, eventually, at least 2,500 permanent jobs. We also estimate that the Project will generate \$6.1 billion in new tax revenues – and \$5.0 billion in *net* tax revenues – for the City and the State over the next 30 years. For these reasons as well, a preliminary injunction would be detrimental to the public interest.

(2) **The Harm to FCRC**

27. Delay also would subject FCRC to severe irreparable harm. At this time, it costs FCRC about \$2,500,000 per month to carry the real property that it has acquired for the Project and the overhead that is in place to work on the Project – a figure that does not include FCRC’s legal fees and also does not include the operating losses that the Nets basketball team, which has been owned by an FCRC affiliate since early 2004, and continues to incur while it is based at its current venue in New Jersey.³ In addition, delay on a project such as this one probably would subject FCRC to escalation in its eventual construction costs of nearly \$1,400,000 per month. Therefore, if a preliminary injunction were to stop the Project temporarily for even one month, the damages to which FCRC would be subjected would exceed \$4,000,000 per month. A delay of six months would subject FCRC to losses in excess of \$24,000,000. These losses would be devastating to FCRC and could jeopardize the Project damaging not only the developer, but also the City and state taxpayers, the beneficiaries under the Community Benefits Agreement, and countless others who would live and work at the Project in the future.

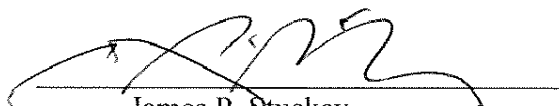
28. It is inconceivable to me that the petitioners in this litigation have the ability to post security that is adequate to protect FCRC against losses in that magnitude. Therefore, while the injury that petitioners would suffer if no injunction is

³ The Continental Area in New Jersey is completely antiquated. The Nets franchise actually lost money there during the recent basketball seasons when the Nets went to the final round of the NBA championships. The inadequacy of the Continental Arena was one of the reasons why the franchise was put up for sale, and one of the principal reasons why FCRC is pursuing the construction of a new state-of-the-art arena designed by Frank Gehry as part of the Project.

granted is non-existent, the injury to which FCRC would be subject were an injunction to be granted would be both enormous and irreparable.

F. Conclusion

29. For all of the foregoing reasons and those set forth in FCRC's other papers and the papers to be submitted on behalf of ESDC, petitioners' motion for a preliminary injunction should be denied in all respects, and FCRC's cross-motion to dismiss should be granted.


James P. Stuckey

Sworn to before me this
8 day of February, 2006.



JEANNE MUCCI
Notary Public, State of New York
No. 30-4834577
Qualified in Nassau County
Commission Expires March 30, 2007