COURT OF APPEALS OF THE STATE OF NEW YORK

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| In the Matter of | : | |
| DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., | : | Motion No. 2009-903 |
| Petitioners-Plaintiffs-Appellants, | : | |
| For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment | : | |
| - against - | : | |
| URBAN DEVELOPMENT CORPORATION, d/b/a Empire State Development Corporation, et al., | : | **AFFIRMATION IN OPPOSITION TO MOTION FOR PERMISSION TO APPEAL** |
| Respondents-Defendants-Respondents. | : | |

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

1. I am a member of the law firm of Kramer Levin Naftalis & Frankel LLP, the attorneys, together with Fried, Frank, Harris, Shriver & Jacobson LLP, for respondent-defendant-respondent Forest City Ratner Companies, LLC ("FCRC"). I make this affirmation in opposition to the motion by petitioners-plaintiffs-appellants ("petitioners") for permission to appeal to this Court from the February 26, 2009 decision and order of the Appellate Division, First Department. The Appellate Division's decision consists of an unsigned 25-page opinion joined in by Justices Gonzalez, Sweeney and DeGrasse and a separate 13-page concurring memorandum by Justice Catterson. Chief Judge Lippman was the fifth member of the Appellate Division panel that heard oral argument in the case, but he left the Appellate Division to become Chief Judge of this Court while the case was *sub judice* in the Appellate Division.

2. By its decision, the Appellate Division unanimously affirmed a 71-page decision and order of Justice Madden of the Supreme Court, New York County. The conclusion uniformly reached by all of the thorough decisions in this case – *i.e.*, that ESDC's determination was proper and should be sustained – was manifestly correct and does not warrant review by this Court.

3. FCRC joins in and fully adopts as its own the opposition by respondent-defendant-respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), to the motion for permission to appeal. I add this affirmation to emphasize a few pertinent points.

4. The Atlantic Yards project (the "Project") is an ambitious public-private project that is intended to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn into a vibrant and revitalized community. The Project is intended to sustain and enhance Brooklyn's ongoing renaissance by, among other things, eliminating blight from the Project's 22-acre site, bringing a multipurpose arena to Brooklyn, remediating environmental contamination at the MTA's existing eight-acre below-grade rail yard on the Project site, building important new mass transit facilities and improvements for the MTA, closing an enormous open trench that separates adjacent neighborhoods with a platform that will cover the MTA's rail yard, and creating numerous other improvements, including thousands of needed new housing units, of which at least 2,250 units will be affordable (*i.e.*, below-market-rate) housing. The arena will be the home of the New Jersey Nets N.B.A. basketball team and will bring a top-tier professional sports franchise to Brooklyn for the first time since the Dodgers left in 1957; the arena also will host amateur athletic events, circuses, graduations and other civic and entertainment events.

5. In addition, the Project is expected to be a powerful engine of economic growth that will create thousands of jobs and generate billions of dollars in net tax revenues for the State and the City. Furthermore, pursuant to an innovative Community Benefits Agreement (Appendix, at pp. 625a-697a), the FCRC affiliates that sponsor the Project are contractually bound to provide a wide array of far-reaching benefits to the historically most disadvantaged segments of Brooklyn's communities, including (but not limited to) contracting and employment opportunities, job training for permanent employment and job placement services, and affordable housing preferences.

6. The Project was the subject of an extensive public review process that was conducted pursuant to the Eminent Domain Procedure Law (the "EDPL"), the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law § 8-0101, *et seq.*) and the Urban Development Corporation Act (the "UDC Act") (Unconsolidated Laws § 6251, *et seq.*). The Project received final approval from ESDC on December 8, 2006, at which time ESDC's Board of Directors approved the adoption of (1) ESDC's determination and findings under Article 2 of the EDPL, (2) a modified General Project Plan under the UDC Act, and (3) a Final Environmental Impact Statement and environmental findings under SEQRA. On December 13, 2006, the MTA's Board of Directors adopted a findings statement under SEQRA and authorized the MTA's Chairman and Executive Director to proceed with the MTA's portion of the Project. On December 20, 2006, the Public Authorities Control Board – a State body whose three voting members are appointed by, respectively, the Governor, the Senate Majority Leader and the Speaker of the Assembly – determined that the Project was financially feasible, and approved ESDC's financial commitments to the Project.

7. This proceeding was commenced in April 2007 to challenge all of the foregoing December 2006 determinations on various statutory grounds. In their papers on the present motion, petitioners refer to recent actions, taken by the MTA's Board of Directors and ESDC in 2009, relating to certain proposed modifications to the Project. These recent actions are *dehors* the record and not proper for consideration in this case, which only challenges the December 2006 determinations.

8. On the present motion, petitioners' repeated conclusory assertions that this case somehow raises an issue as to "bias" and "corruption" on the part of ESDC officials (and, by implication, on the part of then Governor Pataki) are not only offensive, but they are not supported by any record evidence whatsoever, they never were made in the lower courts, and they thus have not been preserved for review by this Court. Furthermore, they are completely without merit. Petitioners' irresponsible assertions are merely an effort to prolong litigation for as long as possible in the hope that the pendency of litigation will "generate interminable delay and interference with" this important project. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991). Significantly, petitioners concede that, in the absence of their unsupported conclusory assertions of "bias and corruption," ESDC's findings are "otherwise facially sufficient" (Pet. Mem. at p. 6; *see also* p. 7 [ESDC's rejection of alternatives to the Project is "otherwise facially sufficient"]).

9. Second, while petitioners assert that "[i]t is undisputed that ESDC purposefully misrepresented conditions in the Project area and in the surrounding area in order to bolster its stated basis for condemning valuable private property and to support its stated justifications for the Project" (Pet. Mem. at p. 2; *see also* pp. 6, 7, 16-17, 25), the record – as opposed to petitioners' allegations – reveals that petitioners' assertion is a complete fabrication.

ESDC has made no misrepresentations, and the evidence in the record overwhelmingly supports ESDC's determination that the Project site suffers from significant blight. Indeed, none of the numerous state and federal judges who previously have reviewed the record has had any doubt that the record supports ESDC's determination that the Project site is blighted. Even Justice Catterson, who expressed substantial misgivings about the use of eminent domain to address blight in his concurring memorandum (and at the oral argument), concluded that the record compelled him to vote in favor of sustaining ESDC's determination – and he thereafter voted to deny petitioners' motion for permission to appeal to this Court.

10. ESDC's papers in opposition to the present motion address the blight issue comprehensively, but FCRC respectfully calls the Court's attention to two specific considerations.

11. First, more than 60% of the Project site is within the Atlantic Terminal Urban Renewal Area ("ATURA"), which has repeatedly been designated as blighted by the City of New York over a period of forty years.

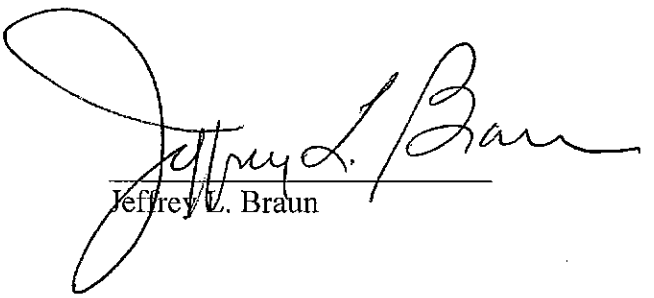
12. Second, the record also demonstrates that there is significant blight within the non-ATURA part of the site, consisting of two city blocks and about one-third of another block. To mention just one example, in December 2005 – a year before ESDC's final approval of the Project – ESDC authorized FCRC to demolish the buildings on five parcels within the non-ATURA portion of the Project site on an emergency basis notwithstanding the fact that ESDC was in the midst of its SEQRA review of the Project and applicable SEQRA regulations normally would have prohibited FCRC from making alterations to the site (*see* 6 NYCRR § 617.3(a)), subject to an exception for emergencies (§ 617.5(c)(33)). However, FCRC had just acquired these sites, and consulting structural engineers reported that the buildings on these

particular parcels were in such poor condition that there was an immediate danger to public safety due to the possibility that these buildings would suffer imminent structural failure and collapse.

13. Seven of the petitioners in this case, including the lead petitioner, commenced an Article 78 proceeding in which they sought, among other things, to prevent FCRC from demolishing these buildings, and challenged ESDC's determination that the buildings were structurally unsound. The Supreme Court denied the petitioners' applications for a temporary restraining order and a preliminary injunction and denied this aspect of their petition; an Appellate Division Justice denied the petitioners' application for an interim stay; an Appellate Division panel denied the petitioners' motion for a stay pending appeal; and the Appellate Division affirmed the Supreme Court's denial of the petitioners' claim. *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *lv. to app. denied*, 8 N.Y.3d 802 (2007). Petitioners' claim that the non-ATURA portion of the Project site somehow is not blighted is completely untenable and, given the determination of the prior *Develop Don't Destroy* litigation, barred by principles of collateral estoppel, which "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984). *See also, e.g., Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999).

14. For the foregoing reasons and those set forth in ESDC's opposition papers, FCRC respectfully submits that petitioners' motion for permission to appeal to this Court should be denied.

Dated: New York, NY
August 13, 2009



Jeffrey L. Braun