COURT OF APPEALS
STATE OF NEW YORK

In the Matter of		
DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,	:	
Petitioners-Plaintiffs-Appellants,	:	**MOTION TO REARGUE/RENEW MOTION FOR <u>LEAVE TO APPEAL</u>**
For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment	:	New York County
	:	Index No. 104597/07
-against-	:	
URBAN DEVELOPMENT CORPORATION d/b/a Empire State Development Corporation, et al.,	:	
Respondents-Defendants-Respondents.	:	

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

Preliminary Statement

Petitioners-Plaintiffs-Appellants ("Appellants") respectfully make this motion to renew their previous motion for leave to appeal the decision of the Appellate Division in *Matter of Develop Don't Destroy (Brooklyn) v. Urban Development Corporation*, 59 A.D.3d 312 (1st Dept, 2009) (Hereinafter "*Develop Don't Destroy")*. On December 1, 2009 this Court denied Appellants' motion. However, only two days after that decision, the Appellate Division, First

Department reached a diametrically opposed and inconsistent decision than it reached in this case and overturned a decision of respondent Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") which approved a Land Use Improvement Project and a Civic Project for Columbia University. *Kaur v. N.Y. State Urban Dev. Corp.*, 2009 WL 4348472 (1st Dep't Dec. 3, 2009).

Appellants recognize that motions to renew are rarely granted and do not make this request lightly. Rather the extraordinary similarities to the facts underlying the blight determinations by ESDC in *Develop Don't Destroy* and *Kaur*, present truly "extraordinary and compelling," reasons as required by 22 NYCRR § 500.24 to warrant the Court's reconsideration of Appellants' motion for leave to appeal. The *Kaur* decision was by a 3-2 majority and will be heard by this Court as a matter of right and there is at least a reasonable chance that this Court will affirm the *Kaur* decision, which could lead to the incongruous and inequitable result that one large project, Atlantic Yards, will be allowed to proceed in Brooklyn on an improper blight determination, while the Columbia University project will properly be halted in Manhattan.

The crux of Appellants' argument can be found in a comparison of Justice Catterson's opinions in the two cases. In *Develop Don't Destroy,* Justice Catterson wrote a scathing concurrence, more properly characterized as a dissent, but nevertheless concurred finding that there was sufficient evidence to defer to ESDC. However in *Kaur*, Justice Catterson, writing for the majority, on virtually identical

facts found there was insufficient basis to support ESDC's determination and that it was not entitled to such deference. There is no significant difference between the facts or the underlying theories in the two cases to warrant disparate results on either the law or the facts. Therefore, the Court should grant Appellants' motion for leave to appeal to be argued concurrently with *Kaur*, or alternatively, it should hold the motion for leave in abeyance and dispose of it consistent with its ultimate decision in *Kaur*.

Argument

Justice Catterson's opinion in *Kaur* explains that the ESDC's "blight designation" was "mere sophistry" created "by ESDC years after the scheme was hatched to justify the employment of eminent domain."[1] *Kaur*, slip op. at 16. Instead of addressing blight, the "project has always primarily concerned a massive capital project for Columbia" and "[i]ndeed, it is nothing more than economic redevelopment wearing a different face." *Id*. Precisely the same is true of the ESDC's "blight" designation in this case.

In *Develop Don't Destroy,* Justice Catterson criticized ESDC as "ultimately being used as a tool of the developer to displace and destroy neighborhoods that are 'underutilized'. *Develop Don't Destroy,* 59 A.D.3d at 326. That is essentially the same criticism that he leveled at ESDC in *Kaur*.

[1] "Even a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor." *Kaur,* slip op. at 29-30.

In *Kaur*, Columbia University selected the properties it desired for its expansion project. Years thereafter, the ESDC made *post hoc* "findings" that these properties were "substandard and insanitary" and approved the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project. In this case, respondent Forest City Ratner Companies (FCRC) selected the properties it coveted for building thousands of units of luxury housing and an arena for a professional basketball team. Years thereafter, the ESDC made *post hoc* "findings" that the targeted properties were "substandard and insanitary" and approved the Atlantic Yards Land Use Improvement and Civic Project.

In *Kaur*, the ESDC hired AKRF to study Columbia's preselected takings area, and AKRF found that the entire area was "substantially unsafe, unsanitary, substandard, and deteriorated." *Kaur*, slip op. at 6-8. AKRF's findings were largely premised on underutilization, which Justice Catterson characterized as a "wholly arbitrary standard of counting any lot built to 60% or less of maximum FAR as constituting a blighted condition." *Id*. at 31.[2] Here, the ESDC similarly hired AKRF to conduct a study of the preselected takings area, and AKRF found that the entire area was characterized by blighted conditions. Like its findings for

[2] "The time has come to categorically reject eminent domain takings solely based on underutilization. This concept put forward by the respondent transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal." *Kaur*, slip op. at 32.

Columbia, AKRF's findings for FCRC were largely premised on "underutilization" based on the same 60% FAR benchmark.[3]

In *Kaur*, the Court found that there was no evidence the area was blighted before Columbia began acquiring properties. *Kaur*, slip op. at 15. Similarly, in this case Justice Catterson stated that determinations of blight should have been based upon an analysis, or a "snapshot" of the conditions that prevailed in the area when FCRC announced the project in 2003. *Develop Don't Destroy*, 59 A.D. 3d at 330.

In *Kaur*, the Court noted that ESDC originally contracted with AKRF to study trends in real estate values and rental demand, a study that was never performed. *Kaur*, slip op. at 17. Similarly in the instant case, Justice Catterson criticized AKRF and ESDC for not completing a similar study that had also been included in the scope of work for the blight study. *Develop Don't Destroy*, 59 A.D. 3d at 330-331.

The only conceivable meaningful distinction between the Atlantic Yards Project and the Columbia University Project, is that in evaluating Atlantic Yards, Justice Catterson found that because the northern portion of the property area was included in the Atlantic Terminal Urban Renewal Area (ATURA), that provided a

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[3] In *Kaur*, Columbia University had retained AKRF to consult about the project *prior* to AKRF being hired by ESDC. Here, Ratner similarly retained a leading environmental lawyer, David Paget, to consult on the Atlantic Yards project, after which the ESDC hired Mr. Paget to assist it in conducting the environmental review process. *See Develop Don't Destroy (Brooklyn) v. N.Y. State Urban Dev. Corp.*, 31 A.D.3d 144 (1st Dep't 2006).

sufficient, albeit slim, basis for the highly suspect extension of the blight designation to the three blocks lying south of Pacific Street. However, in *Kaur*, Justice Catterson essentially found to the contrary when he noted that 2002 West Harlem Master Plan found no basis to determine the area was blighted. *Kaur*, slip op. at 15. That is the same situation in Brooklyn when the ATURA plan had been revised in 2004 after the announcement of the Atlantic Yards Project, yet there was no argument or offer that ATURA should be extended south of Pacific Street or that the blighted areas extended beyond the boundaries of ATURA.

When this Court reviews *Kaur*, it will be reconsidering the elements of a blight determination, including such factors as when the blight study should be conducted, the need for a study evaluating market trends, the concept of underutilization as a basis for blight and the extent that a request from a development interest for the designation of a project as a land use improvement project colors the objectivity of the blight assessment. The issue will come down to the amount of deference that should be afforded ESDC. The salient factors present in both *Kaur* and *Develop Don't Destroy* are the same, and it would be the height of injustice to permit Atlantic Yards to go forward when the Columbia Project is properly being stopped because of a fallacious blight determination.

Conclusion

For the foregoing reasons, we respectfully request that the Court grant the motion to renew and grant leave to appeal concurrently with *Kaur*, or in the

alternative hold this motion in abeyance pending the outcome of its decision in *Kaur* and then dispose of this case accordingly.

Dated: December 23, 2009 YOUNG SOMMER… LLC

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