

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

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In the Matter of	:	
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DEVELOP DON'T DESTROY (BROOKLYN),	:	New York County
INC., et al.,	:	Index No. 104597/07
	:	
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	:	AFFIDAVIT IN OPPOSITION
CORPORATION, et al.,	:	<u>TO APPLICATION FOR A STAY</u>
	:	
Respondents-Defendants-Respondents.	:	
	:	
----- X		

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

MARYANNE GILMARTIN being sworn, states:

1. I am Executive Vice President of respondent-defendant-respondent Forest City Rather Companies, LLC ("FCRC"). Two affiliates of FCRC, Atlantic Yards Development Company, LLC and Brooklyn Arena, LLC are the sponsors of the Atlantic Yards Civic and Land Use Improvement Project (the "Project"). I make this affidavit in opposition to the application by petitioners-plaintiffs-appellants ("petitioners") for a stay of construction work at the Project site pending the appeal from the decision, order and judgment of the Supreme Court, New York County (Joan A. Madden, J.), dated January 11, 2008, which dismissed the Article 78 petition.

2. I am responsible for the management of the Commercial and Residential division of FCRC, and I am the senior FCRC executive with over-all day-to-day responsibility for the Project. I have over 13 years of experience in the development of major entertainment and commercial projects for FCRC. Prior to joining FCRC, I was Assistant Vice President for commercial development at the New York City Economic Development Corporation.

3. This affidavit provides a general overview of the Project and demonstrates that a stay of the work now underway would be injurious to the public interest, and would wrongfully expose the Project's sponsors to enormous financial harm. The accompanying affidavit of Robert P. Sanna, R.A., FCRC's Executive Vice President and Director of Construction Design and Development, describes in more detail the work that has been done, is underway and is about to be commenced, all of which is lawful and proper. This work is crucial to the timely completion of the Project, and a delay to even one step in the work's critical sequence would have a serious adverse impact.

A. Overview of the Project

4. The Project is an ambitious public-private undertaking that will transform a largely derelict 22-acre swath of underutilized land near central Brooklyn into a vibrant, revitalized community. The Project will contribute substantially to Brooklyn's ongoing renaissance. It will, among other things, eliminate blight from the 22-acre Project site, bring a multipurpose arena to Brooklyn, remediate environmental contamination, build important new mass transit facilities and improvements, and create more than 6,400 units of needed new housing, including 2,250 units of affordable (*i.e.*, below-market-rate) housing. The arena will be the home of the New Jersey Nets N.B.A. basketball team and thus will bring a top-tier professional sports franchise to Brooklyn for the first time since the Dodgers baseball team left

more than 50 years ago. In addition to serving as the home of the Nets, the arena will host amateur athletic events, circuses, graduations and other civic and entertainment events. The Project is being designed by Frank Gehry, one of the preeminent American architects of our time. Among the Project's many supporters are Governor Spitzer, former Governor Pataki, Mayor Bloomberg, City Comptroller Thompson, Senator Schumer, Borough President Markowitz and numerous members of the State Legislature and City Council.

5. In addition to the direct public benefits that the Project will create, the Project also is a powerful engine of economic growth. The Final Environmental Impact Statement (the "FEIS") for the Project estimates that the Project will create 15,000 construction jobs and between 1,300 and 6,400 permanent office jobs, depending on the ultimate mix of commercial and residential uses in the Project. The FEIS also estimates that the Project will generate \$5.6 billion in new tax revenues – and \$4.4 billion in net tax revenues – for the City and the State over the next 30 years.

6. After an extensive public review process conducted pursuant to the Eminent Domain Procedure Law ("EDPL"), the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law § 8-0101, et seq.), and the Urban Development Corporation Act (the "UDC Act") (Unconsol. Laws § 6251, et seq.), the Project received final approval on December 8, 2006, from the Board of Directors of respondent-defendant-respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"). At that time, the ESDC's Board of Directors approved the adoption of (1) ESDC's Determination and Findings pursuant to the EDPL, (2) a General Project Plan pursuant to the UDC Act, and (3) the FEIS pursuant to SEQRA. In addition, on December 20, 2006, the Public Authorities Control Board (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.

B. The Public Interest

7. An injunction halting work on the Project would contravene the public interest. For one thing, it would delay those components of the Project that are intended to foster important public purposes, including the elimination of blight, environmental remediation, and the creation of an arena – which, as the motion court recognized, will serve numerous civic purposes, including the relocation of the Nets basketball team from New Jersey to Brooklyn – the creation of new housing (including affordable housing), the improvement of important mass transit facilities, and the generation of jobs and tax revenues.

8. An injunction also would delay other substantial public benefits. One important aspect of the Project is its sponsors' entry into an extensive Community Benefits Agreement with a broad coalition of Brooklyn community groups and community action organizations.¹ This Agreement is historic, because it is the first such agreement ever entered into by the developer of a major New York City project. We believe that it may set a standard for future projects in the City and around the country.

9. By the Community Benefits Agreement, the Project's sponsors have bound themselves to carefully articulated commitments to the local communities, which 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. As one example, not only does the Agreement commit the

¹ The leaders of these Brooklyn community organizations include Rev. Lydia Sloley, Bertha Lewis, Elenora Bernard, Freddie Hamilton, James Caldwell, Rev. Dr. Herbert Daughtry, Delia Hunley-Adossa and Charlene Nimmons.

Project's sponsors to assuring that a percentage of the construction contracts for the Project will be awarded to minority- or women-owned businesses, but it also obligates the sponsors to establish, in consultation with the other parties to the Agreement, programs to hire residents of the surrounding communities who are members of minorities, women or people of low or moderate-income, and to train them for permanent employment (§ IV(A)). The Community Benefits Agreement 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)), and also commits the Project's sponsors to offer "all residential tenants currently renting and legally occupying a legal residential dwelling unit as their primary residence within the Project site," and who are in good standing under their leases and resided in their current residence for at least one year as of the date of the Agreement (June 27, 2005), with "reasonably comparable living space in a new unit within the Project, at their then current rent," plus interim housing at no greater cost than their current rent, plus the payment of brokerage commissions and reasonable relocation costs (§ VI(D)(1)).

10. These commitments are only a handful of those contained in the Agreement, but all of the Agreement's commitments have teeth in the form of substantial legally enforceable penalties for a failure by FCRC to fulfill its obligations. Furthermore, FCRC is honoring these commitments in the performance of the demolition and construction work at the site and has been entering into relocation agreements with willing tenants still residing in the Project's footprint.

C. The Financial Impact of Delay

11. Delay in the progress of construction work for the Project not only would defer the Project's important public benefits, but it would expose FCRC to severe irreparable harm, resulting from, among other things, (a) the prolongation of the time in which FCRC must

carry the real property and the Project's overhead without generating income, (b) costs incurred in connection with equity invested in the Project, and (c) the prolongation of the Nets basketball team's operating losses arising from its use of the current inadequate arena in New Jersey.

12. At this time, it costs FCRC about \$2,400,000 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 take into account the operating losses that the Nets basketball team, which has been owned by an FCRC affiliate since 2004, continues to incur while it is based at its current venue in New Jersey.

13. Delay on a construction project such as this one probably would subject FCRC to significant escalations in its eventual construction costs. FCRC cannot accurately predict the amount of these cost escalations. However, given that the costs of materials historically have increased over time and also given the magnitude of the Project, it is reasonable to assume that a delay would cause a significant adverse financial impact. A delay also would subject FCRC to penalties and claims from construction contractors that would be forced to stop work, demobilize and subsequently start up again. FCRC cannot accurately quantify these penalties, but they would be significant.

14. In addition, during the construction of the temporary rail yard described in Mr. Sanna's accompanying affidavit, the Long Island Railroad ("LIRR") must modify its operations to allow trains displaced from the MTA's Vanderbilt Yard facility to be serviced elsewhere. As a result, FCRC is now paying approximately \$300,000 per month to cover the increase in the LIRR's operating costs. A stay pending appeal would increase the period of time during which FCRC must make these payments.

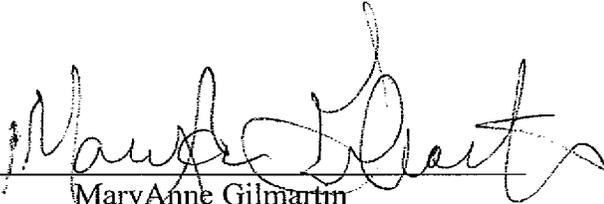
15. Therefore, if construction work on the Project was stayed temporarily for even one month, the damages to which FCRC would be subjected would be about \$6,000,000 per month, not including the escalation of construction costs. A delay of two months would thus expose FCRC to damages of at least \$12,000,000.

16. A delay also would expose FCRC and its affiliates to other financial injuries of an extraordinary nature. The current work is proceeding in accordance with an intricate schedule, detailed in Mr. Sanna's affidavit, that is intended to allow the new arena to be completed in time for the Nets to relocate there in 2010. FCRC's construction schedule has been carefully drawn to allow the arena to be ready in 2010 by commencing work now on vacant properties that are owned by FCRC, the MTA and the City of New York, with work on properties that are owned or occupied by other parties deferred until ESDC actually uses its powers of eminent domain to acquire title to and possession of those properties. Therefore, even a short delay in the ongoing work could jeopardize the arena's availability for both basketball games and community events, and thus would expose the Nets to millions of dollars in additional operating losses.

17. These financial consequences would be devastating to FCRC, injuring not only the developer, but also the City and the State, the intended beneficiaries of the Community Benefits Agreement (who are the least privileged residents of Brooklyn), and countless others who would live and work at the Project in the future. It is inconceivable that petitioners would be able to post a bond in an amount sufficient to protect FCRC – let alone the public – from the adverse financial impact of a stay.

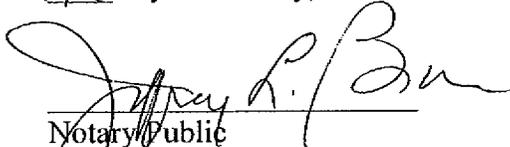
D. Conclusion

18. For these reasons, the Court should not issue any form of order that would prevent FCRC from continuing with the construction-related work that is ongoing or about to commence at the Project's site.



Mary Anne Gilmartin

Sworn to before me this
17th day of January, 2008.



Notary Public

JEFFREY BRAUN
NOTARY PUBLIC, State of New York
No. 02822687663
Qualified in Westchester County
Commission Expires November 30, 2008