

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

In the Matter of : New York County
Index No. 104597/07

DEVELOP DON'T DESTROY :
(BROOKLYN), INC., *et al.*, :

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.*, :

Respondents-Defendants-Respondents. :

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**REPLY AFFIRMATION OF JEFFREY S. BAKER IN
FURTHER SUPPORT FOR APPELLANTS' MOTION FOR LEAVE TO APPEAL**

JEFFREY S. BAKER, an attorney duly admitted to practice before the Courts of the State of New York, hereby avers, under penalty of perjury, as follows:

1. I am a member of the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for appellants Develop Don't Destroy Brooklyn, Inc. *et al.*, and respectfully submit this affirmation in reply to the Affirmation of Philip E. Karmel in Opposition to Appellants' Motion for Leave to Appeal to the Court of Appeals ("Karmel Aff."), submitted on behalf of respondent Urban Development Corporation d/b/a/ Empire State Development Corporation ("ESDC"), and in reply to the Affirmation in Opposition to Appellants' Motion for Leave to Appeal of Jeffrey L. Braun ("Braun Affirm"), submitted on behalf of respondent Forest City Ratner Companies, LLC ("FCRC").

2. ESDC mischaracterizes Appellants' motion as seeking another review of ESDC's Blight Study (Karmel Aff ¶ 10), whereas Appellants actually seek review and clarification of the legal standards of review of ESDC's findings and determinations.

3. As discussed in my moving affirmation, this Court relied upon a line of cases, beginning with *Kaskel v. Impellitteri*, 306 N.Y. 73 (1953), which have reviewed blight determinations under the admittedly higher standard of taxpayer actions brought under General Municipal Law § 51, which requires a showing that the alleged illegal action by the governmental player is clearly illegal or corrupt. In contrast, the "arbitrary and capricious" standard applicable to an Article 78 proceeding, which Appellants believe should apply herein, requires that the action has a rational basis supported by substantial evidence. The case relied upon by ESDC, *Pell v. Bd of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck*, 34 N.Y.2d 222 (1974), does not equate to the same extremely high level of deference.

4. Incredibly, ESDC continues to deny that the neighborhood in and around the Project site experienced rapid, desirable, private residential redevelopment both before and after the Project was announced (Karmel Affirm. ¶12), even though, as this Court plainly acknowledged at oral argument, and as Justice Catterson discussed in his concurrence, the evidence of the redevelopment trends in the blocks in and around the non-ATURA portion of the Project site is obvious and insurmountable. ESDC knew its repeated statements proffered as justification of the Project, that "blighted conditions . . . are unlikely to be removed without public action," were false when it made them (R. 20085), and Appellants submit that ESDC's knowing reliance on false justifications for the

Project renders its findings impermissibly biased, and arbitration and capricious, under the Article 78 standard of review.

5. ESDC also mischaracterizes Appellants' argument that section 6259(1) of the Urban Development Corporation Act ("UDCA") precludes ESDC from selling or leasing a "civic project" to a private entity which is not carrying out a "community, municipal, public service or other civic purpose" under the UDCA. Regardless of whether a professional sports arena can rationally be deemed to serve a civic purpose under the UDCA, ESDC's plan to lease the entire operation of the Barclays Center Arena to a private, for-profit entity with no obligation to carry out any "civic purpose" violates the plain language of the UDCA.

6. Regarding FCRC's contentions set forth in Mr. Braun's affirmation, I submit that it is grossly inappropriate for FCRC to try to disparage Appellants' exercise of their right to seek judicial review, given that FCRC has utilized its special relationship with ESDC, as Justice Catterson stated in his concurrence, to turn the UDCA into its own private development tool.

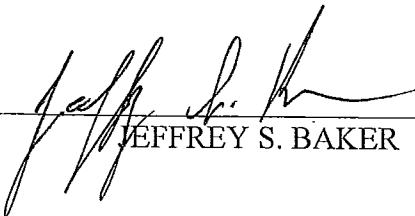
7. Moreover, the statements by Mr. Braun touting the supposed public benefits of the project are greatly overstated and largely no longer operable. For reasons completely unrelated to this litigation, including the enormous cost of the project, the economic recession, the lack of market demand, and FCRC's inability to obtain sufficient financing, the actual construction of even some, let alone all, of the Project is highly in doubt.

8. It has been repeatedly reported in the press that the Project is in the midst of significant downsizing, and that the Barclays Center Arena may be the only element to

move forward within the next several years.¹ Even this Court has noted, in the decision from which appellants seek leave to appeal, the economic uncertainties facing the Atlantic Yards Project.

9. Unlike the situation in *Society of Plastics Industry, Inc. v County of Suffolk*, 77 N.Y.2d 761 (1991), which FCRC relies upon, Appellants are not pursuing this case to obtain an economic benefit. Rather, Appellants are striving to preserve the character of their community against a state agency which has usurped the local approval process and the protections of local land use laws. Having had the political process taken away from them, Appellants, all neighborhood organizations, should not have the door to the courts also barred, simply to assist the economic needs of a private party which is facing obstacles of its own making.

April 9, 2009


JEFFREY S. BAKER

¹ See, e.g., “Atlantic Yards, Inch by Inch”, New York Magazine, March 29, 2009, <http://nymag.com/news/intelligencer/topic/55684> (breaking down specific project delays as well as the elimination of Miss Brooklyn from project); “Q&A Gehry at 80”, The Architects Newspaper, March 24, 2009, http://archpaper.com/e-board_rev.asp?News_ID=3321 (architect Frank Gehry quoted regarding Atlantic Yards Project: “I don’t think it’s going to happen.”); “ESDC CEO Lago admits the obvious: Atlantic Yards would take ‘decades’”, Norman Oder Blog, <http://atlanticyardsreport.blogspot.com/2009/04/esdc-ceo-lago-admits-obvious-atlantic.html>.