

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

In the Matter of	:	
DEVELOP DON'T DESTROY (BROOKLYN), INC., <i>et. al.</i> ,	:	REPLY AFFIRMATION OF RANDALL L. RASEY IN FURTHER SUPPORT OF APPELLANTS' MOTION TO ENLARGE THE APPELLATE APPENDIX
Petitioners-Plaintiffs-Appellants,	:	
For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment	:	
-against-	:	New York County Index No. 104597/07
URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, <i>et al.</i> ,	:	
Respondents-Defendants-Respondents.	:	

RANDALL L. RASEY, an attorney admitted to practice before the courts of the State of New York, affirms under penalty of perjury as follows:

1. I am an associate of the law firm Barton Barton & Plotkin LLP, co-counsel for Appellants in the above-captioned appeal. I respectfully make this affirmation in reply to the Affirmation of Philip E. Karmel sworn to on September 3, 2008 (the "Karmel Affirm.") submitted on behalf of Respondent ESDC in opposition to Appellants' motion to enlarge the appellate appendix to include the EIS Contract Scope.¹

2. ESDC concedes that the EIS Contract Scope was part of its agreement with its environmental consultant, AKRF, and does not dispute that the document was created to define the scope of the studies and investigations to be conducted by AKRF for the environmental

¹ Shortened names and other defined terms used in Appellants' moving papers have the same meanings herein.

review and Blight Study which Appellants have challenged in this case, or that ESDC had the EIS Contract Scope before it when it made the determinations at issue herein. (Karmel Affirm.

¶2)²

3. Rather, ESDC contends that that it did not directly rely on the EIS Contract Scope in making any of the decisions at issue in this proceeding, and, on that basis, asserts that the EIS Contract Scope should not have been included in the administrative record. ESDC is wrong, because the EIS Contract Scope not only is part of the record upon which ESDC's relied, it defines the scope of the matters which ESDC considered.

4. ESDC has argued throughout this proceeding that it rationally based its determinations regarding blight and development of the Non-ATURA Blocks within the Project footprint solely on the point-in-time physical conditions addressed in the Blight Study, and that it had no evidence before it of the continuing, substantial residential redevelopment and rapidly rising property values on those blocks.

5. The EIS Contract Scope directly rebuts ESDC's arguments, in that it plainly establishes that ESDC actually engaged AKRF to analyze and compare rents, value and vacancy trends, and economic activity within the Project site and in the surrounding area. (RA 28) Thus, the EIS Contract Scope strongly suggests that ESDC intentionally omitted such factors from the Blight Study submitted by ESDC in this proceeding as part of its administrative record.

6. Under CPLR 7804(e), ESDC was required to submit "a certified transcript of the record" to the Court below "with sufficient material necessary to render a decision in this matter." *Argyle Conservation League, Inc. Town of Argyle*, 223 A.D.2d 796, 788 (3d Dep't

² Neither ESDC nor anyone else involved in the Project review has explained why ESDC did not require completion of the EIS Contract Scope or whether the data contracted for was ever submitted to ESDC.

1996). The EIS Contract Scope was necessary to permit the Court to determine whether ESDC properly determined both that (i) the Non-ATURA Blocks were “blighted”, and (ii) they would not continue to undergo substantial, desirable redevelopment unless they were razed and redeveloped as part of the Project. Therefore, ESDC should have included it in its record.

7. None of the cases relied upon by ESDC support its position. (See Karmel Affid. ¶2) Specifically, in *Pacific Shores Subdivision, California Water District v. U.S. Army Corps of Engineers*, 443 F. Supp. 2d 1 (D.D.C. 2006), decided under federal law, there was no showing that the agency’s decision makers were aware of the documents which the plaintiff sought to add to the record, and the court noted that plaintiffs actually had to bring the documents to the agency’s attention. *Argyle Conservation League, supra*, actually supports Appellants, in that the appellate court in that case found that the motion court properly “had before it all the documents furnished pursuant to Freedom of Information Law requests”, which is how the EIS Contract Scope was obtained by an independent journalist and ultimately disclosed to Appellants. 223 A.D.2d at 798. And *Regional Action Group for the Environment, Inc., v. Zagata*, 245 A.D.2d 798 (3d Dep’t 1997), simply iterates the rule, without elaboration, that judicial review is limited to the record as it existed before the agency when the decision was made, which criterion is plainly met herein.

8. ESDC’s argument that Appellants should have somehow discovered the EIS Contract Scope and presented it to the Court below is particularly cynical and disingenuous, given that ESDC excluded the document from its administrative record and failed to disclose its existence to Appellants or to the Court. Indeed, ESDC directly attacked Appellants’ argument that known real estate market conditions in and around the Project site warranted a market study of the area, contending that “Appellants present no competent evidence to support this claim,

which is mere speculation.” (ESDC Opp. Brf. at 38) Now, it is clear that ESDC determined early on that a market study was in fact warranted, but excluded that information from the Blight Study.

9. Appellants were unaware that ESDC had even prepared a scoping document as an adjunct to its contract with AKRF, and, as stated in my moving Affirmation, learned of the existence of the EIS Contract Scope on August 15, 2008, when a journalist referenced it in his online blog after obtaining it through a Freedom of Information Law request. Further, the Court below declined Appellants’ request to conduct an evidentiary hearing on the basis of ESDC’s blight determination. (See Karmel Affirm. ¶3)

10. The EIS Contract Scope was part of the record before the decision makers at ESDC, was exclusively within ESDC’s control, and is essential for adequate judicial review of decisions challenged in this proceeding. Appellants should not be prejudiced by ESDC’s own failure to disclose it or to include it in the administrative record.

WHEREFORE, Appellants respectfully request permission to submit the EIS Contract Scope as a reply appendix, and such other and further relief as to this Court seems just and proper.

Dated: September 5, 2008


RANDALL L. RASEY