

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

In the Matter of	:	New York County
	:	Index No. 104597/2007
	:	
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.	:	

**MEMORANDUM OF LAW IN OPPOSITION TO
THE MOTION FOR A PRELIMINARY INJUNCTION
AND IN SUPPORT OF THE CROSS-MOTION
FOR A BRIEFING SCHEDULE AND PREFERENCE ON THE APPEAL**

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PRELIMINARY STATEMENT

Respondent-defendant-respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) respectfully submits this memorandum in opposition to the motion of petitioners-plaintiffs-appellants (“appellants”) for a preliminary injunction and in support of ESDC’s cross-motion for a briefing schedule and preference on the appellants’ appeal.

Appellants’ application for a preliminary injunction is submitted on the same litigation papers they submitted in support of their application for a temporary restraining order for the same relief. That request was denied after argument of counsel before the Court (Justice Angela M. Mazzarelli) on January 18, 2008. Appellants’ motion for a preliminary injunction should also be denied.

Their motion seeks to stop the ongoing construction work at the site of the Atlantic Yards Civic and Land Use Improvement Project (the “Atlantic Yards Project” or “Project”), a major ESDC-sponsored Project in Brooklyn that will replace a currently blighted area with a new professional sports arena, more than 6,000 residential units (including 2,250 affordable housing units), office space, eight acres of open space, and a new Long Island Rail Road (“LIRR”) train yard to serve the LIRR Atlantic Terminal. Although their motion seeks to stop all construction on this multi-billion dollar Project, their particular focus is the work required to construct the temporary rail yard that must be completed and in operation before the current LIRR yard is decommissioned and rebuilt. Specifically, the appellants seek to stop the closure and dismantlement of the Carlton Avenue Bridge, whose southern abutment must be removed to complete work on the temporary rail yard.

Appellants' perfunctory motion papers – consisting of a conclusory affirmation of counsel with no supporting memorandum of law or affidavits – fail to establish any of the elements required for the granting of a motion for preliminary injunction. ESDC's cross-motion for a briefing schedule and a preference should be granted to allow this appeal to be argued in the May term so that this litigation, which clouds the future of this important public project, can be brought to a speedy conclusion.

POINT I

THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED

Appellants are not entitled to a preliminary injunction because they have failed to demonstrate: (i) a likelihood of ultimate success on the merits; (ii) irreparable injury absent the granting of the preliminary injunction; and (iii) a balance of the equities in their favor. *See, e.g., Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748, 751 (1988). A preliminary injunction is an extraordinary exercise of a court's equitable powers. "So drastic a remedy is not to be granted unless the moving papers establish a clear and undisputed right to relief." *Deane v. City of New York Department of Buildings*, 177 Misc.2d 687, 694 (Sup. Ct. N.Y. Co. 1998) (citing *Park Terrace Caterers v. McDonough*, 9 A.D.2d 113, 114 (1st Dep't 1959)). The party seeking a preliminary injunction has the burden of establishing its clear entitlement to such relief, based upon the facts presented in its moving papers. A "movant's rights must be certain as to the law and the facts and the burden of establishing such an undisputed right rests upon the one seeking the relief." *Current Audio, Inc. v. RCA Corp.*, 71 Misc.2d 831, 834 (Sup. Ct. N.Y. Co. 1972). *See also Peterson v. Corbin*, 275 A.D.2d 35, 37 (2nd Dep't 2000) (preliminary injunction is a "drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts

upon the moving papers, and the burden of showing an undisputed right rests upon the movant” (citation omitted)). Since the appellants here fail to demonstrate that any of the factors weigh in favor of granting a preliminary injunction, such relief should be denied.

A. Appellants Have No Likelihood of Success on the Merits.

Appellants have not established a likelihood of success on the merits of their appeal. As they acknowledge, *see* Affirmation of Jeffrey S. Baker (“Baker Aff.”) ¶ 17, their claims could succeed only if they overcome the deferential standard of review that courts apply in challenges to agency decisions under the State Environmental Quality Review Act (“SEQRA”) and the Urban Development Corporation Act (the “UDC Act”). In such cases, judicial review is limited “to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination ‘was affected by an error of law or was arbitrary and capricious or an abuse of discretion.’” *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (quoting CPLR § 7803[3]); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986).

In their motion for a preliminary injunction, appellants assert that the decision of New York State Supreme Court, New York County (Justice Joan A. Madden) dismissing all of their claims (the “Decision”) was in error on three specific points. Appellants’ assertions, however, are not supported by any disciplined legal analysis that suggests – much less establishes – that the appellants have any realistic prospect of success in their appeal of the Decision. Nevertheless, appellants’ three arguments are specifically addressed below.

1. The Decision Correctly Concluded That the Public Authorities Control Board's Review of ESDC's Approval of the Project Was Not Subject To SEQRA.

All parties agree that the review of the Project by ESDC, the Metropolitan Transportation Authority and the City of New York was subject to SEQRA. Thus, a comprehensive environmental impact statement ("EIS") was prepared, and each of these governmental entities issued a detailed SEQRA Findings Statement pursuant to section 8-0109(8) of the Environmental Conservation Law ("ECL"). Appellants contend, however, that a fourth governmental body – the Public Authorities Control Board ("PACB") – was also required to make SEQRA Findings prior to its scrutiny of ESDC's decision to approve the Project. The Decision analyzed appellants' contentions in detail but held them to be without merit. *See* Decision at 14-17.

Appellants argue that "[t]he court below erroneously held that PACB's review was solely limited to reviewing the financial elements and guarantees of the project and it did not have discretion regarding other issues and that environmental considerations had no bearing on its determination." Baker Aff. ¶ 22. They contend that the court ignored the "inherent discretion" vested in the PACB, as well as the appellants' supposed "proof" that PACB members have on occasion considered non-statutory factors in reviewing a public authority's decision to approve a project.

The Decision begins by reviewing applicable Court of Appeals precedent interpreting the language of SEQRA, which provides that the term "actions" does not include "official acts of a ministerial nature, involving no exercise of discretion." ECL § 8-0103(5)(ii). The Decision notes that in *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993) ("*Gavalas*"), the Court of Appeals held that "when an agency has some discretion, but that discretion is circumscribed by a narrow set of

criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered ‘actions’ for purposes of SEQRA’s EIS requirements.” Decision at 15 (quoting *Gavalas*, 81 N.Y.2d at 326).

Next, the Decision examines the language of the Public Authorities Law – the statute that created the PACB – to determine whether that statute prescribes criteria for PACB’s review that bear on the sorts of environmental issues analyzed under SEQRA. The Decision correctly held that PACB’s responsibility under the Public Authorities Law “is confined to reviewing the financial feasibility and impact of proposed debt-incurring projects, which bear no relationship to the environmental concerns that may be raised in an [environmental impact statement].” Decision at 17. Therefore, PACB’s approval of ESDC’s decision to approve the Project was not an “action” subject to SEQRA.¹

Appellants attack the Decision’s reliance on Court of Appeals precedent, arguing that it is limited to the specific type of approval (a building permit) at issue in *Gavalas*. See Baker Aff. ¶ 25. But appellants do not point to any language in *Gavalas* limiting the SEQRA principle articulated in that decision to building permits. Appellants fail to mention that this Court and other courts have followed the principle set forth in *Gavalas* in other contexts. See *CitiNeighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Comm’n*, 306 A.D.2d 113, 114 (1st Dep’t 2003) (issuance of a certificate of appropriateness under the City’s landmarks law held not an “action” subject to SEQRA), *appeal dismissed*, 2 N.Y.3d 727 (2004); *Ziamba v. City of Troy*, 37

¹ This conclusion is not altered by the fact that, if appellants’ “proof” is to be credited, individual members of the PACB, such as the Speaker of the Assembly, have allegedly on occasion made political decisions based on non-statutory factors. See ESDC Mem. of Law at 99 n.26, annexed as Exhibit 5 to Affirmation of Philip E. Karmel (“Karmel Aff.”).

A.D.3d 68, 75 (3d Dep't) (discretionary issuance of demolition permit held not an "action" subject to SEQRA), *leave to appeal denied*, 8 N.Y.3d 806 (2006); *Lighthouse Hill Civic Assoc. v. City of New York*, 275 A.D.2d 322, 323 (2d Dep't) (City Planning Commission determination allowing modification of topography and tree removal in a Special Natural Area District held not an "action" subject to SEQRA), *leave to appeal denied*, 95 N.Y.2d 768 (2000).

2. The Decision Correctly Concluded That ESDC Properly Designated the Atlantic Yards Project as a "Civic Project" Under the UDC Act.

The Decision correctly determined that ESDC properly designated the arena portion of the Project as a "civic project" under the UDC Act. *See* Decision at 26-32. Recent ESDC-approved civic projects include the new Yankee Stadium under construction in the Bronx, the new CitiField Stadium for the Mets under construction in Queens, improvements to Ralph Wilson Stadium (home of the Buffalo Bills), and the construction of a new arena for the Buffalo Sabres. *See* Verified Answer ¶ 6 (Karmel Aff. Exh. 4). Under the UDC Act, a "civic project" requires the existence of a need for an "educational, cultural, recreational, community, municipal, public service or other civic facility." Unconsol. L. § 6260(d).²

Appellants allege that the Decision "ignored the clear language of the UDC Act" in reaching the conclusion that a "recreational" facility could be one at which

² The Decision focused on whether the arena portion of the Project was properly designated a "civic project." *See* Decision at 27. In approving the Project, ESDC also cited other components in finding that the Project was a "civic project," including eight acres of publicly accessible open space; new subway entrances; an "Urban Room" connected to the arena that "will accommodate[e] the major flows of people to and from the transit center during the day and night ... and allow[] for a variety of public uses and programmed events throughout the year"; and an upgraded rail yard for LIRR. *See* ESDC's General Project Plan ("GPP") at 36-37 (Karmel Aff. Exh. 3).

spectators enjoy watching a professional sports team such as the National Basketball Association Nets. Baker Aff. ¶ 27. To the contrary, the Decision carefully analyzes the relevant statutory language. *See* Decision at 27-29. Noting that the term “recreational” in the UDC Act’s definition of “civic project” does not have “a controlling statutory definition,” *id.* at 27, the Decision considers “recreational” as “a word of ‘ordinary import’ which must be construed in accordance with its usual and commonly understood meaning.” *Id.* at 27-28. The court looked to dictionary definitions of “recreation,” and found that attending a Nets game would be a recreational activity for the spectators. Decision at 29. Appellants’ motion papers cite to no legal authority for reading the ordinary meaning of the term “recreation” out of the statute.³

Appellants also argue that the court ignored state legislation that allegedly demonstrates that the New York State Legislature “felt special authorizing legislation was necessary” to permit ESDC to fund sports stadiums. Baker Aff. ¶ 28. Contrary to the appellants’ assertion, the Decision did not ignore this legislation. Rather, the court below properly rejected the appellants’ interpretation of the relevance of the law they cite, holding that the appellants “point to no language in that law indicating an intent to narrow or amend the broad terms of the UDCA.” Decision at 30.⁴

Appellants also argue that the “UDCA requires that a civic project must be owned or leased to a public entity or a not-for-profit corporation.” Baker Aff. ¶ 31. The

³ In addition to serving as the home of Brooklyn’s only major league sports franchise, the arena will also host college basketball games, concerts, the circus, college graduation ceremonies, and political and religious events that would also constitute activities falling within the broad parameters of a “civic” facility under the UDC Act.

⁴ To the extent it is relevant at all, the 1993 law cited by appellants indicates that sports facilities are a subcategory of “civic projects” under the UDC Act. *See* L. 1993, ch. 258 § 2 (defining the term “project” in the 1993 law as “a civic project of the [ESDC] that entails the development or modernization of a sports facility”). *See* ESDC’s Mem. of Law at 42-43 (Karmel Aff. Exh. 5).

Decision carefully examined the language of the UDC Act, noting, in particular, the provisions that call for “maximum participation by the private sector of the economy.” Decision at 31 (quoting Unconsol. L. § 6252). The Decision held that the UDC Act “expressly authorizes” ESDC to “sell or lease ... any civic project to the state ... to any municipality ... or to *any other entity* which is carrying out a community, municipal, public service or other civic purpose.” Decision at 31 (quoting Unconsol. L. § 6259(1)). The Decision’s analysis of ESDC’s authority – and the conclusion that a professional sports facility leased to a private entity can be a civic project – is grounded squarely in the UDC Act itself. Appellants’ argument that the Decision was based on authority granted under “separate statutes or special legislation” (Baker Aff. ¶¶ 30-31) is clearly without merit.

3. The Decision Correctly Concluded That ESDC Properly Designated the Atlantic Yards Project as a “Land Use Improvement Project” Under the UDC Act.

In addition to designating portions of the Project as a “civic project” under the UDC Act, ESDC also designated the Project as a “land use improvement project” under that Act. *See* GPP at 33-35 (Karmel Aff. Exh. 3). The designation of a “land use improvement project” requires a finding that “the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area.” Unconsol. L. § 6260(c)(1). It is this finding that the appellants and the Decision refer to as the “blight determination.” ESDC’s blight finding was based on information compiled in a 378-page Blight Study that was included in the administrative record and reviewed in detail by Justice Madden.

Since appellants have not provided a copy of the Blight Study to this Court in its motion papers, they limit their arguments to generalized assertions.

Appellants contend that “the blight determination by ESDC is clearly arbitrary and capricious” and that “[t]o let that determination stand would be to condone blight determinations based solely on volumes of papers without consideration for their content and accuracy.” Baker Aff. ¶ 47. Appellants also allege that ESDC “arbitrarily and capriciously included the entire three block southern section of the project area, without sufficient basis and without responding or considering the public comments that challenged the blight determination.” *Id.* ¶ 4(C).⁵ Appellants further allege that “the record failed to explain the basis for ESDC’s determination either that individual lots were blighted or why the designated blocks or sections thereof were blighted.” Baker Aff. ¶ 20.

The Decision reflects Justice Madden’s careful review of the Blight Study and other relevant portions of the administrative record, as well as the applicable caselaw, in holding that ESDC properly designated the Atlantic Yards Project as a “land use improvement project” under the UDC Act. Decision at 32-40.

Appellants’ contentions on appeal are the same as those asserted in their papers and in oral argument before the court below. *See* Baker Aff. ¶¶ 34-45. Notwithstanding appellants’ assertions, the Decision makes clear that the court considered and rejected these contentions. The Decision examines the Blight Study and notes that it “evaluated the 73 lots comprising the entire Project Site, by presenting a detailed profile for every lot, as well as one or more photographs of the exteriors and some interiors of the properties.” Decision at 36. The Decision gives particular attention

⁵ The blocks to which the appellants refer are Blocks 1127 and 1129 and a small portion of Block 1128 that are the only portions of the Project site not in the Atlantic Terminal Urban Renewal Area (“ATURA”), which the City has designated as blighted ten times, most recently in 2004. *See* Decision at 33.

to the non-ATURA portion of the Project site, observing that in “[p]rofile[ing] the 52 lots in the non-ATURA portion, the Blight Study analyzed each lot in terms of the blight characteristic noted above, finding one or more such characteristics in at least 30 lots. Among the specific blight characteristics identified were serious structural problems, unsanitary and unsafe conditions, underutilization, vacant lots and vacant buildings.” *Id.* at 37. Ultimately, the Decision held that “contrary to petitioners’ assertion, the Blight Study documented well more than a ‘handful’ of blight characteristics on well more than a ‘few’ properties in the non-ATURA portion of the project.” *Id.* at 37.

The Decision also held that the UDC Act “simply requires a finding of ‘substandard and insanitary conditions’ as to the Project site as a whole,” *id.*, and that the appellants’ suggestion that the non-ATURA portion of the Project site should be considered on its own “is inconsistent with the legal authorities ... holding that the focus of any blight determination should be directed at the entire area of a redevelopment project as a unit, rather than individual parcels.” *Id.* at 37-38. Appellants provide no basis for their assertion (Baker Aff. ¶ 44) that the court below misapplied relevant caselaw in reaching this conclusion.

Petitioners also allege that ESDC made its determinations without responding to or considering the public comments on the Blight Study. Baker Aff. ¶¶ 4(C), 39. ESDC did in fact consider the public comments on the Blight Study, even going so far as to prepare a written analysis of these comments. *See* Verified Answer ¶ 134 (Karmel Aff. Exh. 4).

Finally, appellants claim that the court below should have held an evidentiary hearing on “blight,” but they fail to disclose that: (i) they never filed a motion

