

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	:	Index No. 114631/09
DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,	:	IAS Part 57
Petitioners,	:	Justice Marcy S. Friedman
For a Judgment Pursuant to Article 78 of the CPLR	:	
– against –	:	
EMPIRE STATE DEVELOPMENT CORPORATION, et al.,	:	
Respondents.	:	

In the Matter of the Application of	:	Index No. 116323/09
PROSPECT HEIGHTS NEIGHBORHOOD	:	IAS Part 57
DEVELOPMENT COUNCIL, INC., et al.,	:	Justice Marcy S. Friedman
Petitioners,	:	AFFIRMATION OF
For a Judgment Pursuant to Article 78 of the Civil Practice	:	PHILIP E. KARMEL
Law and Rules	:	IN OPPOSITION TO
– against –	:	THE MOTIONS TO
EMPIRE STATE DEVELOPMENT CORPORATION, et al.,	:	REARGUE AND RENEW
Respondents.	:	

PHILIP E. KARMEL, an attorney admitted to the practice of law in the State of New York, hereby affirms and declares under the penalty of perjury:

1. I am a member of Bryan Cave LLP, attorneys in these proceedings for respondent Empire State Development Corporation (“ESDC”). I respectfully submit this affirmation in opposition to petitioners’ motions for reargument and renewal with respect to this Court’s decision and order dismissing this proceeding. Petitioners’ motions should be denied for the reasons stated in ESDC’s Memorandum of Law submitted herewith and for the reasons stated below.

2. I am fully familiar with the facts and circumstances set forth herein. The facts are based on my own personal knowledge, participation in the judicial proceedings discussed below, my visits to the site of the Atlantic Yards Project (the “Project”) and the construction progress reports posted on ESDC’s web site.

Progress of the Project Since the Affirmation of the 2009 MGPP

3. The affirmative statement of facts in ESDC’s Answer and the documents included in the 13-volume administrative record previously presented to the Court provide a detailed review of the facts that led up to ESDC’s affirmation of the Modified General Project Plan for the Atlantic Yards Project on September 17, 2009 (the “2009 MGPP”). The discussion below briefly summarizes the progress that has been made with respect to the Project since the affirmation of the 2009 MGPP.

4. On December 23, 2009, the Brooklyn Arena Local Development Corporation successfully sold \$511 million of tax-exempt bonds in a well publicized and critical milestone for the Project. The proceeds of this bond offering will be used to help pay for the cost of constructing the Arena.

5. On the same date, FCRC delivered several letters of credit, totaling more than \$160 million, to ESDC and the MTA to: (i) guarantee payment of the purchase price of ESDC’s acquisition of certain MTA property interests in the Arena Block; (ii) provide security towards the reconstruction of the permanent rail yard; and (iii) guarantee payment of the “just compensation” eminent domain awards.

6. On the same date, numerous leases, contracts and other agreements between and among ESDC, FCRC and other entities were finalized and executed (collectively, the “Master Closing Documents”). Among the several hundred contracts, leases, escrow

agreements and other documents that collectively comprise the Master Closing Documents is the Development Agreement annexed to petitioners' motion papers.

7. On the same date, ESDC filed a petition with the Supreme Court for Kings County, pursuant to Article 4 of the Eminent Domain Procedure Law, to acquire the non-MTA property required for the construction of the Arena, the permanent rail yard and ancillary parking facilities and construction staging areas. This first phase condemnation includes the Arena Block (*i.e.*, Blocks 1118, 1119 and 1127 and certain adjoining street segments); Block 1129 and an adjoining street segment; Lots 42 and 47 of Block 1121; and Lot 35 of Block 1120. The land that is the subject of this first-phase condemnation includes the land on which the Arena will be constructed and also includes the land designated for the construction of the permanent railyard and eight non-Arena buildings (Buildings 1, 2, 3, 4, 11, 12, 13 and 14). This proceeding (the "Condemnation Proceeding") is pending before Justice Abraham Gerges, who presides over the condemnation part of Kings County Supreme Court.

8. On March 1, 2010, Justice Gerges issued a Vesting Order and supporting decision in the Condemnation Proceeding. The Vesting Order transferred title to all of the properties described in the preceding paragraph to ESDC.

9. On April 9, 2010, Justice Gerges signed an Order to Show Cause as to why Writs of Assistance should not be issued requiring certain occupants of the first-phase condemnation properties to vacate the premises and directing the Sheriff of the City of New York to eject them if they refuse to leave.

10. The Order to Show Cause hearing was held on April 21, 2010 before Justice Gerges. At the hearing, several settlements were reached whereby persons occupying the

ESDC-owned condemnation properties agreed to leave the properties on or before May 7, 2010, while others agreed to vacate their premises on or before June 30, 2010.

11. As a result of these settlements, it is expected that on May 7, 2010, ESDC will have achieved “vacant possession” of the Arena Block. This critical milestone will allow the draw-down of the \$511 million bond proceeds to construct the Arena.

12. I expect that the balance of the first-phase condemnation properties now owned by ESDC will be vacant by approximately June 30, 2010, either as a result of settlements or additional proceedings before Justice Gerges.

13. Construction work on the Project has also continued apace since September 2009 and is expected to accelerate rapidly after vacant possession of the Arena Block is achieved on May 7, 2010. Since the affirmation of the 2009 MGPP on September 17, 2009, the temporary LIRR rail yard has been completed and is operational. The dismantling and removal of components of the old rail yard on the Arena Block have been completed. Since September 2009, FCRC has also completed several segments of new sewers, sewer chambers and water mains under streets adjacent to the Project site; continued abating asbestos in buildings on the Project site to ready them for demolition; demolished one building on the site; finished most of the pre-excitation environmental testing on Blocks 1127 and 1119; and installed wells to monitor water quality pursuant to its environmental remediation commitments.

14. In March 2010, the contractor for the Arena was issued a notice to proceed. The contractor has begun to construct the site enclosure for the Arena construction. Drilling activities for support of excavation for the northeastern half of the Arena have begun. In the meantime, FCRC has installed maintenance and protection of traffic devices, including jersey

barriers with plywood fencing, along Atlantic Avenue, in anticipation of the commencement of Arena construction and in accordance with the requirements of the FEIS.

**The Development Agreement and Related Master Closing Documents
Were Made Available to the Public On January 25, 2010**

15. On January 25, 2010, ESDC made the Development Agreement and most of the other Master Closing Documents available to the public. ESDC provided notice of the documents' availability to Jeffrey S. Baker, Esq., the attorney for petitioners Develop Don't Destroy (Brooklyn), Inc., et al. and other persons who had filed a request for the documents under the Freedom of Information Law.


16. Mr. Baker inspected the documents at ESDC's offices on January 28, 2010 and marked the Development Agreement and a number of other documents for photocopying.

17. On February 4, 2010, after receiving a check for the photocopying from Mr. Baker, ESDC sent Mr. Baker a copy of the Development Agreement and the other documents he had marked for photocopying by FedEx/Priority Overnight delivery.

18. Petitioners provide no justification for having failed to seek a stay of this proceeding pending their receipt of the Master Closing Documents, for having failed to move this Court to enlarge the record to include the Development Agreement, or for having failed to move this Court to allow them to amend their petition to include allegations pertaining to the Development Agreement. Instead of taking any of these actions, petitioners waited until this Court dismissed the proceeding before filing a motion to renew based on the Development Agreement.

WHEREFORE, ESDC respectfully requests that petitioners' motions to reargue and renew be denied; but, if the Court grants either motion, that it re-affirm its decision, order and judgment dismissing each of the proceedings with prejudice; and that ESDC be granted its costs and disbursements in these proceedings and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 27, 2010


PHILIP E. KARMEL