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.	:	

AFFIRMATION IN OPPOSITION TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL AND IN SUPPORT OF THE CROSS-MOTION TO COMPEL APPELLANTS TO EXPEDITE THEIR APPEAL

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

1. I am a member of the law firm of Kramer Levin Naftalis & Frankel LLP, the attorneys, together with Fried, Frank, Harris, Shriver & Jacobson LLP, for Forest City Ratner Companies, LLC ("FCRC"), one of four respondents-defendants-respondents ("respondents") in this litigation. The three other respondents are (1) the New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC"), (2) the Public Authorities Control Board (the "PACB"), and (3) the Metropolitan Transportation Authority (the "MTA").

2. I make this affirmation (a) in opposition to the motion by petitioners-plaintiffs-appellants ("petitioners") for a stay pending appeal, and (b) in support of the motion by ESDC to compel petitioners to perfect and prosecute their appeal on an expedited basis. The appeal is from a decision, order and judgment (one paper) of the Supreme Court, New York County (Joan A. Madden, J.), entered on January 17, 2008, which dismissed the petition in this Article 78 proceeding in its entirety. A copy of Justice Madden's decision is annexed hereto as Exhibit A. It was published in *The New York Law Journal* on January 23, 2008 (p. 27, col. 1).

3. The motion for a stay seeks to stop FCRC from proceeding with construction work at the site of the Atlantic Yards project, described in more detail below, particularly the closure and dismantling of the Carlton Avenue bridge, which is a block-long segment of Carlton Avenue in Brooklyn. The bridge spans the MTA's below-grade Vanderbilt Yard facility and connects Atlantic Avenue and Pacific Street, which run along either side of the Yard. On January 18, 2008, Justice Angela M. Mazzarelli of this Court denied an emergency application by petitioners for an interim stay. As previously scheduled and publicly announced, the bridge was closed to traffic on January 23, 2008, and work in preparation for its imminent dismantlement has begun. It is anticipated that, by February 5, 2008, the bridge's roadway will have been partially removed.

4. In addition to the denial of petitioners' motion for a stay pending appeal, it is essential that this Court establish an expedited briefing schedule for the appeal that will allow the appeal to be heard by this Court by no later than its May 2008 term.

5. On January 18, 2008, as soon as the parties were advised by personnel in the office of this Court's clerk that Justice Mazzarelli had denied petitioners' emergency application for an interim stay, petitioners' counsel – who had been discussing an expedited

briefing schedule for the appeal with respondents' counsel – suddenly reversed course and announced that petitioners would wait the full ninth months that would be available in a normal case before perfecting their appeal and serving and filing their opening brief. It was obvious that, if this Court was not going to halt work at the project site, petitioners' intention – their Plan B – would be to prolong the pendency of this appeal for as long as possible in the hope that intervening events unrelated to litigation would interfere with FCRC's ability to implement the Atlantic Yards project. In that connection, FCRC submits the accompanying affidavit of Andrew P. Silberfein, an Executive Vice President who is its Director of Financing. The Silberfein affidavit shows that, in view of the turmoil that now is affecting the financial markets, the prolonged pendency of this appeal could have an adverse effect on the financing of the Atlantic Yards project, particularly the complex bond financing that is planned for the multi-purpose arena that is a key component of the project and the first building to be constructed. It also could jeopardize the other buildings that would follow shortly thereafter, including the project's affordable housing components. The Atlantic Yards project is an ambitious public-private project that has been designed to further significant public objectives. The enormous public interest in having this project built requires the establishment of an expedited briefing schedule for this appeal, and the rejection of any tactic by which petitioners try to strangle the project with multiple litigations that, while without merit, remain pending for prolonged periods of time and therefore could create significant difficulties in moving the project forward.

6. In addition to the Silberfein affidavit submitted herewith, there are annexed to this affirmation as Exhibits B and C, respectively, copies of affidavits by MaryAnne Gilmartin, an FCRC Executive Vice President who is the senior FCRC executive with over-all day-to-day responsibility for the Atlantic Yards project, and Robert P. Sanna, R.A., an FRCR

Executive Vice President who is FCRC's Director of Construction Design and Development. Unlike my affirmation and the accompanying Silberfein affidavit, the Gilmartin and Sanna affidavits were prepared last week, in anticipation of petitioners' emergency application for an interim stay, but prior to respondents' receipt of petitioners' actual papers in support of their motion. The Gilmartin and Sanna affidavits were submitted to Justice Mazzarelli on January 18, 2008, when she denied petitioners' emergency application for an interim stay.

A. Background – the Atlantic Yards Project and Resulting Litigations

7. This litigation is an attack on the Atlantic Yards Civic and Land Use Improvement Project, an ambitious public-private project that is intended to transform a largely derelict 22-acre swath of underutilized land near central Brooklyn into a vibrant and revitalized community. The Atlantic Yards project is intended to sustain and enhance Brooklyn's ongoing renaissance by, among other things, eliminating blight from the project's 22-acre site, bringing a multipurpose arena to Brooklyn, remediating environmental contamination at the MTA's Vanderbilt Yard (which is an existing eight-acre rail yard), building important new mass transit facilities and improvements for the MTA, closing an enormous open trench that separates adjacent neighborhoods by constructing a platform to cover the MTA's rail yard, and creating numerous other improvements, including more than 6,400 units of needed new housing, of which 2,250 units will be affordable (*i.e.*, below-market-rate) housing. The arena will be the home of the New Jersey Nets N.B.A. basketball team and will bring a top-tier professional sports franchise to Brooklyn for the first time since the Dodgers baseball team left in 1957; the arena also will host amateur athletic events, circuses, graduations and other civic and entertainment events. The project is being designed by Frank Gehry, a California-based Brooklyn native who is one of the preeminent American architects of our era. The project's many supporters include

Governor Spitzer, former Governor Pataki, Mayor Bloomberg, City Comptroller Thompson, Senator Schumer, Brooklyn Borough President Marty Markowitz and numerous members of the State Legislature and the City Council.

8. In addition to the foregoing public benefits, the project will be a powerful engine of economic growth. The environmental impact statement for the project estimates that the project will create 15,000 construction jobs and between 1,300 and 6,400 permanent jobs, as well as $4.4 billion in net tax revenues for the City and the State over 30 years. Furthermore, pursuant to an innovative Community Benefits Agreement (Exhibit D hereto), the FCRC affiliates that sponsor the project are contractually bound to provide a wide array of far-reaching benefits to the historically most disadvantaged segments of Brooklyn's communities, including (but not limited to) contracting and employment opportunities, job training for permanent employment and job placement services, and affordable housing preferences. For example, the Agreement obligates FCRC's affiliates to "use good faith efforts" to cause at least 35% of the construction workers in the project to be members of minorities and at least 10% to be women, with 35% of each category to be "journey level" workers (§ IV(B)). Furthermore, not only are the Agreement's obligation contractually enforceable against FCRC's affiliates, but the Agreement obligates FCRC to fund an "Independent Compliance Monitor" who is hired by the community groups that are parties to the Agreement to monitor FCRC's compliance and investigate any complaints about FCRC's implementation of its commitments (§ III(D)).

9. The Atlantic Yards project was the subject of an extensive public review process that was conducted pursuant to the Eminent Domain Procedure Law (the "EDPL"), the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law § 8-0101, *et seq.*) and the Urban Development Corporation Act (the "UDC Act") (Unconsolidated

Laws § 6251, *et seq.*). The project received final approval from ESDC on December 8, 2006, at which time ESDC's Board of Directors approved the adoption of (1) ESDC's determination and findings under Article 2 of the EDPL, (2) a General Project Plan under the UDC Act, and (3) a Final Environmental Impact Statement and environmental findings under SEQRA. On December 13, 2006, the MTA's Board of Directors adopted a findings statement under SEQRA and authorized the MTA's Chairman and Executive Director to proceed with the MTA's portion of the project. On December 20, 2006, the PACB – a State body whose three voting members are appointed by, respectively, the Governor, the Senate Majority Leader and the Speaker of the Assembly – determined that the project is financially feasible.

10. This proceeding was commenced on or about April 4, 2007. The lead petitioner, Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), is the main opposition group fighting the Atlantic Yards project. The other petitioners are local neighborhood associations; there are no individual petitioners. DDDB previously spearheaded another litigation, commenced in January 2006 against the project, in which DDDB unsuccessfully sought to (a) prevent FCRC from demolishing a number of vacant buildings that had been determined by consulting engineers to be so structurally unsound that they posed a danger to public safety, and (b) disqualify ESDC's environmental counsel from representing ESDC in the public review process for the project on the ground of a purported appearance of impropriety. *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d 144 (1st Dep't 2006), *lv. to app. denied*, 8 N.Y.3d 802 (2007).

11. The commencement of this litigation as an Article 78 proceeding in the Supreme Court, New York County, is part of a litigation strategy that has been orchestrated by DDDB to avoid EDPL § 207, which provides that the Appellate Division in the Judicial

Department in which real property that is subject to condemnation is situated – in this case, the Second Department – shall have "exclusive" jurisdiction to review, at the behest of condemnees, determinations by condemnors to exercise eminent domain, and further requires that such proceedings be heard expeditiously and be given a preference (§ 207(B)). The issues that may be considered in such a proceeding under EDPL § 207 include whether the condemnor's determination was constitutional, whether "the proposed acquisition is within the condemnor's statutory jurisdiction or authority," and whether "the condemnor's determination and findings were made in accordance with" the EDPL and SEQRA (EDPL § 207(C)). Specifically, as described below, DDDB has organized two separate lawsuits that challenge the approvals of the Atlantic Yards project on precisely the foregoing grounds. Neither of these suits is, technically, a proceeding commenced under EDPL § 207, and therefore neither is governed by the requirement in EDPL § 207(B) that it "shall be heard and determined ... as expeditiously as possible and with lawful preference over other matters." However, the considerations that led the Legislature to enact that requirement apply with equal force to the present litigation.

12. First, DDDB's spokesman, Daniel Goldstein, who owns a condominium unit in the project's footprint, is the lead plaintiff in an action brought by several condemnees in the U.S. District Court for the Eastern District of New York to challenge the constitutionality of ESDC's use of eminent domain in furtherance of the project. On June 6, 2007, Judge Nicholas G. Garaufis dismissed that lawsuit on the ground that the complaint does not state a cognizable constitutional claim, holding, among other things, that the project's numerous public purposes satisfy the "public use" requirement to which takings of property are subject under the Fifth Amendment to the U.S. Constitution. *Goldstein v. Pataki*, 488 F.Supp.2d 254 (E.D.N.Y. 2007).

An appeal from that decision is pending before the U.S. Court of Appeals for the Second Circuit, was briefed on an expedited schedule, and was heard by that court on October 9, 2007.

13. Second, DDDB itself and the other petitioners – none of which is a condemnee – thereafter commenced this proceeding in the Supreme Court, New York County, to challenge on statutory grounds the approvals of the project by ESDC, the PACB and the MTA. The petition asserts that ESDC violated SEQRA on various grounds and exceeded its authority under the UDC Act, while the PACB and the MTA allegedly failed to fulfill their obligations under SEQRA. The proceeding was briefed on an expedited basis and heard by Justice Madden on May 3, 2007. On January 11, 2008, Justice Madden issued a 71-page opinion, order and judgment (Exhibit A hereto) in which she rejected each of petitioners' contentions and sustained the determinations of ESDC, the PACB and the MTA.

14. A separate group of condemnees, apparently unrelated to DDDB, did bring a proceeding in the Appellate Division, Second Department, under EDPL § 207, to challenge ESDC's approval of the Atlantic Yards project. On November 7, 2007, that court denied the petition in that case and confirmed ESDC's determination. *Anderson v. N.Y.S. Urban Development Corp.*, 45 A.D.3d 583 (2d Dep't 2007), *lv. to app. denied*, ___ A.D.3d ___, Docket No. 2007/00372 (2d Dep't Jan. 8, 2008). In addition, the petitioners in *Anderson* brought a separate proceeding in the Supreme Court, New York County, in which they sought to challenge ESDC's determination on other grounds. The motion court dismissed those claims, holding that the claims should have been asserted in the Appellate Division, Second Department, under EDPL § 207. On October 16, 2007, this Court affirmed that determination. *Anderson v. N.Y.S. Urban Development Corp.*, 44 A.D.3d 437 (1st Dep't 2007). No request was made for permission to appeal to the Court of Appeals from this Court's determination.

B. Petitioners' Motion for a Stay Should Be Denied

15. Petitioners' motion papers are not a model of clarity as to precisely what it is that petitioners would have this Court stay pending the determination of their appeal – *i.e.*, whether the requested stay would apply to all ongoing construction work at the project site, or just to the closing and dismantling of the Carlton Avenue bridge. Petitioners thus broadly assert that, "[s]hould construction of the project proceed in the interim," they "will be irreparably harmed by changes to the area which will have a lasting effect on the local environment and quality of life" (Baker Aff. ¶ 3), but they go on in the very next sentence to complain, "[i]n particular," of the closure of the Carlton Avenue bridge "on or about January 23, 2008 for at least two years," which supposedly "will result in significant unmitigated adverse impacts as traffic is directed to alternative routes" and, if this appeal succeeds, will leave petitioners with a bridge that will have been "demolished without any plan or financing for its replacement" (*id.*). Significantly, when the parties appeared before Justice Mazzarelli on January 18, 2008, petitioners complained only of the closure and demolition of the Carlton Avenue bridge.

16. Closure of the Carlton Avenue bridge is simply the latest phase of construction work that commenced at the project site in February 2007 – about eleven months ago – as set forth in more detail in the Sanna affidavit that is Exhibit C hereto. As that affidavit points out (¶¶ 2, 8), there are construction crews totaling nearly 100 workers now engaged in work at the site, and if the broad stay that petitioners intimate that they seek were to be granted, most of those workers would be demobilized and sent home – in some cases, without pay.

17. In fact, as the Sanna affidavit explains (¶¶ 9-12), FCRC's contractors have been engaged in a substantial amount of asbestos abatement and demolition work at the numerous vacant buildings that FCRC affiliates have acquired in the project site. As of this time, about 25 such buildings have been demolished, and another eight are being demolished or will be

demolished shortly, so that any halt of the work on those buildings is likely to leave some of them in a dangerous partly demolished condition. In April 2007, when petitioners commenced this proceeding, they applied to Justice Madden for a temporary restraining order to halt this demolition. Justice Madden denied petitioners' application in April, and petitioners never applied to this Court for a restraining order under CPLR § 5704.

18. In addition, in November 2007, FCRC contractors began to open some of the street beds in the project site to begin the process of relocating water and sewer mains for the project (*see* Sanna Aff. ¶¶ 13-14). Although FCRC has taken measures to minimize the inconvenience and disruption to persons and businesses in the vicinity of the site, the opening of these streets does create inconvenience, and petitioners have not sought to enjoin it.

19. Most significantly, moreover, since February 2007, FCRC's contractors have been engaged in the construction of a replacement rail yard on the eight-acre portion of the project site that is owned by the MTA. This property, which is the MTA's Vanderbilt Yard, is the site of an active storage and maintenance yard for Long Island Railroad passenger train cars. As the Sanna affidavit explains (¶¶ 3-6, 16-17), in order to build the project's first buildings, including the arena, it will be necessary to dismantle the existing yard, which is situated in the western portion of the MTA's property, at the location of the arena and surrounding buildings. Before the existing yard can be dismantled, however, it is necessary to build a replacement yard so that the LIRR can continue to operate – and provide essential mass transit services – while the arena and surrounding buildings are constructed.

20. The construction of the replacement yard for the MTA is thus an essential component of the project and must be completed for the rest of the project to proceed without disruption to MTA operations. Indeed, back in April 2007, when petitioners applied to Justice

Madden for a TRO halting work at the site, they initially included work at the MTA site within the scope of the work that they sought to enjoin. However, after hearing the MTA's explanation that construction of the replacement yard was essential to avoid disruption of the MTA's operations, petitioners abandoned their request to halt such work.

21. Furthermore, the closing and dismantling of the Carlton Avenue bridge is an essential component of the construction of the replacement yard. As the Sanna affidavit explains (¶¶ 3-6, 16-22), the work on the temporary yard has been carefully choreographed and now has reached the point where the bridge must be closed and dismantled. In particular, the replacement yard is being built on the southern half of the MTA's Vanderbilt Yard, and the structural supports for the southern half of the Carlton Avenue bridge occupy a part of the Vanderbilt Yard on which new tracks for the replacement yard must be installed. Unless the bridge is dismantled, trains will not be able to enter or leave the rail yard, because the bridge itself prevents the installation of the necessary new tracks. In construction terminology, dismantling the Carlton Avenue bridge is a "critical path" item in the project, and if it is delayed at this time, the whole project will be delayed.

22. Against this background, petitioners simply have not shown and cannot show the three items that are necessary to obtain injunctive relief *pendente lite* – *i.e.*, (a) a likelihood of ultimate success on the merits, (b) irreparable harm in the absence of injunctive relief, and (c) a balance of the equities in their favor.

(a) <u>No likelihood of ultimate success</u>

23. As a threshold matter, petitioners cannot make the essential showing of a likelihood that they will prevail on this appeal. The public review of the Atlantic Yards project – including the environmental analysis and review mandated by SEQRA – prior to the project's

final approval by ESDC and then the MTA's Board of Directors was extensive and exhaustive. The record of the administrative proceedings before ESDC that was submitted to Justice Madden by ESDC, and that thus is part of the record on this appeal, exceeds 20,000 pages in length.

24. Justice Madden's 71-page opinion, to which this Court is respectfully referred, is comprehensive and thorough. It systematically addresses, and ultimately rejects, each of the numerous contentions that petitioners placed before the motion court in their ceaseless effort to defeat the Atlantic Yards project. Simply put, petitioners were unsuccessful in opposing this project before the political and policy-making arms of the State and City governments, and now are trying to use the courts to achieve a result that was not attainable in the executive and legislative branches. Their legal contentions are entirely fallacious, as Justice Madden recognized.

(b) No irreparable harm

25. There is no showing that petitioners will suffer irreparable harm of a sort for which legal or equitable redress is available. Since January 2006, DDDB has periodically sought, without success, to obtain an injunction that would restrain FCRC from commencing some phase of the construction work for this project. In January 2006, in its prior litigation, DDDB sought to stop the emergency demolition of structurally dangerous vacant buildings. In April 2007, DDDB asked Justice Madden to halt the demolition of additional vacant buildings that FCRC owns. Now it is asking this Court to prevent FCRC from dismantling the Carlton Avenue bridge. In each instance, what DDDB really was trying to prevent was not some legally cognizable form of irreparable harm, but rather the commencement of a new phase of work that might create a public perception that the project was proceeding and that DDDB's legal campaign to stop the project was ineffective and doomed to failure.

26. Here, DDDB and the other petitioners have not shown that they will suffer any sort of irreparable that is different in nature from what is being experienced by the general public. Normally, a petitioner who wishes to challenge governmental action must show that, by virtue of its ownership or occupancy of specific property or other special circumstances, it will suffer special injury that is different from what the public at large experiences, and that is within the zone of interests that the relevant laws are intended to protect. *See, e.g., Sun-Brite Car Wash, Inc. v. Zoning Board of Appeals of Town of North Hempstead*, 69 N.Y.2d 406, 412 (1987). Petitioners have made no such showing.

27. The Carlton Avenue bridge is being closed and dismantled in accordance with a contract between FCRC and the City of New York. FCRC is contractually obligated to the City to rebuild the bridge, and that obligation is guaranteed by FCRC's publicly owned affiliate, Forest City Enterprises, Inc., which, according to its most recent SEC filings, has total assets of nearly $10 billion. Therefore, petitioners' contention that, were they to prevail on this appeal, there would be no ability to rebuild a bridge is misguided speculation.

28. Furthermore, the bridge is being closed and dismantled – and traffic is being re-routed – in accordance with extensive technical requirements and plans that have been established by the City's Department of Transportation to reduce the impact on traffic in the vicinity and to protect the public in general. Petitioners concede that the impact of this temporary closure of the Carlton Avenue bridge was examined in the Final Environmental Impact Statement ("FEIS") for the project (*see* Baker Aff. ¶ 3), and petitioners' myriad attacks on the FEIS never included any criticism of the FEIS's examination of this particular item. Even now, petitioners have not offered testimony by any individual who resides or transacts business in the vicinity of the Carlton Avenue bridge, nor have they offered testimony by a traffic expert.

Instead, petitioners' motion is supported exclusively by a lawyer's affirmation, and the lawyer whose affirmation is presented is based in Albany and has no first-hand knowledge. In short, petitioners have utterly failed to show that their rights are being prejudiced in some special and irreparable manner.

(c) Balance of the equities

29. In this case, the balance of the equities tilts decidedly against petitioners. As shown above, they have failed to show legally cognizable irreparable harm. At the same time, the harm to the public – and to FCRC – if a stay were to be granted would be overwhelming.

30. The public interest is an important consideration in deciding whether to issue a preliminary injunction. *DePina v. Educational Testing Service*, 31 A.D.2d 744, 745 (2d Dep't 1969). *See also, e.g., Seitzman v. Hudson River Associates*, 126 A.D.2d 211, 214-15 (1st Dep't 1987). Here, a stay pending appeal will delay – and perhaps jeopardize – the numerous significant public purposes that the Atlantic Yards project is intended to achieve. A stay also would be likely to cause the demobilization of many of the nearly 100 construction workers who now are engaged in construction activities at the site.

31. As the annexed Gilmartin affidavit shows (¶¶ 11-16), a stay also would subject FCRC to millions of dollars in financial injury. The expenses that FCRC would continue to incur while a stay was in effect and that are relatively easy to calculate would exceed $12 million per month, and that does not include the operating losses that the New Jersey Nets basketball team incurs while it continues to use an antiquated arena as its home venue. Additional financial injuries – such as escalations in construction costs and damage claims by contractors – are much more difficult to compute but virtually certain to occur. It simply is

inconceivable that petitioners have the financial means necessary to provide a bond in an amount that would be sufficient to protect FCRC from the enormous adverse financial consequences of a stay pending appeal. Therefore, the potential harm to FCRC of a stay far outweighs the harm that petitioners are likely to suffer if there is no stay.

32. For all these reasons, as Justice Mazzarelli recognized when she was confronted with petitioners' emergency application for an interim stay, it would not be appropriate to grant petitioners a stay pending the determination of this appeal.

C. ESDC's Cross-Motion to Expedite the Appeal Should Be Granted

33. FCRC fully supports and joins in ESDC's cross-motion for an order that compels petitioners to perfect this appeal expeditiously and allows the appeal to be heard by this Court during its May 2008 term. It is apparent from the position taken by petitioners' counsel in the Clerk's office on January 18, 2008, that petitioners do not intend to comply with 22 NYCRR § 600.5(d), which is this Court's rule providing that, where an appeal "is prosecuted upon a record which does not involve a transcript or statement requiring settlement or approval by the Court from which the appeal is taken, the record on appeal must be filed or cause to be filed within 30 days after filing of the notice of appeal." In view of this clear manifestation of petitioners' intention, it is pointless to wait for the 30-day period to run out, and only then move for a conditional order of dismissal.

34. The public interest in the Atlantic Yards project requires that the litigations challenging the project's approvals be prosecuted diligently so that any legitimate legal issues can be resolved as expeditiously as reasonably possible. The public purposes that the Atlantic Yards project are intended to advance are numerous and manifest, and the public

interest therefore requires that the project be implemented, and that legal challenges not be permitted to linger.

35. The need to prosecute this appeal expeditiously is particularly compelling in view of the current turmoil in the financial markets. As shown in the accompanying Silberfein affidavit, the project is expected to cost more than $4 billion, and will be financed through a series of separate financing transactions. Of particular concern is the complex financing plan that has been created for the arena, a crucial component of the project and the first building to be built, as well as the financing for the project's affordable housing. The financing for the arena is described in the Silberfein affidavit (*see* ¶¶ 3-7). As a practical matter, the uncertainties now plaguing the financial markets and the additional uncertainty that the pendency of any appeal inevitably creates could cause significant challenges when it is time to close the financings that are necessary for the permit.

36. Appellate courts have recognized in a variety of contexts that the pendency of litigation can prevent or hinder progress on worthy development projects, and that lawsuits that challenge those projects should be carefully administered with an eye to preventing the prolonged pendency of litigation from aborting projects that should proceed – particularly projects that serve legitimate public purposes. *See, e.g., Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991) (holding that a trade association whose grievance was solely economic did not have standing to assert a challenge under SEQRA, and observing that such challenges could "generate interminable delay and interference with crucial governmental projects" and thus would pose "the danger of allowing special interest groups or pressure groups, motivated by economic self-interests, to misuse SEQRA for such purposes"); *East 13th Street Community Association v. N.Y.S. Urban Development Corp.*, 84 N.Y.2d 287,

294-95 (1994) (recognizing that, when the Legislature enacted EDPL § 207, it intentionally narrowed the scope of judicial review in order to "expedite development once the hearing [that the condemnor is required to hold] was concluded"); *Brody v. Village of Port Chester*, 434 F.3d 121, 136 (2d Cir. 2005) (sustaining the judicial review procedures for eminent domain determinations that are created by EDPL § 207 as satisfying the constitutional requirement of due process, because "[t]he government clearly has a strong interest not only in completing projects necessary for public use, but in completing them in a timely and efficient manner"); *cf. Jackson v. N.Y.S. Urban Development Corp.*, 67 N.Y.2d 400, 426 (1986) (rejecting a "requirement of constant updating [of environmental analyses], followed by further review and comment," because it "would render the administrative process perpetual and subvert its legitimate objectives"); *CitiNeighbors Coalition of Historic Carnegie Hill v. N.Y.C. Landmarks Preservation Comm'n*, 2 N.Y.3d 727, 729-30 (2004) (recognizing that, once a developer has obtained the necessary approvals, it has "every business incentive to complete the buildings as quickly as possible so as to profit from [its] investment and avoid paying interest on construction loans").

37. The Legislature similarly has recognized that challenges to development projects should be commenced and prosecuted expeditiously so that the lawful projects may proceed. Not only has the Legislature required that challenges to determinations to exercise eminent domain be commenced within 30 days after publication of the condemnor's determination and findings (*see* EDPL § 207(A)), but it requires that such a proceeding be commenced in the Appellate Division, and that it be "heard and determined ... as expeditiously as possible and with lawful preference over other matters" (§ 207(B)). In the same vein, the Legislature has enacted several provisions requiring that Article 78 proceedings that challenge

zoning determinations be commenced within a 30-day limitation period. *See* Town Law § 267-c(1) (challenges to town zoning board of appeals decisions), § 274-a(11) (challenges to site plan review by town planning officials), § 282 (challenges to town planning board decisions changing zoning regulations); Village Law § 7-712-c (challenges to decisions by village zoning boards of appeals), § 7-725-a(11) (challenges to site plan review by village planning officials), § 7-740 (challenges to decisions by village planning boards changing zoning regulations); General City Law § 38 (review of decisions by city planning boards changing zoning regulations). *See also* N.Y.C. Admin. Code § 25-207(a) (decisions by N.Y.C. Board of Standards and Appeals).

38. In the present case, petitioners should not be allowed to prolong this appeal in the hope that intervening events unrelated to the merits of their legal contentions will adversely affect the ability to proceed with this project and achieve the public purposes that the project is intended to advance. Instead, having commenced this litigation and noticed this appeal, petitioners should be required to pursue the appeal expeditiously so that the public interest can be vindicated as soon as possible.

D. Conclusion

39. For the foregoing reasons and those set forth in the other respondents' papers, petitioners' motion for a stay pending appeal should be denied, and ESDC's cross-motion to require that the appeal be expedited so that it can be heard in the May 2008 term should be granted.

Dated: January 25, 2008
New York, NY

JEFFREY L. BRAUN