

**Matter of Develop Don't Destroy Brooklyn v Empire
State Development Corp.**

2006 NY Slip Op 30536(U)

February 14, 2006

Supreme Court, New York County

Docket Number: 100686/2006

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Develop Don't Destroy
Brooklyn, ET AL.

INDEX NO. 100686/06

MOTION DATE 2/14/06

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Empire State Develop.
Corp., ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause _____ Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Orders to Show Cause sequence numbers 001, 002, and 003 are consolidated in a joint disposition and are decided herein.

This decision incorporates the oral argument on today's date and the transcript (Nelson Carlo, Reporter).

In accordance with the attached Memorandum Decision, it is hereby

ORDERED that the order to show cause (002) by Juan Barrera, Antonio Rodriguez, Antonio Gomes, and Faouzzi Najmi pursuant to CPLR § 7802 for leave to intervene in the instant proceeding, file the proposed Amended Petition *nunc pro tunc*, and amend the caption to reflect the addition of intervenors as petitioners is denied; and it is further

ORDERED that the order to show cause (003) by Councilwoman Letitia James, Congressman Major R. Owens, and Senator Velmanette Montgomery for leave to appear as *amicus curiae* in this proceeding and serve an *amicus curie* brief in support of petitioners' motion for injunctive relief is granted; and it is further

Dated: 2/14/06

Page 1 of 2

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

This Judgment has been entered and notice of entry has been given to all parties and counsel of record. Counsel or surrogate must appear in person at the Judgment Clerk's Office on 2/14/06.

ORDERED and ADJUDGED that the Petition (sequence 001) is granted as to the third cause of action to the extent that the ESDC is hereby enjoined from taking any further action which requires the services of outside counsel David Paget and his firm, until new counsel is engaged, and as to the fourth cause of action to the extent that it the Court declares that the subject deed provides for an easement; and it is further

ORDERED that the ESDC shall engage new counsel within 45 days; and it is further

ORDERED and ADJUDGED that the cross-motions by the respondents ESDC and Ratner Companies to dismiss the petition is granted to the extent that the first, second, and fifth causes of action are dismissed; and it is further

ORDERED that petitioners serve a copy of this decision and judgment upon all parties within 20 days of entry.

This constitutes the decision and Judgment of the Court.

Dated 2/14/06

ENTER:



J.S.C.

Check one: FINAL DISPOSITION

HON. CAROL EDMÉAD
 NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
In the Matter of

DEVELOP DON'T DESTROY BROOKLYN;
DANIEL GOLDSTEIN; ATLANTIC AVENUE
BETTERMENT ASSOCIATION; FORT GREENE
ASSOCIATION; BOERUM HILL ASSOCIATION;
FIFTH AVENUE COMMITTEE; EAST PACIFIC BLOCK
ASSOCIATION; PROSPECT HEIGHTS ACTION
COALITION by its President Patti Hagan; PRATT AREA
COMMUNITY COUNCIL; SOCIETY FOR CLINTON
HILL; DEAN STREET BLOCK ASSOCIATION
(4TH TO 5TH Ave.) by its President Judy Sackoff;
PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT
COUNCIL; ELISELLE ANDERSON; DAVID SHEETS
KEN DIAMONSTONE; and PACIFIC CARLTON
DEVELOPMENT CORP.,

Petitioners,

Index No. 100686/2006

DECISION/ORDER

Motion Seq. Nos. 001, 002,
and 003

For a Judgment Pursuant to Article 78 of the CPLR and
Declaratory Judgment

-against-

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES,

Respondents.

-----X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION¹

This proceeding involves the enormous real estate development project located in the
heart of Brooklyn, New York, formally known as the Atlantic Yards Arena and Redevelopment,

¹ The orders to show cause sequence numbers 001, 002, and 003 are consolidated for joint disposition and
are decided herein.

Project (the “Atlantic Yards Project”). Located within the neighborhoods of Fort Greene, Prospect Heights, Park Slope, and Boerum Hill, the project site is adjacent to the third-largest transportation hub of New York City, the Atlantic Terminal, where nine different subway lines and the Long Island Railroad converge.² It is reported that during the period of 1990 and 2000, the half-mile area outside the project area underwent a dramatic demographic shift toward higher income, better educated, younger and predominantly white households.³ Yet, the borough still experiences poverty and unemployment levels far above the national average.⁴

There is no doubt that a project of this magnitude will profoundly impact the area in which it is situated, and its environs. Thus, since the Atlantic Yards Project was announced in 2003, it has engendered significant controversy among the individual and commercial residents of the affected parts of Brooklyn and the developer of the project, Forest City Ratner Companies (“Ratner Companies”), and community leaders and officials alike.

PROCEDURAL BACKGROUND

Develop Don't Destroy Brooklyn's Order to Show Cause⁵

Petitioners in the initial order to show cause move pursuant to CPLR 6301 to enjoin respondents Empire State Development Corporation (the “ESDC”) and the developer, Ratner Companies (collectively “respondents”) from demolishing or authorizing any other party to

² *Slam Dunk or Airball? A Preliminary Planning of the Brooklyn Atlantic Yards Project*, Pratt Institute Center for Community and Environmental Development (“PICCED”), report March 2005. Counsel for petitioners represents that PICCED is unrelated to the petitioner, Pratt Area Community Council.

³ *Id.* at page 1.

⁴ *Id.* at page 2.

⁵ The January 19, 2006 interim order by this Court denied petitioners' request for a temporary stay.

demolish the structures located at 608-20 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street, and 620 Pacific Street (collectively the “Buildings”), or any other buildings located in the footprint of the proposed Atlantic Yards Project pending the determination of the underlying proceeding (Order to Show Cause ¶1).⁶

Petitioners’ underlying “combined proceeding,” brought pursuant to Article 78, seeks five forms of relief: (1) to annul a determination by the ESDC, namely its “Emergency Declaration,” which approved the demolition of the Buildings as an emergency Type II action under the State Environmental Quality Review Act (ECL §§8-0101-8-0117) (“SEQRA”), (2) a stay against Ratner Companies from demolishing the Buildings and the building located at 622 Pacific Street, until independent engineering assessments of the Buildings can be done and a determination made that demolition is necessary to protect health and safety,⁷ (3) an order disqualifying ESDC’s outside counsel, Sive, Paget & Riesel, P.C., on the ground that a conflict of interest exists between the ESDC and such counsel,⁸ (4) a preservation of an easement, and (5) discovery (the “Initial Petition”).

Proposed Intervenors’ Order to Show Cause

In a subsequent order to show cause, Juan Barrera, Antonio Rodriguez, Antonio Gomes, and Faouzzi Najmi (the “Proposed Intervenors”) move pursuant to CPLR § 7802 for leave to

⁶ The Proposed Intervenors point out that although the ESDC’s Emergency Declaration identifies five addresses, there are twelve buildings at the addresses at issue.

⁷ Although counsel for petitioners acknowledges that 622 Pacific Street was not subject to the Emergency Declaration, and is therefore not subject to Article 78 analysis, petitioners seek a stay enjoining the demolition of this building, which was reported in the press release by Ratner Companies (*see infra* p. 15).

⁸ Petitioners initially sought an order directing that the ESDC be refrained from issuing a Final Scoping Document until new counsel can review the Draft Scoping Document. During oral argument, petitioners’ counsel withdrew the request to stay the preparation of the Final Scope Document.

intervene in the instant proceeding, file the proposed Amended Petition *nunc pro tunc*, and amend the caption to reflect the addition of intervenors as petitioners. In their proposed Amended Petition, the Proposed Intervenors seek the identical relief sought by the petitioners, and purport to allege the distinct manners in which the proposed demolition will affect them (*infra*, at pages 5-6) (the "Proposed Amended Petition").

In yet another separate order to show cause, elected officials representing the constituents allegedly adversely affected by the Atlantic Yards Project (the "Representatives Opposing the Project") seek leave to appear as *amicus curiae* in this proceeding and serve an *amicus curie* brief in support of petitioners' motion for injunctive relief. This order to show cause has been met with opposition from other elected, religious, and community officials (the "Representatives in Favor of the Project"), who represent the constituents also affected by the Project.

PARTIES

Respondent ESDC is the New York State lead economic development agency, which serves as Lead Agency for the SEQRA review of the Project. Its primary mission is to encourage economic investment and prosperity in the state. To this end, the ESDC offers a wide range of development programs, and helps promote large-scale real estate projects that create and retain jobs and/or re-invigorate distressed areas. (ESDC Memorandum of Law, page 5).

Ratner Companies is the Project sponsor, or applicant, undertaking the building of the Atlantic Yards Project.⁹

The petitioners in the initial order to show cause consist of residential owners, stabilized

⁹ The Project's sponsors are actually two affiliates of Ratner Companies, Brooklyn Arena, LLC and Atlantic Yards Development Company, LLC. (Ratner Companies Memorandum in Opposition, page 4, fn. 1).

tenants, and various not-for-profit Associations located within the Project footprint and near the Buildings at issue. Petitioners represent the voices of the residential owners, renters, and businesses who are concerned with beautifying their parts of Brooklyn, providing affordable housing, and improving the quality of life, work, and commerce within, and the economy of, the communities of Brooklyn in which they live and serve. Develop Don't Destroy Brooklyn advocates for greater transparency, government accountability and community involvement in the development of the Atlantic Yards. Petitioners oppose the Project because they believe that demolishing the Buildings will give the public the perception that the Project has been or will be approved and that the public review process is a sham. Also, there is a concern that the SEQRA review process and the general project review process by the ESDC be conducted in an objective and transparent manner that assures the integrity of the review. Petitioners are also concerned that the Atlantic Yards Project will adversely impact the environment and character of the community, in that the development is out of scale with the area. Petitioners opine that the Project will destroy the racial, cultural, and economic diversity of the local and wider area, have adverse visual impacts, produce significant traffic impacts, cause an increase in air pollution, as well as undermine public safety and security.¹⁰

Petitioner David Sheets lives at 479 Dean Street in the Project footprint, in close proximity to the buildings proposed for demolition on Dean Street. Mr. Sheets claims that the Project will negatively affect cultural, economic and racial diversity, and have significant adverse impacts on the local environment, "including *inter alia* traffic, air pollution, destruction of

¹⁰ Petitioner Daniel Goldstein lives in a condominium on Dean and Pacific Streets, and is also concerned that the Project will cause him to lose his property under the theory of eminent domain.

community character and adverse visual impacts.”

The Proposed Intervenors, who also live at 479 Dean Street, are all long-term, low income Single Room Occupancy residents of this rent-stabilized building. According to their proposed Amended Petition and affidavits, the Proposed Intervenors oppose the Atlantic Yards Project because they feel that the Project will cause displacement and make it impossible for them to continue to reside in their neighborhood. The Proposed Intervenors contend that the demolition would permit Ratner Companies to evade the environmental review process. Further, it is alleged that the demolition will cause irreparable harm in that the Proposed Intervenors will essentially be living in a construction site, surrounded by vacant lots, noise, dust, debris, which negatively impacts their quality of life. They argue that there could be lasting environmental and health effects, since, upon information and belief, at least one of the subject buildings contains a significant amount of asbestos. In support of intervention, the Proposed Intervenors claim that they stand to be directly affected by the ESDC’s alleged arbitrary actions. If the demolition proceeds, their neighborhood will be negatively altered, and they are the very parties that SEQRA was designed to protect. Thus, they will experience a harmful effect of the ESDC’s decision in a way different from the public at large, and have a direct interest in ensuring that they have an opportunity to comment on the proposed development before demolition and construction begin. Therefore, they should be permitted to intervene.

The Representatives Opposing the Project consist of Councilwoman Letitia James, Congressman Major R. Owens, and Senator Velmanette Montgomery. Councilwoman James represents District 35, which includes the areas of Fort Greene, Clinton Hill, and Prospect Heights in Brooklyn. Congressman Owens represents the 11th Congressional District of New

York and Senator Montgomery represents the 18th Senate District. Each of these Districts includes the areas of Brooklyn which lie in the footprint of the Atlantic Yards Project. (Owens Affidavit ¶1; Montgomery Affidavit ¶1).

These Representatives assert that as representatives of the areas affected by the Atlantic Yards Project, they have a special interest in the matter before the Court, and seek to bring to the Court's attention arguments that might not otherwise be presented. The Representatives Opposing the Project challenge the ESDC's Emergency Declaration on the grounds asserted by the initial order to show cause movants. However, they also argue that the Project usurps the local political process, in that the ESDC has declared it a "State Project" under the Urban Development Corporation Act, thereby overriding both the New York City Uniform Land Use Review Procedures and the New York City Zoning Resolution. Thus, since the Project circumvents local review, the Representatives have a special duty to ensure that it is an open and deliberative process. These Representatives also believe that Ratner Companies is abusing the power of eminent domain by using it as a "strong-arm negotiating" tactic even though the Project is only in its earliest stages of review. These Representatives assert that a battery of lawyers has descended on homeowners and businesses in the area, telling them that they should accept Ratner Companies' offer to purchase their property at a given price or suffer condemnation. Additionally, the unwilling owners are being urged to sign an order that they will not speak out against the Project, nor attend community meetings.

The Representatives in Favor of the Project consist of Brooklyn Borough President Marty Markowitz, Congressman Edolphus Towns, State Senator Carl Andrews, State Assembly Member Roger L. Green, Rev. Herbert Daughtry, and Bertha Lewis, who is the Executive

Director of the New York Association of Community Organizations for Reform Now, commonly known as ACORN and Mutual Housing Association of New York, Inc. ("MHANY").¹¹ Elected officials who also support the Project include Governor Pataki, Mayor Bloomberg, Senator Schumer (who lives in Park Slope), and City Comptroller William Thompson.

The Representatives in Favor of the Project oppose any delay in ESDC's review of the Project, and find it difficult to imagine a project where there has been greater attention given by a developer to the needs of the surrounding community. According to Brooklyn Borough President Markowitz, this Project is a huge growth engine that will benefit a wide swath of the public with thousands of units of affordable and market rate housing, thousands of good paying jobs, and billions of dollars of tax revenues for the Borough, the City, and the State. This Project, through the Community Benefits Agreement,¹² will ensure that the Borough's most disadvantaged and disenfranchised residents will have a real interest in this Project, a real seat at the table, and will share in its benefits. Supporters of the Project believe that the Project will rejuvenate a deteriorated and underutilized area near Brooklyn's downtown, and attract new business activity, residents and visitors to Brooklyn. To ACORN and MHANY, the most remarkable aspect of the Project could be the Community Benefits Agreement, which commits the Project's sponsors to numerous substantial programs that are designed to create economic opportunities for the most disadvantaged communities within Brooklyn.

¹¹ ACORN, a housing activist group, and MHANY are not for profit housing and community development organizations whose mission is to own, develop and manage housing affordable to low- and moderate-income persons. ACORN and MHANY provide all technical and development assistance in connection with the affordable housing component of the Atlantic Yards Development.

¹² On or about June 27, 2005, Ratner Companies, and several community groups including ACORN, executed the Community Benefits Agreement.

The petitioners, Proposed Intervenors, and Representatives in Favor of the Project essentially rely on the protections afforded by SEQRA.

REGULATION AT ISSUE

SEQRA, enacted in 1975 and codified in the Environmental Conservation Law (ECL §§8-0101-8-0117), was adopted in order to

... encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state (ECL §8-0101).

SEQRA charges state and local agencies with the responsibility to “conduct their affairs with an awareness that they are stewards of the air, water, land and living resources,” and to “protect the environment for the use and enjoyment of this and all future generations” (ECL §8-0103 (8)). Furthermore, SEQRA requires that “all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage” (ECL §8-0103 (9)).

When an agency proposes or approves any action “which may have a significant effect on the environment,” such agency is required to prepare, or cause to be prepared, an environmental impact statement [“EIS”] (ECL 8-0109 (2)).¹³ While an agency “may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including

¹³ The EIS must set forth a detailed description of the proposed action, its environmental setting, and its long- and short-term effects on the environment (§8-0109 (2)(a)-(b)). The EIS must also explain any adverse environmental effect which cannot be avoided upon implementation, alternatives to implementation, and any irreversible commitments of resources if the action is implemented (§8-0109 (2)(c)-(e)).

the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement . . . [n]otwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement” (§8-0109(3)).

If the responsible agency makes an initial determination that an EIS is needed, the agency or the applicant at (the applicant’s) option shall prepare or cause to be prepared a draft EIS, informing the public and other public agencies as early as possible about the proposed action that may significantly affect the quality of the environment and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action (§8-0109(4)). Such draft EIS should resemble the EIS in form and content (*Id.*). After the draft EIS is filed, the agency must either hold a public hearing to discuss the environmental issues raised therein and prepare the EIS within 45 days thereafter, or make available the EIS within 60 days of the filing of the draft EIS.

With respect to the project sponsor, it may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with. The only exception to this is provided under section 617.5(c)(18), (21) and (28) of this Part (6 NY ADC 617.3 (a)).¹⁴

The New York State Department of Environmental Conservation (the “Conservation Department”) enacts regulations to implement SEQRA. The Conservation Department enacted Part 617, which identifies three categories of “actions” as potentially subject to its regulations. Type I actions are major actions with a legal presumption that they are more likely to have a

¹⁴ 6 NY ADC 617.3 (a) also provides that no agency involved in an action may approve the action until it has complied with the provisions of SEQRA.

significant impact on the environment and thus require the preparation of an EIS.¹⁵ “Type II” actions are actions that are not subject to SEQRA review and that do not require preparation of an EIS, because the Conservation Department has determined that they do not have a significant effect on the environment or that they are otherwise precluded from review (6 NY ADC 618.2 (a)(2); ECL 8-0113[2][c][ii]; 6 NYCRR 617.5; see *Concern, Inc. v Pataki*, 7 Misc.3d 1030(A), 801 N.Y.S.2d 232 [N.Y.Sup. 2005]).¹⁶ Finally, “Unlisted” actions are all actions that are neither Type I nor Type II.¹⁷

As relevant to the instant proceeding, included among the Type II actions that need no environmental assessment, and are exempt from SEQRA review are

(33) emergency actions that are immediately necessary on a limited and temporary basis

¹⁵ Pursuant to 6 NY ADC 617.4 (b), “the following actions are Type I if they are to be approved by an agency: . . . (5) construction of new residential units that meet or exceed the following thresholds: . . . (v) in a city or town having a population of greater than 1,000,000, 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; (6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds: (i) a project or action that involves the physical alteration of 10 acres; . . . (iii) parking for 1,000 vehicles; . . . [and] (v) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area . . . [and] (11) any Unlisted action that exceeds a Type I threshold established by an involved agency pursuant to section 617.14 of this Part.” Section 617.14 (e) permits agencies to adopt their own lists of Type I actions, in accordance with section 617.4.

¹⁶ Section 617.5 Type II actions are addressed as follows: (a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. . . . (1) maintenance or repair involving no substantial changes in an existing structure or facility; (2) replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part; (3) agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming; (4) repaving of existing highways not involving the addition of new travel lanes; (5) street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities

¹⁷ Unlisted actions, *i.e.* actions not listed as Type I or Type II, must undergo an environmental assessment to determine if the action may have a significant adverse environmental impact (6 NYCRR 617.6(a)(3)). If an agency determines that its action may include the potential for at least one significant adverse environmental impact, an EIS is required (6 NYCRR § 617.7(a)(1)).

for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part (hereinafter, the "Emergency Exemption").

FACTUAL BACKGROUND

In December 2003, Ratner Companies announced the Atlantic Yards Project, which comprises a 22-acre, underutilized and underdeveloped area in Brooklyn that includes several blocks of currently occupied residential and commercial buildings and eight acres of the Metropolitan Transportation Authority's Vanderbilt Yards. The Vanderbilt Yards, which stores buses and Long Island Railroad cars, are several feet below the grade of the surrounding streets and are open to the air, thereby creating a massive trench that acts as a barrier isolating the neighborhoods to the south of the site from the other nearby neighborhoods. The Project would close this gouge by construction of a permanent platform over the Yards, on top of which buildings and public space will be constructed.¹⁸

The Project includes a new 850,000 gross square foot arena accommodating up to 20,500 persons for the NBA New Jersey Nets team which has been purchased by a group headed by its principal, Bruce Ratner.¹⁹ The arena also includes 7,300 residential units (of which 2,250 would be reserved for affordable rental housing), 4,000 parking spaces, and a 180-room hotel. The

¹⁸ According to Brooklyn Borough President Markowitz, platforming over the unsightly open rail yards, which have separated four neighborhoods on all sides for decades, made good sense from an urban planning perspective.

¹⁹ Brooklyn Borough President Markowitz expressed his sentiments as follows: "Like many others in Brooklyn, I have always regretted Walter O'Malley's decision to move the Brooklyn Dodgers to Los Angeles, and saw [bringing the Nets to Brooklyn] as a way to right that wrong 50 years later by bringing another professional sports franchise to our wonderful Borough."

arena will also be used for concerts, tournaments and local community events, such as college and high school athletic programs and graduations. The Project also includes approximately 9 million square feet of residential, office and commercial space located in approximately 16 high-rise towers.

Ratner Companies began buying properties in the project area in 2004. In February 2005, Ratner Companies, the ESDC, and the City of New York entered into a Memorandum of Understanding governing the scope and approval for the Atlantic Yards Project. At some time in 2005, the ESDC classified the Atlantic Yards Project as a Type I Action under SEQRA. On September 16, 2005, the ESDC released a Combined Notice of "Public Scoping and Intent to Prepare a Draft Environmental Impact Statement" for the Atlantic Yards Project, and announced it intent to serve as the Lead Agency.²⁰ A public hearing was held in October, 2005, and the ESDC received written comments until October 28, 2005. As of the date of the Petition, the ESDC had not issued a Final Scoping Document or released a Draft Environmental Impact Statement for the Project.²¹ Petitioners believe that the ESDC, in consultation with David Paget and Sive, Paget & Riesel, P.C. have reviewed the comments submitted on the Draft Scoping Document and are near completion of the Final Scoping Document.

In November 2005, Ratner Companies and its engineering consultant, LZA Technology,

²⁰ According to counsel for the ESDC, the ESDC's "Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement" dated September 16, 2005 (also known as the "Positive Declaration" for the Project), sufficiently demonstrates that the Project qualifies as a Type I action under Section 617.4(b)(5)(v) and Sections 617.4(b)(6)(i), (iii) and (v) (*see* Letter by counsel for ESDC, dated January 31, 2006).

²¹ The Proposed Intervenors point out that only when the a final EIS is approved by the ESDC, may work on the proposed project commence. Thus, Ratner Companies is less than a third of the way through the SEQRA process (Proposed Intervenors', Petition ¶8).

made a presentation to the ESDC, among others, explaining the condition of the Buildings. The presentation included photographs of the Buildings, a question-and-answer session, and explanations by LZA engineers as to why they believed the Buildings posed an imminent danger to public health and safety.

In the first week of December 2005, Ratner Companies met with the ESDC to propose the demolition of the Buildings, and presented a report dated November 7, 2005 prepared by LZA Technology (the "Inspection Report"). This Report summarizes the inspections of various properties owned or controlled by Ratner Companies. According to the Inspection Report, LZA recommends that the Buildings²² be demolished because "they pose an immediate threat to the preservation of life, health, and property." The Report also makes reference to previous inspections in May and November 2004.

Thereafter, by memorandum dated December 15, 2005, Rachel Shatz of the ESDC stated that upon her review of the Inspection Report, the Buildings present an imminent threat to public health and safety, and the need for demolition constituted an emergency which is a Type II action under SEQRA (the "ESDC Emergency Declaration").

On December 16, 2005, Ratner Companies issued a press release announcing its plans to begin asbestos abatement on December 20, 2005 on the Buildings, as well as the building located at 622 Pacific Street prior to demolition. According to the press release, demolition of these

²² The Inspection Report covered the buildings located at 608-20 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street, and 620 Pacific Street. Ratner Companies states that it intended to include 622 Pacific Street building during its presentation to the ESDC, but did not due to ongoing negotiations with the seller of that parcel. Ratner Companies expects to close on its acquisition of this parcel in February 2006, and apply to the ESDC for approval of this building's demolition (Ratner Companies Memorandum of Law, page 11, fn. 3).

buildings “will begin after the abatement has been completed.”²³

During the week of December 19, 2005, petitioner Develop Don't Destroy Brooklyn obtained a copy of the Inspection Report, and with various elected officials, including, Councilwoman James, requested an opportunity to inspect the buildings with the assistance of an independent engineer. Ratner Companies agreed to an inspection on December 20, 2005, but then cancelled it without explanation. Ratner Companies rescheduled the inspection, but this time precluding Develop Don't Destroy Brooklyn and an engineer from participating. Councilwoman James declined to do the inspection without an engineer.

By letter dated December 29, 2005, Mr. Paget, as counsel to the ESDC, advised Develop Don't Destroy Brooklyn that the ESDC's Emergency Declaration did not apply to the 622 Pacific Street location, but that Ratner Companies had informed the ESDC that an engineer's report would be submitted in support of the demolition of 622 Pacific Street location, as well.

Develop Don't Destroy Brooklyn then hired an engineer, Jay Butler, P.E., to review the Inspection Report and to perform an external inspection. According to his affidavit, Mr. Butler opined that based on such limited review, he could not conclude that the Buildings pose an imminent threat to public safety, and an internal inspection is necessary before a definitive assessment can be made. However, based on his external inspection, the 608-20 Atlantic Avenue building appears sound, the 461 Dean Street and 463 Dean Street buildings have exterior conditions which have been restored in other similar buildings in New York City, the buildings at 585-601 Dean Street appear to be in “better than average condition,” and the exterior appearance

²³ Ratner Companies asserts that asbestos abatement began at 608-20 Atlantic Avenue in January 2006 and as of February 9, 2006, is complete or nearly complete. Therefore, demolition of this building is expected to commence shortly.

of the 620 Pacific Street building does not warrant demolition. Mr. Butler's affidavit is silent as to the building located at 622 Pacific Street.

PETITION²⁴

I. Article 78 of ESDC's Determination

Petitioners allege that the ESDC's Emergency Declaration and approval of the demolition of the Buildings as an emergency Type II action under SEQRA was illegal, arbitrary and capricious and should be annulled because the ESDC (1) failed to undertake any independent evaluation by a professional engineer of the Inspection Report or of the Buildings themselves, and failed to take a "hard look" at the environmental consequences of its actions; (2) failed to inquire as to LZA's earlier May and November 2004 inspections, Ratner Companies' culpability in the deterioration of the Buildings, or Ratner Companies' failure to take measures to stabilize the Buildings short of demolition; and (3) violated SEQRA by allowing a change in the physical environment before completing the review process and without consideration of other reasonable means to stabilize the buildings and protect the public. Petitioners allege that the ESDC accepted without any independent review, the representation by Ratner Companies that the subject buildings presented an emergency situation and an imminent threat to public health and safety, and thus permissible to demolish under the SEQRA regulations (6 NYCRR § 617.5(c)(33)). Petitioners argue, in their memorandum of law, that demolition is an extreme remedy, and absent a factual basis indicating that it is "reasonably necessary" or "practicable under the circumstances," it should not go forward as the preferred remedy until a hearing is held to

²⁴ Except for the allegations specific to the Proposed Intervenor, the proposed amended petition mirrors the initial petition. The contentions described in this section of the Decision derive from the initial petition, unless noted otherwise.

determine what type of emergency action is reasonably necessary under the circumstances. There has been no independent assessment by the ESDC as to whether there are less drastic measures to preserve the Buildings short of demolition. According to Mr. Butler, since the results of LZA's prior inspections are not provided, it is impossible to determine what the prior conditions of the Buildings were or if there were any changes to those Buildings since the prior inspections.

The Proposed Intervenors, in their memorandum of law, argue that the Inspection Report is devoid of any quantitative measurements or the results of any probes that might substantiate the engineer's conclusions. The Proposed Intervenors point out that the Inspection Report expressly states that "the evaluation was visual in nature, neither probes nor laboratory testing were performed." Thus, the extent of the damage cannot be determined from the face of the Inspection Report. Further, the Inspection Report fails to address what measures might be taken to render the subject Buildings safe, or whether protecting the structures from water infiltration would obviate the need to demolish the Buildings. Had the ESDC perused the available public records pertaining to the Buildings, it would have discovered that the Department of Buildings ("DOB") and the Department of Housing Preservation and Development ("HPD") previously inspected at least four of the Buildings, and at no time ordered their demolition on the grounds that they were unsafe or in imminent danger of collapse, although empowered to do so. Instead, DOB and HPD issued a violation for improper signage, a boiler violation, and issued no immediately hazardous (Code "C") violations.²⁵

²⁵ The "Hazard Class" on the Building Registration Summary Report submitted refers to the classification of the housing code violation. The classification is based on the effect of the violation upon the life, health and safety of the occupants of the building and upon the public (*HPD Online Glossary*, <http://www.nyc.gov/html/hpd/html/pr/hpd-online-glossary.shtml>). There are three classes of violations: "A", non-hazardous; "B", hazardous; or "C", immediately hazardous. An "A" violation is described as "Non-hazardous, such as minor leaks, chipping or peeling paint when no children under the age of six live in the home, or lack of signs designating floor numbers." A "B"

The Proposed Intervenors also argue that in order to meet the emergency exception to SEQRA's review requirements, the proposed action must be "immediately necessary on a limited and temporary basis" and "performed to cause the least change or disturbance, practicable under the circumstances, to the environment" and that here, there is nothing "limited and temporary" about the permanent destruction of property. Further, the ESDC failed to take a "hard look" at any available public records to determine whether there was a less permanent and less intrusive means to address the potential harm, and failed to seek an independent analysis of the integrity of the Buildings, to determine whether the proposed action was both necessary and designed to minimize environmental harm as required under the Emergency Exemption.

2. Stay against Ratner Companies

As to Ratner Companies, petitioners allege that any threat to public health and safety posed by the Buildings is directly attributable to Ratner Companies' failure to take reasonable steps to stabilize the Buildings to prevent their deterioration. Ratner Companies seeks to obtain a psychological advantage by creating the impression that the Project is moving forward, and that the owners should sell their properties to Ratner Companies. Further, Ratner Companies' should be enjoined from demolishing the Buildings and the building located at 622 Pacific Street,

footnote 25 contd.

violation is described as "Hazardous, such as requiring public doors to be self-closing, adequate lighting in public areas, lack of posted Certificate of Occupancy, or removal of vermin." A "C" violation is described as "Immediately hazardous, such as inadequate fire exits, rodents, lead-based paint, lack of heat, hot water, electricity, or gas." (*Id.*)

because such demolition violates SEQRA's requirement that there not be any physical change in the environment while the project is undergoing SEQRA review.

3. Disqualification of Counsel

Petitioners also seek a declaration disqualifying David Paget, Esq. and the law firm of Sive, Paget & Riesel, P.C. as counsel to the ESDC for the Atlantic Yards Project due to an irreconcilable conflict of interest. The ESDC has enormous authority to override local laws and the local approval process, and can approve a project without referral to the New York City approval process, namely the Uniform Land Use Review Process. Under the New York State Development Corporation Act, the ESDC has the authority to exercise the power of eminent domain to acquire property not owned or controlled by a project applicant. Therefore, it is important that the ESDC's review of the Project be transparent and objective to work for the public interest.

In their memorandum of law, petitioners contend that Public Officers Law § 74 provides that no employee of a state agency should have any interest which is in "substantial conflict" with the discharge of his duties in the public interest.²⁶ It is alleged that Mr. Paget served as an attorney for Ratner Companies for the Atlantic Yards Project in the Fall of 2004,²⁷ before

²⁶ Petitioners contend that in NY Adv Op 90-25, the Ethics Commission pointed to the fact that the non-profit organization was licensed by the Office of Mental Retardation and Developmental Disabilities ("OMRDD") and was required to obtain an operating certificate from OMRDD before beginning any programs. The opinion stated that "it is not necessary that an actual conflict be present before a violation of § 74 can occur." Further, in NY Adv Op. 93-16, where the public might suspect that an individual was favorably disposed toward the two organizations which employed him, the individual should recuse himself from voting as a member of the Board upon applications of members of the two organizations and should not consult with any other Board member as to the merits of such applications. Petitioners also cite to various sections of General Municipal Law, which prohibit municipal officers or employees from engaging in acts that would constitute a conflict of interest.

²⁷ Counsel for petitioners states in his affirmation (¶32) that when he was retained by Develop Don't Destroy Brooklyn in the Fall of 2004, he spoke with David Paget, who confirmed that he was representing the Ratner Companies on the Atlantic Yards Project. When petitioners' counsel saw Mr. Paget in October 2005, he was still

becoming outside counsel for the ESDC in 2005 for the review of the same Project. When petitioners' counsel spoke with Mr. Paget on December 22, 2005 with respect to the instant demolition, Mr. Paget advised that the ESDC reviewed the Inspection Report and confirmed the need to demolish the Buildings. Mr. Paget informed petitioners' counsel that the ESDC did not inspect the Buildings, and commented that "it is not enough to rely on the report of a respected engineering firm like LZA" Technology. Petitioners believe that Mr. Paget and his law firm continue to serve as attorneys for Ratner Companies on other projects. By relying upon the legal advice of an attorney who represents the applicant on a variety of projects, including the Project under review, there exists, at a minimum, a perception of a conflict of interest. Such conflict is also shown by Ms. Shatz's notes, which indicate that she conferred only with ESDC staff and ESDC counsel, presumably Mr. Paget. Thus, Mr. Paget's representation of both the applicant and the public agency reviewing the application undermines the public confidence in the process, and its expectation that the ESDC will undertake an objective review of the Project. The dual representation of Mr. Paget could also prejudice and irreparably harm petitioners by resulting in the issuance of a Final Scope that may be biased in favor of Ratner Companies.

Petitioners also argue that Mr. Paget can be considered an independent contractor. Thus, it is unlikely that his status as a non-governmental employee would render him exempt from General Municipal Law's prohibition against municipal officers or employees engaging in acts that would constitute a conflict of interest. Mr. Paget need not be disallowed from representing the ESDC on other legal issues. However, similar to other persons who have been disqualified

footnote 27 contd.

under the impression that Mr. Paget represented the Ratner Companies on the Atlantic Yards Project.

from deliberating on applications by entities for which such persons are employed, Mr. Paget should be disqualified from counseling the ESDC on transactions with Ratner Companies.

Further, the Code of Professional Responsibility, DR 5-101, *inter alia*, prevents Mr. Paget from accepting employment as counsel for ESDC since his professional judgment may be affected by his own interests. And, courts are directed to resolve uncertain disqualification issues in favor of disqualification.

4. Easement

Finally, petitioners seek a declaration that if Ratner Companies is permitted to demolish the Buildings, it must maintain a covered easement on the building located at 585-601 Dean Street for the benefit of petitioner, Pacific Carlton Development Corp. ("Pacific Carlton"). It is alleged that Pacific Carlton owns a building on Pacific Street, and the deed to Pacific Carlton has a covered easement over 585-601 Dean Street, an adjoining property.²⁸

As to the likelihood of success of the merits of their claims, petitioners contend that they need not establish a certainty of success on their claims, but need only make a *prima facie* showing of likelihood of success, which petitioners argue has been demonstrated. Petitioners also argue that they will suffer irreparable harm if a stay is not granted, since the Buildings, once demolished, will never be replaced, and that the neighborhood's character will forever be altered. As to the Proposed Intervenors, it is claimed that they will essentially be living in a construction site, surrounded by vacant lots, noise, dust, debris, which negatively impacts their quality of life. Further, there could be real and lasting health effects due to the suspected presence of a

²⁸ Petitioners also seek discovery in order for the Court to assess the extent of the threat and whether other means are available to stabilize the buildings without demolition.

significant amount of asbestos in one of the subject Buildings. Moreover, it is argued, the balance of equities tips in favor of a stay.

Respondents' Position

Ratner Companies and the ESDC oppose the Initial and Amended Petitions and cross move to dismiss the proceeding.

Ratner Companies contends that the ESDC's Emergency Declaration was rational and reasonable and amply supported by the evidence before it. An emergency action is a Type II action, and as a result, exempt from SEQRA's requirement that an agency determine whether an action may have a significant adverse environmental impact and prepare an EIS. In any event, the ESDC's approval of the demolition is not required because demolition of the subject buildings is not "related to" the Project within the meaning of the applicable regulation. In this regard, Ratner Companies claims that its decision to demolish the buildings at issue was based on the dangerous condition of the buildings, a concern for public safety, and the need to avoid third-party liability. After their demolition, the buildings can be redeveloped regardless of whether the Project is approved. Thus, the proposed demolition is independent from, and not "related to" the Project and not subject to 617.3(a)'s prohibition against physical alterations "related to" an action pending SEQRA compliance. Further, Ratner Companies, as the owner or contract vendee of the Buildings, is entitled to a demolition permit pursuant to the New York City Building Code, which issues permits as a ministerial act upon compliance with specific criteria.

Moreover, Ratner Companies argues, petitioners cannot show that the demolition of the Buildings will impose on them any environmental injury that is within the zone of interests that

SEQRA is intended to protect. Finally, the balance of the equities and the public interests both weigh heavily against an injunction, because the failure to demolish the Buildings, while not injuring petitioners in any cognizable respect, will expose Ratner Companies to enormous potential liability to third parties, and expose the members of the public to death or serious bodily harm in the event of a building collapse.

Ratner Companies and the ESDC further argue that there is no conflict of interest on the part of Mr. Paget because with respect to environmental review, the relationship between the ESDC and Ratner Companies is not adversarial, but collaborative. While disagreements may arise on discrete issues, the ESDC and Ratner Companies share a common interest in getting the Project completed, while ensuring that there is full compliance with SEQRA, and that all relevant environmental issues are identified and evaluated. Further, at all times, the ESDC (through its in-house counsel) and Ratner Companies (through its senior outside counsel for the Project, Fried, Frank, Harris, Shriver & Jacobson, LLP) each had in place separate counsel with overall responsibility for their legal representation in connection with the Project. And, both parties have always understood and agreed to the professional and financial arrangements to which petitioners purport to object. The ESDC and Ratner Companies agreed that the ESDC would retain Paget's law firm at Ratner Companies' expense, pursuant to a letter agreement prepared by ESDC's in-house counsel and negotiated with Ratner Companies' counsel, Fried, Frank. Also, the Memoranda of Understanding between the ESDC and Ratner Companies were concluded by February 2005, before the ESDC formally retained Paget's firm. Thus, Paget's firm played no role in those matters as to which the interests of the ESDC and Ratner Companies were adverse. Petitioners also cannot show that the purported conflict of interest tainted the environmental

review process or caused the ESDC to issue a deficient draft scoping document.

The ESDC adds that the petitioners' and Proposed Intervenors' two causes of action as against the ESDC (the first and third) fail to state a cause of action under SEQRA, that the ESDC was not required to take a "hard look" in determining whether to issue the Declaration of Emergency, that the petitioners lack standing to seek disqualification of ESDC's unconflicted counsel of choice, and that if there was a conflict, it has been waived.

In any event, petitioners have failed to allege a single valid deficiency in the ESDC's environmental analysis. It is impermissible to enjoin an agency from taking action that is within its jurisdiction. Further, the "final" scoping document is not a "final" action within the meaning of Article 78, but rather an interim step in a long process under SEQRA that will eventually lead to a final determination by the ESDC on the Project. Thus, judicial review of interim decisions is premature and impermissible.

It is argued that both the balance of the equities and the public interest outweigh the issuance of an injunction because petitioners are not aggrieved by the interim administrative step, while an injunction staying the review process will expose Ratner Companies to enormous financial injury. Finally, there is no showing of irreparable harm if the buildings are demolished. Nothing in the law or in SEQRA protects petitioners from "psychological" harm, the "perception" that the review process is a "sham," or from a change in the "character" of the area.

Although the ESDC does not oppose leave for intervention, Ratner Companies argues that these Intervenors failed to allege that they will suffer any "environmental" injury from the demolition that is different from that suffered by the public at large, or that they are within the zone of interests that SEQRA was intended to protect. Further, they failed to state a legally

cognizable claim, which is an essential requirement for leave to intervene in an Article 78 proceeding. Any claim of harm that “public perception” that the Project has been approved will create a “psychological advantage” is not a harm within the zone of interests of SEQRA warranting intervention status. And, the alleged interests of the Proposed Intervenors are already expressed in the Initial Petition by Mr. Sheets. Ratner Companies asserts that it is in contract to purchase 47 Dean Street, which is not included in the ESDC’s Emergency Declaration, or adjacent to any of the buildings authorized to be demolished under the Emergency Declaration. Nor does Ratner Companies intend to demolish 479 Dean Street prior to final approval of the Project or on an emergency basis.

In opposition to *amici curiae* relief, Ratner Companies points out that the *amici*’s allegations are about the Project, not the demolition, and consequently, do not provide standing to challenge the demolition. Further, any “intimidation” claims are not environmental injuries, and the ESDC was not required to consult its own engineer or evaluate the feasibility and expenses of alternatives to demolition.

ANALYSIS

Intervention

Before addressing the merits of the applications before the Court, the Court must determine whether the application to intervene and the application to appear *amicus curiae* should be granted. CPLR Article 7802(d) permits the Court to “allow other interested persons to intervene.” To be an “interested party,” for purposes of Article 78 intervention status, one must have a legally cognizable claim to intervene, rather than just a general interest in the result of the proceeding (*New York State Senator Kruger v. Bloomberg*, 1 Misc 3d 192, 768 NYS2d 76).

The “interests” of the Proposed Intervenors that are purportedly unique from those of the public or asserted by the initial movants, are (1) the fear of displacement and impossibility to continue residing in the neighborhood, (2) the concern that they will be living in a construction site, surrounded by vacant lots, which will be visually disturbing and make them feel unsafe, and (3) the possibility that their health could be affected based on the belief that one of the subject Buildings has a significant amount of asbestos.

Foremost, these interests are either raised, or should have been raised in the Initial Petition by Mr. Sheets, who resides in the same building as the Proposed Intervenors. Economic injury and the displacement from one’s residence are legitimate concerns. However, economic injuries and the fear of displacement are not concerns relevant to SEQRA’s 617.5 (c)(33), Type II “emergency” provision, which is the principle issue in this proceeding. Moreover, such concerns are related to the outcome of the Project as a whole, and cannot serve as basis to block the proposed demolition. Noise, dust and debris are matters of personal inconvenience, also insufficient to challenge the ESDC’s determination to issue the Emergency Declaration. Further, the claim regarding potential asbestos in one of the buildings subject to demolition, and the possibility that it might affect the health of the Proposed Intervenors is conclusory and based on sheer speculation. While the Proposed Intervenors experience the impacts of the Project in a manner different from those in the general public, their experience is no different from those named and articulated in the Initial Petition and do not legally cognizable claims with respect to the ESDC’s Emergency Declaration.

Therefore, the order to show cause by the Proposed Intervenors to intervene pursuant to Article 7802(d) is denied.

Preliminary Injunction

In order for a preliminary injunction or temporary restraining order to be issued pursuant to CPLR § 6301, the petitioner must demonstrate (1) a likelihood of success on the merits of any one of its claims in the underlying action, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities which favors the issuance of injunctive relief (*see St. Paul Fire and Marine Ins. Co. v York Claims Serv., Inc.*, 765 NYS2d 573, 308 AD2d 347 [1st Dept 2003]; *New York City Off-Track Betting Corp. v New York Racing Assn., Inc.*, 250 AD2d 437, 673 NYS2d 387 [1st Dept 1998]). Preliminary injunctive relief is a drastic remedy, which will only be granted if it is established that there is a clear right to the relief under the law and the facts (*Koultukis v Phillips*, 285 AD2d 433, 728 NYS2d 440 [1st Dept 2001]).

Petitioners' application for injunctive relief primarily turns on whether petitioners have established the likelihood of success on the merits of their claims that (1) the ESDC's Declaration of Emergency was arbitrary and capricious (Article 78), (2) Ratner Companies should be enjoined from demolishing the buildings at issue, (3) there is an irreconcilable conflict of interest between the ESDC and Mr. Paget, or (4) an easement over the property located at 585-601 Dean Street should be maintained.

A. Likelihood of Success of the Merits of the Petition

First Cause of Action: Article 78

As to the merits of petitioners' Article 78 claim, it is noted at the outset the purported "emergency" demolition of the Buildings is a Type II "emergency" action. The issue before this Court is therefore what scrutiny is required to review the Emergency Declaration by the ESDC, approving the demolition of the Buildings as an "emergency" Type II action under SEQRA.

The Court's review of the ESDC's determination to issue the Emergency Declaration is limited to whether such determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (CPLR 7803(3)); *see 475 Ninth Avenue Assocs. LLC v Bloomberg*, 2 Misc 3d 597, 773 NYS2d 790 [Sup Ct New York County 2003], *citing Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]; *see also Matter of Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 494 N.E.2d 429 [1986]; *Halperin v City of New Rochelle*, --- NYS2d ----, 2005 WL 3543612 [2d Dept 2005], *citing Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 619; *Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]).

An action is arbitrary and capricious, or an abuse of discretion, when the action is taken “without sound basis in reason and ... without regard to the facts” (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Education*, 34 N.Y.2d, at 231). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Howard v Wyman*, 28 NY2d 434 [1971]; *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept.], *aff'd* 66 NY2d 1032 [1985]).

Although “a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion,” (*475 Ninth Ave. Associates LLC v Bloomberg*, 2 Misc 3d 597, 773 NYS2d 790 [NY Sup 2003] *citing Pell v Bd. of Educ. Union Free School Dist.*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321), a mere assertion by the ESDC that the demolition of the subject Buildings, at

issue, is a Type II “emergency” action pursuant to 617.5 (33) does not foreclose review of the ESDC’s determination. Nevertheless, the Court’s review of the ESDC’s determination is limited to the facts and record adduced before the agency when the administrative determination was rendered (*see 475 Ninth Ave. Associates LLC v Bloomberg*, 2 Misc 3d 597 *supra* citing *Matter of Levine v. New York State Liquor Auth.*, 23 NY2d 863, 298 NYS2d 71).

SEQRA Environmental Review Not Required for Type II Emergency Actions

Contrary to petitioners’ contentions, “Type II” actions need not be preceded by any environmental assessment (*Markowitz v Bloomberg*, 2 Misc 3d 558, 766 NYS2d 815 [NY Sup 2003] citing *Civic Ass’n of Utopia Estates v City of New York*, 258 A.D.2d 650, 685 N.Y.S.2d 781 [2d Dep’t 1999] [concerning a Type II action, agency had “no further responsibilities under SEQRA”]; *New York City Coalition for the Preservation of Gardens v Giuliani*, 175 Misc 2d 644, 652, 670 NYS2d 654, 660 [Sup Ct NY County 1997], *aff’d*, 246 AD2d 399, 666 NYS2d 918 [1st Dept 1998] [“... Type II actions ... require neither determinations of significance nor environmental impact statements....”]; *Hazan v Howe*, 214 AD2d 797, 798, 625 NYS2d 670, 671 [3d Dept 1995] [“No individualized assessment is required with respect to Type II activities”]). Type II actions, by definition, do not have “a significant impact on the environment” and do not require environmental impact review under SEQRA (*see* 6 NYCRR 617.5; *see also Matter of Crews v. Village of Dobbs Ferry*, 272 A.D.2d 540, 710 N.Y.S.2d 77).

The level of analysis required in assessing the environmental affect of a Type II emergency action is significantly less burdensome than that which is required of a Type I action. With respect to the environmental affect of an action classified under “Type II,” Part 617.5(c)(33), the ESDC is only required to determine that the emergency action, *i.e.*, the

proposed demolition, is “performed to cause the least change or disturbance, practicable under the circumstances, to the environment.” Thus, contrary to petitioners’ contentions, SEQRA provides that actions designated by that law as “Type II” actions require neither determinations of significance nor environmental impact statements (citing 6 NYCRR 617.3[f]).

“Hard Look” Review Not Required When Determining a Type II Classification

Moreover, the ESDC need not take a “hard look” when determining whether a particular action, *which falls within a project already designated as Type I*, should be classified as a Type II “emergency” action pursuant to Section 617.5 (c) (33) (*emphasis added*) (*see Village of Hudson Falls v New York State Dept. of Environmental Conservation*, 158 AD2d 24, 557 NYS2d 702 [3d Dept 1990] [discerning “a clear distinction between the exhaustive SEQRA review required for Type I actions and the ‘hard looks’ associated therewith, and the determination involving Type II actions and SEQRA analysis associated with permit renewals”]; *cf. Anderberg v New York State Dept. of Environmental Conservation*, 141 Misc 2d 594, 533 NYS2d 828 [Sup Ct New York County 1988] [in reviewing the DEC’s and the County’s determinations the “court must consider whether DEC and the County identified the relevant areas of environmental concern, took a “hard look” at such concerns and made a “reasoned elaboration” of the basis for their determination that the bridge replacement was a Type II action”]).

Independent Evaluation by a Professional Engineer

Petitioners’ contention that an independent assessment was required to determine whether “less drastic measures” were available to preserve the buildings short of demolition also fails. Again, the review of the ESDC’s Emergency Declaration is whether such determination was rational, and not whether other potentially preferable alternatives exist (*see New York State*

Thruway Auth. v Dufel, 129 AD2d 44 [3d Dept 1987]).

The ESDC's determination to issue an emergency declaration pursuant to Part 617.5 (33) need not be based upon an "independent evaluation by a professional engineer," as petitioners propose. There is no such requirement in Part 617.5(c)(33), and petitioners failed to cite to any authority in SEQRA, or by caselaw, for this position. At the same time however, ECL 8-0109 (2) contains a formula by which a leading agency prepares an EIS in connection with a Type I action, or an action which may have a significant effect on the environment. Under ECL 8-0109 (2), the ESDC may require and utilize an environmental report submitted by an applicant. In preparing, or causing to be prepared the EIS, an agency "may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement." This section further provides that *notwithstanding any use of outside resources or work*, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement (§8-0109(3)) (emphasis added). Therefore, since the ESDC is permitted to utilize either an environmental report submitted by an applicant or an *outside resource or work* in connection with a Type I action, this Court finds that the ESDC would likewise be able to utilize an engineer's report submitted by the applicant to undertake a Type II emergency action.

Nor is the ESDC required to evaluate previous inspections of the buildings subject to emergency demolition. Again, there is no such requirement in Part 617.5(c)(33). Further, the evaluation of whether the proposed demolition is "immediate" logically would rest on the most recent assessment of the condition of the subject buildings.

The additional arguments raised in the Proposed Intervenors' Amended Petition and *amicus curiae* brief to these parties are legally insufficient to challenge the ESDC's Emergency Declaration.

Applying the appropriate legal standard, a review of the record before this Court leads to the conclusion that the ESDC's determination that proposed demolition of the Buildings is a Type II "emergency" action, not subject to SEQRA review, is a reasonable interpretation of applicable statutes and is supported by the record. It was the determination of Rachel Shatz, the Director of Planning and Environmental Review at the ESDC, to issue the Emergency Declaration after her consideration of numerable factors.

In her affidavit, Ms. Shatz states that on November 2, 2005, she attended the presentation made by LZA Technology concerning the subject buildings. Ms. Shatz attests to LZA's "well deserved reputation as one of the best engineering firms in the City of New York." At the conclusion of the presentation, Ms. Shatz requested that Ratner Companies submit a report documenting the physical conditions of the buildings, and the reasons it believed that demolition was warranted. On November 8, 2005, she received a letter from Ratner Companies' head of construction, enclosing the Inspection Report. The Inspection Report, which included numerous photographs, confirmed her concerns about the possible threat to public health and safety presented by the subject buildings.

Ms. Shatz further attests that after reviewing the Inspection Report, she consulted with Mr. Paget, and "with other senior officials at the ESDC," including Soo Kang (Senior Planner), Anita Laremont (ESDC's Senior Vice President and General Counsel), Steven Matlin (Project Attorney for the Project), Anne Hulka (Senior Vice President/Real Estate), and Eileen

Mildenberger (CEO), who agreed that it was appropriate to issue the Declaration. Relying on all of these factors, Ms. Shatz determined that an “emergency” existed within the meaning of 6 NYCRR 617.5(c)(33), and that “immediate action” was warranted for the protection and preservation of life, health, and property as contemplated by that section.

Her decision was also based on the fact that she previously toured the project site, and was aware that the site contained a number of vacant, boarded-up, and deteriorated buildings that did not have landmark designation or other historical significance. Based on her experience, such deteriorated buildings posed a risk of harm to public health and safety. Ms. Shatz further describes an incident in May 2005, when an entire side of a neglected and vacant building in the Fort Greene section of Brooklyn, collapsed and crushed a woman to death, while injuring six others. Ratner Companies expressly noted this collapse when it expressed its desire to demolish the subject buildings. According to Ms. Shatz, she was also aware that children, teenagers, or homeless persons might enter the buildings and suffer injury from falling debris, or from fires started to keep warm or as acts of vandalism.

The record before the ESDC also supports the conclusion that the proposed demolition is “immediately necessary” on a “limited and temporary basis for the protection or preservation of life, health,” and property. Further, the record supports the ESDC’s conclusion that such demolition is directly related to the emergency and is being performed to cause the least change or disturbance, practicable under the circumstances, to the environment. According to Ms. Shatz, as well as the photographs in the record, stabilization of the subject buildings to prevent their collapse, in the absence of any historical preservation purpose, would be pointless and wasteful, especially since these buildings will be ultimately demolished regardless of the Project’s

approval. Again, this Court is not permitted to substitute its judgment for that of the agency.

The cases upon which petitioners rely are factually distinguishable.

The determination of the ESDC that the demolition of the Buildings was a Type II action pursuant to 6 NYCRR 617.5 (c)(33) was not arbitrary and capricious and had a rational and substantial basis in the record (*see Matter of Lahey v Kelly*, 71 NY2d 135, 140, 524 NYS2d 30, 518 NE2d 924; *Matter of Fuhst v Foley*, 45 NY2d 441, 444, 410 NYS2d 56, 382 NE2d 756).²⁹

Second Cause of Action: Enjoin Ratner Companies from Demolition

Here, petitioners' claim that Ratner Companies should be enjoined from demolishing the Buildings and the building located at 622 Pacific Street rests upon the assertions that Ratner Companies failed to take reasonable steps to stabilize the buildings, and the demolition is a violation of SEQRA's requirement that there not be any physical change in the environment while the project is undergoing SEQRA review.

Even assuming there is merit to the claim that Ratner Companies failed to take reasonable steps to stabilize the Buildings, petitioners failed to establish that Ratner Companies had a legal obligation to do so. Nor has there been any showing that a private right of action stems from such failure. Further, there is no prohibition against making a change, *i.e.*, demolishing the Buildings, while the Project is undergoing SEQRA review, where the ESDC has subsequently determined that such action is necessary pursuant to the Emergency Exception, 617.5(33). Therefore, there is no basis in law to enjoin the proposed demolition of the Buildings based on petitioners' second cause of action.

²⁹The Court does not rest its decision on the respondent's claim that issuing the Building Permits is ministerial.

Third Cause of Action: Conflict of Interest Between the ESDC and Mr. Paget

DR 5-105 (A) and (B) (22 NYCRR § 1200.24) of the Code of Professional Responsibility

provides:

A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests.... A lawyer shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests....

Nevertheless, DR 5-105 (C) provides that an attorney may represent clients with potentially adverse interests if “. . . a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.”

Given the conflicts inherent in simultaneous representation, a *prima facie* rule of disqualification applies where there is an existing attorney-client relationship on behalf of a client whose interests are adverse to the interests of another current client (*Cinema 5, Ltd. v Cinerama, Inc.*, 528 F2d 1384 [2d Cir 1976]). Under this standard, where the attorney-client relationship is a continuing one, adverse representation is *prima facie* improper, (*Matter of Kelly*, 23 NY2d 368, 376 [1968]), and the attorney must be prepared to meet the very high standard that there will be no actual or apparent conflict in loyalties or diminution in the vigor of representation (*Cinema 5, Ltd. v Cinerama, Inc.*, 528 F2d 1384 [2d Cir. 1976]; *Thaler v Jacoby & Meyers Law Offices*, 294 AD2d 230, 742 NYS2d 241 [2002]). The *prima facie* rule of disqualification applies, even

though the simultaneous representation occurred unknowingly and inadvertently (*see, e.g., Cinema 5, Ltd. v Cinerama, supra*). An attorney must avoid not only representing clients who have actual conflicts but also must avoid representing client whose interests appear conflicting (*Cardinale v. Golinello, supra; see also, Kassis v. Teacher's Ins. & Annuity Assn., 93 N.Y.2d 611 [1999]*). And, an attorney must avoid not only the fact but even the mere appearance of impropriety (*Tekni-Plex, Inc. v Mayner & Landis, 89 NY2d 123, 130-131 [1996]*). Where there is a conflict of representation, doubts as to the existence of a conflict of interest are to be resolved in favor of the disqualification (*Lammers v Lammers, 205 AD2d 432, 613 NYS2d 906 [1st Dept 1994]*).

Prior to his engagement with Ratner Companies, Mr. Paget represented the ESDC for nearly 30 years on major real estate development projects in the city. In December 2003, Ratner Companies and the ESDC “discussed and agreed upon their respective relationships with Paget and his firm, and ESDC specifically approved the immediate retention of Paget’s firm at FCRC’s [Ratner Companies’] expense.” (Ratner Companies Memorandum of Law, page 7). Thus, in December 2003, Ratner Companies commissioned Mr. Paget and his lawfirm to begin working on the Atlantic Yards Project. From the time Mr. Paget was retained in 2003, until September 2005, he provided advice to Ratner Companies. Yet, in February 2005, during this almost two-year period, and mid-project completion, the ESDC formally retained Mr. Paget as outside counsel to the ESDC to perform “[l]egal services . . . in connection with the environmental analysis of the Project” that ESDC would “authorize and oversee” (Ratner Companies, Exh. H). In short, the ESDC essentially hired the sponsor’s current lawyer, at the sponsor’s expense, to assess the environmental ramifications of the sponsor’s project.

Moreover, it is uncontested that Mr. Paget still represents Ratner Companies on another, albeit unrelated, matter and thus, in this capacity, Mr. Paget's duty of loyalty to Ratner Companies continues. Yet, as counsel to the ESDC concerning the Atlantic Yards Project, Mr. Paget owes, as any fiduciary, a high degree of undivided loyalty to the ESDC. Mr. Paget, who upon retention by the ESDC, and along with the ESDC, is obligated to review the Project with the environmental interests of the public in mind, not the project sponsor's interests.

Potentially, the interests of Ratner Companies, as an applicant or project sponsor, are adverse to the interests of the ESDC, which is charged with the responsibility to protect the environment and regulate the activities of individuals and corporations so that "due consideration is given to preventing environmental damage." The oft bottom-line, profit-making pursuits of real estate development corporations, may not necessarily align with the stated, valid environmental interests of the ESDC, whose very function in this matter is to subject the proposed action to a high level of environmental review. Thus, the simultaneous representation of the ESDC and Ratner Companies is *prima facie* evidence of a conflict of interest.

Mr. Paget failed to assert or demonstrate, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of representation of both the ESDC and Ratner Companies.

The Court does not question respondents' contention that it is normal procedure for the applicant to pay for ESDC specialists. However, that does not obviate the obligation to avoid any conflict of interest.

Further, the Court is cognizant that Mr. Paget and his firm are members of a boutique, discrete area. However, avoiding even the appearance of impropriety is critical in a case of this

magnitude and with such long-lasting effects the Borough of Brooklyn and the City of New York generally.³⁰

Easement over the property located at 585-601 Dean Street

As pointed out by respondents, the deed, dated October 2, 1939, provides for an “easement and right of way” over a 13' 8" long portion of 585-601 Dean Street for the benefit of 754 Pacific Street. The area encumbered by the easement was to have “an overhead clearance of not more nor less than 13 feet 8 inches at its southerly end on the northerly side of Dean Street, and not more nor less than 17 feet at its northerly end or rear” (Ratner Companies, Exh. R). According to Ratner Companies, after demolition of the existing building, there will be no building in existence to obstruct the Pacific Carlton’s right of passage. However, Ratner Companies acknowledges that “[d]emolition of the existing building in no way eliminates or otherwise interferes with the right of passage that is established by the covenant creating the easement.” (Ratner Companies Memorandum of Law, page 34).

The existence of the easement over such property does not warrant an injunction preventing Ratner Companies from demolishing the subject Buildings, and there is no showing as to how permitting such demolition would result in any prejudice or irreparable harm related to such easement. Therefore, though the cause of action seeking to maintain an easement over the property located at 585-601 Dean Street cannot serve as a basis for injunctive relief, it is uncontested that a right of passage is established by the covenant creating the easement.

³⁰ The Court does not address respondents’ opposition to enjoin the ESDC from completing the Final Scoping Document on the ground that the Final Scoping Document is not a “final determination” ripe for Article 78 review seems to improperly interpose two distinct concepts together.

Accordingly, the fourth cause of action in the petition is granted solely to the extent that the Court acknowledges that the subject deed provides for an easement. However, the request that Ratner Companies “maintain” this easement is premature, as the issue of redevelopment on this site is yet to be determined.

B. Irreparable Harm and Balance of the Equities

Because the merits inquiry as to first, second, and fourth causes of action weighs overwhelmingly against a preliminary injunction, the Court need not determine which way the balance of equities tips and irreparable harm as to these claims. However, petitioners have established the likelihood of success on the merits of its conflict of interest claim.

The record demonstrates that the decision to issue the Emergency Declaration was made by Rachel Shatz of the ESDC in her capacity as ESDC’s Director of Planning and Environmental Review. There are no allegations that she was had a conflict of interest or should be disqualified. Thus, there is no demonstration as to how the Emergency Declaration to demolish the buildings flowed from the conflict of interest between Mr. Paget and the ESDC so as to warrant a stay of the demolition of the buildings (*see Maglione v. New York State Dept of Health*, 9 AD3d 522 [3d Dept 2004]).

However, the balance of the equities and the public interest tip in favor of granting an injunction to the limited extent of enjoining the ESDC from performing those acts which depend upon the assistance of Mr. Paget until new environmental counsel is obtained. The magnitude of the impact of ESDC’s future actions are so monumental and will have such a considerable effect on an entire conglomerate of communities, that the slightest appearance of impropriety and conflict warrant the disqualification of Mr. Paget and his firm from the involvement in ESDC’s

review and approval process. Therefore, the Court solely enjoins the ESDC from taking any review action that requires the input of Mr. Paget or his firm, until new counsel is engaged.

Conclusion

Petitioners' initial order to show cause pursuant to CPLR 6301 to enjoin the ESDC and Ratner Companies from demolishing or authorizing any other party to demolish the structures located at 608-20 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street, 620 Pacific Street, or any other buildings located in the footprint of the proposed Atlantic Yards Project, pending the determination of the underlying proceeding is denied. Petitioners failed to demonstrate a sufficient level of merit to their claim that the ESDC Emergency Declaration, was arbitrary or capricious, or an abuse of discretion. Nor is a stay against the Ratner Companies from demolishing the Buildings and the building located at 622 Pacific Street, until independent engineering assessments of the Buildings can be done and a determination made that demolition is necessary to protect health and safety, warranted. The request to enjoin Ratner Companies from demolishing the subject Buildings is tied solely to the claim that the ESDC's Emergency Declaration was arbitrary and capricious, or an abuse of discretion, and this Court determines that the Declaration was supported by the record.

However, petitioners established a likelihood of success on the merits of their claim that a conflict of interest exists between the ESDC and outside counsel, Sive, Paget & Riesel, P.C.. Such counsel should be disqualified from the ESDC's review process on the Atlantic Yards Project.

Although petitioners have established their entitlement to an order directing that the subject easement be maintained, there is no basis to stay the proposed demolition on this basis.

In light of the above, the cause of action for discovery is moot.

Accordingly, it is hereby

ORDERED that the order to show cause (002) by Juan Barrera, Antonio Rodriguez, Antonio Gomes, and Faouzzi Najmi pursuant to CPLR § 7802 for leave to intervene in the instant proceeding, file the proposed Amended Petition *nunc pro tunc*, and amend the caption to reflect the addition of intervenors as petitioners is denied; and it is further

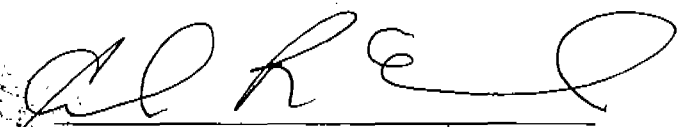
ORDERED that the order to show cause (003) by Councilwoman Letitia James, Congressman Major R. Owens, and Senator Velmanette Montgomery for leave to appear as *amicus curiae* in this proceeding and serve an *amicus curie* brief in support of petitioners' motion for injunctive relief is granted; and it is further

ORDERED and ADJUDGED that the Petition (sequence 001) is granted as to the third cause of action to the extent that the ESDC is hereby enjoined from taking any further action which requires the services of outside counsel David Paget and his firm, until new counsel is engaged, and as to the fourth cause of action to the extent that it the Court declares that the subject deed provides for an easement; and it is further

ORDERED that the ESDC shall engage new counsel within 45 days; and it is further

ORDERED that the cross-motions by the ESDC and Ratner Companies to dismiss the petition is granted to the extent that the first, second, and fifth causes of action are dismissed.

This constitutes the decision and Judgment of the Court.

Dated: February 14, 2004

 Hon. Carol Robinson Edmead, J.S.C.

This judgment has been entered and notice of entry of judgment has been mailed hereto. To obtain entry, counsel or other interested representative must appear in person at the Judgment Clerk's Desk (Room 415).