

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

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In the Matter of	:	New York County
	:	Index No. 104597/07
DEVELOP DON'T DESTROY (BROOKLYN),	:	
INC., et al.,	:	AFFIRMATION OF
	:	PHILIP E. KARMEL
Petitioners-Plaintiffs-Appellants,	:	SUBMITTED ON BEHALF OF
	:	RESPONDENT-DEFENDANT-
For a Judgment Pursuant to Article 78 of the CPLR	:	RESPONDENT URBAN
and Declaratory Judgment	:	DEVELOPMENT CORPORATION
	:	D/B/A EMPIRE STATE
-- against --	:	DEVELOPMENT CORPORATION
	:	IN OPPOSITION TO PETITIONERS-
URBAN DEVELOPMENT CORPORATION d/b/a	:	PLAINTIFFS-APPELLANTS'
EMPIRE STATE DEVELOPMENT	:	MOTION TO ENLARGE THE
CORPORATION, et al.,	:	APPELLATE APPENDIX
	:	
Respondents-Defendants-Respondents.	:	
	:	
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PHILIP E. KARMEL, an attorney admitted to the practice of law in the State of New York, hereby affirms and declares under the penalty of perjury:

1. I am a member of Bryan Cave LLP, attorneys for respondent-defendant-respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”). I am fully familiar with all the proceedings heretofore had herein and the facts hereinafter recited. I respectfully submit this affirmation in opposition to the Motion To Enlarge The Appellate Appendix served by petitioners-plaintiffs-appellants (“Appellants”).

2. Appellants assert that the document titled “Atlantic Yards Arena And Redevelopment Project – Contract Scope For An Environmental Impact Statement” (the “Contract Scope”) should have been included in the administrative record. See Randall L. Rasey’s Affirmation ¶¶ 6-7. This assertion is incorrect. The Contract Scope

is nothing more than a portion of the agreement whereby ESDC retained the services of its environmental consultant. The Contract Scope was not relied upon by ESDC in making its blight determination, or any other decision that is at issue in this proceeding and thus is not part of the administrative record. *See Pacific Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp.2d 1, 7 (D.D.C. 2006); *Argyle Conserv. League Inc. v. Town of Argyle*, 223 A.D.2d 796, 798 (3rd Dep't 1996); *Regional Action Group for the Envir. Inc. v. Zagata*, 245 A.D.2d 798, 801 (3rd Dep't 1997). ESDC's decision-making was based on the Blight Study, the Environmental Impact Statement, the General Project Plan, public comments submitted during the course of the public review, and other documents in the administrative record. It is those documents, and not the Contract Scope, that form the "record of proceedings" in this matter within the meaning of CPLR § 7804(e).

3. In addition, since the Contract Scope was not before the lower court, it would be improper to consider that evidence on appeal. *See Scotto v. Mei*, 219 A.D.2d 181, 183-84 (1st Dep't 1996); *Chimarios v. Duhl*, 152 A.D.2d 508 (1st Dep't 1989). Appellants were well aware that ESDC had retained an environmental consultant in this matter and provide no adequate excuse for not having presented this document to the lower court. It is particularly objectionable that Appellants have now attempted to add the document to the record with their reply brief.

4. Finally, the document is irrelevant. Appellants assert that the Contract Scope undermines ESDC's blight finding, but the required record evidence of blight is not determined by the Contract Scope. That determination is to be based upon the evaluation of the condemning authority as to whether "substandard or insanitary"

conditions exist and does not require any prediction as to how market forces might ameliorate such conditions. McKinney's Uncons. Laws §§ 6260(c)(1), 6253(6)(c), (12). Moreover, the Blight Study adequately addresses the issues Appellants have raised.

5. I have been authorized to state that the other respondents-defendants-respondents join in this objection to Appellants' motion.

WHEREFORE, Appellants' motion should be denied.

Dated: New York, New York
September 3, 2008


PHILIP E. KARMEL

