

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

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DEVELOP DON'T DESTROY BROOKLYN, et al., : Index No. 100686/06
 : IAS Part 35
 Petitioners, : Justice Edmead

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

EMPIRE STATE DEVELOPMENT CORPORATION :
and FOREST CITY RATNER COMPANIES, :

Respondents. : **AFFIDAVIT**

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STATE OF NEW YORK)
 : ss.:
COUNTY OF KINGS)

JANE MARSHALL, being sworn, states:

1. I am a Senior Vice President for Commercial and Residential Development of respondent Forest City Ratner Companies ("FCRC"). I am a city planner by training and joined FCRC in 1995. From 1990 to 1995, I was an officer of what is now known as the New York City Economic Development Corporation ("EDC"). From 1980 to 1990, I was employed by the New York City Department of City Planning, where my last position was Deputy Executive Director of the Department's Land Use Division. At FCRC, I have substantial responsibilities for the oversight of the Environmental Impact Statement and the design of the Master Plan the Atlantic Yards Arena and Redevelopment Project (the "Project"). I make this affidavit, which is based

upon my first-hand knowledge, in opposition to petitioners' motion for a preliminary injunction, and in support of FCRC's cross-motion to dismiss.

2. Since early 2004, there have been regular weekly meetings of FCRC personnel with responsibility for the Project and Empire State Development Corporation ("ESDC") personnel with responsibility for the Project, except that there was a moratorium on contact between FCRC and ESDC from June 2005 to mid-September 2005, while the MTA was considering alternative proposals for redevelopment of its Vanderbilt Yards. I have attended most of these meetings, which usually are held at ESDC's main offices at 633 Third Avenue in Manhattan.

3. At a meeting on January 22, 2004, I discussed with Rachel Shatz of ESDC the status of David Paget and his law firm. Ms. Shatz is ESDC's Director of Planning and Environmental Review, Design and Construction. In late 2003, FCRC had asked Mr. Paget and his firm, as well as other outside environmental consultants, to begin work on the environmental review of the Project. At that time, it was anticipated that, at some point in the near future, ESDC would declare itself the "lead agency" for the Project's environmental review and, at that point, assume primary responsibility for the environmental review. It was also assumed that, at that point, ESDC would retain Mr. Paget – with whom we knew that ESDC had a long professional relationship – as its environmental counsel for the Project, with FCRC reimbursing ESDC for Mr. Paget's fees. I am able to identify the date of my conversation with Ms. Shatz, because I found my notes of the meeting. A copy of those notes is being submitted as FCRC Exhibit G.

4. In my conversation with Ms. Shatz, we discussed the fact that Mr. Paget would be retained by ESDC, and that at that point the work product that Mr. Paget

and his firm had generated would be assigned by FCRC to ESDC. We also agreed that ESDC's attorneys should prepare a "cost letter" to establish the cost allocations between FCRC and ESDC and the mechanisms by which environmental counsel and experts would be retained by ESDC at FCRC's expense, with ESDC establishing an imprest account to be funded by FCRC for that purpose.

5. In the same conversation or perhaps in a later one, I also asked Ms. Shatz when she anticipated that the outside environmental consultants who were working on the Project would begin working for ESDC. She replied that the change probably should occur when ESDC declared itself the lead agency under SEQRA. I then asked her whether that meant that Mr. Paget and the outside consultants at the firm of AKRF, Inc. would be retained by ESDC at that point. Ms. Shatz replied that that made sense to her, but that she wanted to discuss the question with ESDC's in-house attorneys, including ESDC's General Counsel, Anita Laremont. At our next meeting, Ms. Shatz told me that ESDC staff, including its in-house attorneys, had discussed the matter and had concluded that ESDC wanted Mr. Paget and his firm to be ESDC's environmental counsel, and that Mr. Paget and his firm should assume that status when ESDC declared itself the lead agency for purposes of the Project's SEQRA compliance.

6. After my conversation of January 22, 2004, with Ms. Shatz, ESDC's lawyers did prepare a draft cost letter. A copy of the first draft of the cost letter that was shared with FCRC is being submitted as FCRC Exhibit H. I have reviewed the relevant e-mail traffic, which demonstrates that this draft, which is dated February 2, 2004, was transmitted by Steven Matlin, an in-house lawyer at ESDC, to Stephen Lefkowitz of Fried Frank Harris Shriver & Jacobson, LLP, FCRC's general outside

counsel with respect to the Project, on February 2, 2004, and then transmitted by Mr. Lefkowitz to FCRC on the following day, February 3, 2004. I understand that Mr. Lefkowitz's transmittal e-mail contains, in addition to the actual transmission of the draft letter, further attorney-client communications that are confidential, and that Mr. Lefkowitz's e-mail therefore is not being submitted to the Court.

7. The Court will observe that the draft cost letter of February 2, 2004, contains a "footer" at the bottom of the page that includes the words "JMarshall." However, I assure the Court that neither I nor anyone else representing FCRC drafted this document, which instead was drafted by Mr. Matlin of ESDC.

8. Later that month, FCRC and ESDC did execute a cost letter (the "Cost Letter") dated February 18, 2004, and a copy of it is being submitted as FCRC Exhibit C. The Cost Letter provides, among other things, that it "sets forth the agreement of [FCRC] to pay certain costs incurred by [ESDC] with respect to the proposed Atlantic Yards-Brooklyn Arena Mixed-Use Development Project (the 'Project')." It also states that FCRC "has requested that [ESDC] authorize and/or oversee the following services to be performed in connection with the Project," which services include "[l]egal services to be provided by Sive, Paget & Riesel, P.C. in connection with the environmental analysis of the Project" Significantly, this language appeared in the first draft of the Cost Letter – *i.e.*, the draft that Mr. Matlin of ESDC transmitted to Mr. Lefkowitz of the Fried Frank firm on February 2, 2004 – and shows that the basic understanding that Mr. Paget and his law firm really were working for ESDC, although at FCRC's expense, was understood by both FCRC and ESDC at the outset of the environmental work on the Project.

9. As of February 2004 when the Cost Letter was finalized and executed, it was anticipated by the people at FCRC and ESDC who were working on the Project that Memoranda of Understanding between FCRC and ESDC would be prepared and finalized in short order. It was further anticipated that, once these MOU's had been concluded, it would not be much longer before the ESDC's Board of Directors authorized ESDC to declare itself the "lead agency" for purposes of compliance with the State Environmental Quality Review Act ("SEQRA") and commence the formal process of SEQRA compliance. Instead, however, in early 2004, the Long Island Railroad raised unanticipated questions about the Project that had the effect of delaying FCRC's ability to conclude MOU's with ESDC for an entire year. It was not until February 2005 that these MOU's were concluded.

10. Then, in about June 2005, the MTA decided to open the redevelopment of its Vanderbilt Yards to competitive bidding, which in turn led to a competing proposal by another developer, Extell Corporation. It was not until September 14, 2005, that the MTA's Board of Directors decided to proceed with FCRC as the developer. It was later that month that ESDC's Board of Directors authorized ESDC to declare itself the lead agency for the Project's SEQRA compliance.

Jane M Marshall
Jane Marshall

Sworn to before me this
8 day of February, 2006.

Jeanne Mucci

JEANNE MUCCI
Notary Public, State of New York
No. 30-4834577
Qualified in Nassau County
Commission Expires March 30, 2011