

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Anderson, Elisele

INDEX NO. 106056/08

MOTION DATE 6/23/08

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

NYS Urban Development Corp.

The following papers, numbered 1 to 14 were read on this motion to/for Art 78 relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-14
13-15
16-17

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

petition is decided pursuant to attached Deacon order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/23/08

Jane S. Solomon
JANE S. SOLOMON 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):

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

-----X
Eliselle Anderson, Ronald Parrish, Robert Jackson, William A.
Lashley, Jr., Allison Sniffin, Jonathan Willner, Robin Weil, Daniel
Saks, Nikkia Revellac, Yvonne Chak, Joel Weiskopf, Marina
DeFranza and Adam Radbell,

INDEX NO.
102056/08

Petitioners,

-against-

DECISION
*ORDER &
JUDGMENT*

New York State Urban Development Corporation,
d/b/a Empire State Development Corporation,

Respondent.

SOLOMON, J.:

UNFILED JUDGMENT
*This judgment has not been entered by the County Clerk
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1140)*

Petitioners are rent regulated tenants in two buildings, each of which is located within Phase I of the Atlantic Yards Arena and Redevelopment Project. Respondent is a New York State government agency charged with the duty of supervising the said Atlantic Yards Arena and Re-development Project. The instant petition is brought pursuant to Article 78 of the CPLR, and seeks relief from this court in the form of an order as follows: voiding the contract known as the "Funding Agreement" entered into between respondent and the Brooklyn Arena, LLC and Atlantic Yard Development Company, LLC (hereafter "developer"), and dated September 12, 2007 to the extent that 1) it permits the acquired property to remain undeveloped for a period of more than ten years, and 2) to the extent that it purports to give respondent the option to re-

acquire such property as remains undeveloped for four years. Petitioners seek further relief in the form of an order requiring respondent to hold public hearings on the announced amendments to the project. In sum, the petitioners allege that, pursuant to the said funding agreement, the duration of the development of the Atlantic Yards Project is extended beyond the time limit set forth in Eminent Domain Procedure Law Section 406, which provides in relevant part as follows:

If, after acquisition in fee pursuant to the provisions of this chapter, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use within ten years of acquisition without first offering the former fee owner of record at the time of acquisition a right of first refusal to purchase the property at the amount of the fair market value of the property at the time of such offer...

The specific language complained of, in relevant part, is found in the last two pages of the agreement, annexed to the petition as Exhibit "1" and contained in the successive paragraphs designated "Phase 1 Commitment and Remedies", and "Phase 2 Commitment and remedies" and provides as follows:

Developer ...shall complete the construction of..."Phase 1"... within twelve years of the effective date, subject to Force Majeure. ...Developer ...shall complete the construction of ..."Phase 2"... subject to Force Majeure, by a date to be established in the Project Documentation...(the "Final Deadline")....If Developer...fails to complete the balance of Phase 2 by the Final Deadline...ESDC shall have an option to purchase Developer's...interest in the parcels not yet developed....

Petitioners contend that this language allows the ESDC to retain title to the acquired property for more than the permitted ten years without material improv-

ment, in direct derogation of the statute, improperly extends the deadline to twelve years in phase 1, and indefinitely in the case of phase 2. Further, the agreement permits ESDC to acquire the property without first offering the original owner a right of first refusal, also in derogation of EDPL 406.

Respondent cross-moves to dismiss the petition on the grounds that petitioners lack standing and have failed to state a claim.

In a prior decision involving the same parties, the Appellate Division determined that petitioners had standing to challenge defendant's authority to condemn their residences pursuant to EDPL 207 (*Anderson v. New York State Urban Dev. Corp.*, 44 AD3d 437 [1st Dept, 2007]), finding them to be "condemnees" within the meaning of EDPL 103 [C]; i.e., "the holder of any right, title, interest, lien, charge or encumbrance in real property subject to an acquisition or proposed acquisition."

In this matter, however, the petitioners seek relief pursuant to EDPL 406, *supra*, which makes reference only to "fee owners" not to "condemnees" or tenants, or any other category into which the petitioners may be included. "It is a universal principle in the interpretation of statutes that *expressio unius est exclusio alterius*. That is, to say, the specific mention of one person or thing implies the exclusion of other persons or thing. As otherwise expressed, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." (McGivney's Statutes Section 240).

The same principle of statutory interpretation may be applied to the petitioners' substantive issues; i.e. that the complained of language in the funding agreement violates EDPL

406. The statute is focused on abandonment of the project, and subsequent disposition of the property to a private owner. There simply are neither allegations nor proof in petitioners' papers that the project is or will be abandoned, that the property will not be timely improved or that it is intended to be conveyed to a private user without giving the fee owner a right of first refusal. Similarly, as argued by Respondent, there is no evidence that the challenged agreement is not consistent with the contemplated project and existing general project plan so as to bring into play the need for a public hearing.

Accordingly, it hereby is

ORDERED and ADJUDGED that the cross motion is granted and the petition is dismissed and denied.

DATED: September 23, 2008

ENTER,



JANE S. SOLOMON

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