SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of

FRANKLIN AVE. ACQUISITION, LLC,

Petitioner,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY PLANNING COMMISSION, and KENNETH J. KNUCKLES, in his official capacity as acting Director of the New York City Department of City Planning and the Chair of the City Planning Commission,

Respondents.

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AFFIRMATION OF ALICE R. BAKER IN OPPOSITION TO PETITIONER'S REQUEST FOR A TEMPORARY RESTRAINING ORDER

Alice R. Baker, an attorney duly licensed to practice law before the Courts of the State of New York, affirms under penalties of perjury pursuant to CPLR § 2106 as follows:

1. I am a Senior Counsel at the Office of the Corporation Counsel of the City of New York, representing, in the above-captioned matter, The City of New York, The New York City Department of City Planning, The New York City Planning Commission.[1] I make this Affirmation in opposition to Petitioner's, Franklin Ave. Acquisition, LLC ("Developer"), request for a Temporary Restraining Order ("TRO").

2. I am fully familiar with the facts and circumstances of this proceeding. The following statements are based on my personal knowledge, that of attorneys in my office, and information provided by my clients based on their personal knowledge.

[1] The caption improperly names Kenneth J. Knuckles as acting Director of the New York City Department of City Planning and the Chair of the City Planning Commission. No acting Director of the New York City Department of City Planning of Chair of the City Planning Commission has been nominated at this time.

3. The Developer seeks an unprecedented injunction preventing the City Planning Commission ("Commission") from taking a vote and issuing a decision on September 22, 2021 on a Uniform Land Use Review Procedure ("ULURP") application to rezone a portion of a single block at 960 Franklin Avenue in Crown Heights Brooklyn ("Rezoning Application"), claiming it will be harmed by circumstance of Developer's own creation.

4. A TRO should only be granted pending a hearing for a preliminary injunction "where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be held." CPLR § 6301. Notably, a party seeking a TRO has a higher burden of proof than a party seeking a preliminary injunction "as it must demonstrate not only that it will suffer irreparable injury, which is sufficient for a preliminary injunction, but also that the anticipated injury is 'immediate'." *Develop Don't Destroy Brooklyn, Inc. v. Urban Dev. Corp.*, 2007 NY Slip Op. 30825U, 2007 N.Y. Misc. LEXIS 5833 at *9 (N.Y. Sup. Ct. April 20, 2007) (citation omitted). TROs are drastic remedies which should be used sparingly. *Id.* The Developer has provided no credible evidence of harm, let alone met their burden of immediate and irreparable harm such that the Commission's process should be enjoined.

5. I am unaware of any Commission ULURP vote ever being enjoined. The requested injunction would interfere with the Commission's ability to complete the necessary ULURP review within the strictly proscribed timeframes required by the City Charter.

6. Moreover, the Developer cannot support a claim of irreparable injury, as it seeks court intervention to address an alleged crisis for which it bears sole responsibility, and which is entirely of Developer's own making.

7. Through a multi-year application process, the Department of City Planning ("DCP") repeatedly informed the Developer that its proposal was too large, too bulky, and had

unacceptable impacts, and that the Developer should assess a lower density alternative and revise its application accordingly. A significant concern was that shadows from the proposed development would be cast onto Brooklyn Botanic Garden greenhouses which contain rare desert and tropical plant species that are particularly sunlight sensitive and require full year-round sun. The Developer, however, ignored that advice, and pressed on with its out of scale proposal without assessing a lower density alternative when it submitted its draft environmental analysis for public review.

8. ULURP, which is required for certain land use proposals as set forth under City Charter section 197-c including the Rezoning Application here, prescribes an orderly public review process for land use applications. It mandates review at multiple levels of government—including the local community board, the appropriate borough president, and the Commission—with public hearings and opportunities for the public to submit comments on an application. It also requires adherence to strict timeframes, with the affected community board notifying the public of the application, conducting a public hearing, and submitting a recommendation to the Commission and the appropriate Borough President no more than 60 days after DCP deems an application complete and certifies it into ULURP. Charter § 197-c(e). The Borough President then can, but is not required to, hold a public hearing and has 30 days after the filing of the Community Board's recommendation to submit a written recommendation to the Commission. Charter § 197-c(g). After the Borough President's 30-day review period, the Commission has 60 days to hold a hearing and approve, approve with modifications, or disapprove the application. Charter § 197-c(h). There are no mechanisms to extend the timeframes under ULURP.

9. This Rezoning Application was deemed complete and certified into ULURP on February 1, 2021. When the Rezoning Application was certified, the Chair of the Commission

publicly noted the significant adverse impacts of the proposal due to direct shadows effects on the unique natural resources in Brooklyn Botanic Garden and called the proposed structures grossly out of scale with the surrounding neighborhood.

10. Still, the Developer steadfastly clung to its proposal.

11. Significantly, at the Community Board 9 hearing on June 21, 2021, the public expressed overwhelming opposition to the Rezoning Application. Not surprisingly, on June 23, 2021, the Community Board recommended the Commission disapprove the Rezoning Application.[2] Similarly, the Borough President also recommended disapproving the Rezoning Application.[3] And at the Commission's public hearing on July 29, 2021, again, the public overwhelmingly opposed the Rezoning Application.

12. Only now, after the impacts of the proposal in the Rezoning Application have been evaluated, the public has had its opportunity to participate in the process, and the Commission is ready to act within its Charter-mandated timeframe, does the Developer attempt to add this new lower density alternative to the final environmental analysis and rely on it as a basis for the Commission to use its discretion to consider and presumably adopt this new scaled down proposal, effectively bypassing public review by the Community Board and Borough President of this substantially different proposal. The law is clear: the Commission may, but is not required to consider a new proposal after an application has been certified as complete and begun the formal

[2] As a result of an unprecedented TRO imposed in a separate lawsuit in Kings County Supreme Court regarding this Rezoning Application, Community Board 9's public hearing was delayed beyond its 60-day ULURP time clock.
[3] The potential of a lower density alternative was mentioned at an information session before the Community Board. In its recommendation to disapprove the Rezoning Application, the Community Board noted that there had been little interaction between the applicant and the Board to try to incorporate community concerns into a revised application and that the potential design modifications mentioned after the application was certified should not be considered as part of the ULURP review as the Board had not been provided sufficient documentation to substantiate or refute any claims made presentations. Similarly, its recommendation to disapprove the Rezoning Application, the Brooklyn Borough President indicated that such a scenario is not under official consideration. No information pertaining to a proposed modification was provided to DCP or the Commission until the end of July 2021, just days before the Commission's public hearing on the Developer's Rezoning Application.

ULURP process. *See* 62 RCNY § 2-06(c) ("The Commission *may* propose a modification of an application . . . ." (emphasis added)). Here, the Commission has already indicated, at a public review session, that it is not interested in modifying the application at this late date and facilitate Developer's tactics. The Commission has no obligation to consider modifications to a ULURP application, and Developer's last minute submission of a proposed alternative is patently improper, especially given the history and complexity of this application.[4]

13. Moreover, judicial review of a ULRUP decision, including the underlying environmental review required by the SEQRA, is premature before the final zoning action is taken. Although unusual for an application's proponent to seek to stop its own application from advancing through the process, *Hell's Kitchen Neighborhood Ass'n v. N.Y. City Dep't of City Planning* provides relevant precedent. In that case, petitioners sought to stop the ULURP process because they claimed a flawed environmental impact statement underlay the expected ULURP decision. 6 Misc. 3d 1031(A) (Sup. Ct. New York County 2004). The court held that petitioner had not suffered injury because no final approval had been issued and refused to halt the ULURP process. *Id.* Similarly, here, the Developer seeks review of what it alleges is a faulty environmental review before the final ULURP decision has been made.

14. At this late stage in the ULURP process, the Commission, and DCP staff, have suggested to the Developer that it file a new application for the new proposal, so that it can receive the appropriate consideration and review. The Developer's intransigence and refusal to

[4] The Developer points to a July 16, 2021 email from DCP regarding key dates for finalizing the environmental analysis underlying the Rezoning Application as support for their contention that their last-minute submission of a substantially different alternative was timely. But this email was not an invitation to submit an entirely new and previously unreviewed lower density alternative, but rather an enumeration of chapters of the environmental review that needed to be finalized. The Developer had been told for years that a lower density alternative should be explored. To now claim that this last-minute submission of such complexity, which has its own complicated shadows analysis, is consistent with DCP's instructions regarding timing of finalizing the environmental review is disingenuous.

address the deep-rooted and repeatedly identified concerns with its proposal at an earlier time when it could have been evaluated and considered by DCP and the Commission and reviewed and commented upon by the public cannot now serve as the basis of a TRO to enjoin the Commission from performing its mandate and voting on the Rezoning Application.

15. Finally, the lower density alternative the Developer now wants considered appears to continue to have significant adverse impacts to open space, natural resources, transportation, and, importantly, continues to cast shadows onto Brooklyn Botanic Garden greenhouses that include numerous light-sensitive plants.

16. Accordingly, Developer's application for a TRO should be denied.

Dated: New York, New York
September 20, 2021

/s/ Alice R. Baker

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