New York County Clerk's Index Nos. 114631/09, 116323/09

Court of Appeals of the State of New York

Index No. 114631/09

In the Matter of the Application of

DEVELOP DON'T DESTROY (BROOKLYN), INC., COUNCIL OF BROOKLYN NEIGHBORHOODS, INC., ATLANTIC AVENUE BETTERMENT ASSOCIATION, INC., BROOKLYN BEARS COMMUNITY GARDENS, INC., BROOKLYN VISION FOUNDATION, INC., CARLTON AVENUE ASSOCIATION, INC., CENTRAL BROOKLYN INDEPENDENT DEMOCRATS, by its President Lucy Koteen, CROWN HEIGHTS NORTH ASSOCIATION, INC., DEAN STREET BLOCK ASSOCIATION, INC., DEMOCRACY FOR NEW YORK CITY, EAST PACIFIC BLOCK ASSOCIATION, INC., FORT GREENE ASSOCIATION, INC., FRIENDS AND RESIDENTS OF GREATER GOWANUS, PARK SLOPE NEIGHBORS, INC., PROSPECT HEIGHTS ACTION COALITION, by its President Patricia Hagan, PROSPECT PLACE OF BROOKLYN BLOCK ASSOCIATION, INC., SOCIETY FOR CLINTON HILL, INC., SOUTH OXFORD STREET BLOCK ASSOCIATION, and SOUTH PORTLAND BLOCK ASSOCIATION, INC.,

Petitioners-Respondents-Respondents,

(For Continuation of Caption See Inside Cover)

MOTION FOR LEAVE TO APPEAL

BRYAN CAVE LLP
Attorneys for Respondent-Appellant-Appellant Empire State Development Corporation
1290 Avenue of the Americas
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For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

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

Respondents-Appellants-Appellants.

Index No. 116323/09

In the Matter of the Application of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., ATLANTIC AVENUE LOCAL DEVELOPMENT CORP., BOERUM HILL ASSOCIATION, INC., BROOKLYN HEIGHTS ASSOCIATION, INC., FIFTH AVENUE COMMITTEE, INC., PARK SLOPE CIVIC COUNCIL, INC., PRATT AREA COMMUNITY COUNCIL, INC., STATE SENATOR VELMANETTE MONTGOMERY, NEW YORK CITY COUNCIL MEMBER LETITIA JAMES, ALAN ROSNER, EDA MALENKY, PETER KRASHES, JUDY MANN, RHONA HESTRONY, JAMES GREENFIELD, MICHAEL ROGERS, ANURAG HEDA, ROBERT PUCA, SALVATORE RAFFONE, RHONA HETSTONY, ERIC DOERINGER, JILLIAN MAY and DOUG DERRYBERRY,

Petitioners-Respondents-Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

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

Respondents-Appellants-Appellants.

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners-Respondents-Respondents,

For a Judgment Pursuant to Article 78 of the CPLR

– against –

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

Respondents-Appellants-Appellants.

In the Matter of the Application of

PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al.,

Petitioners-Respondents-Respondents,

For a Judgment Pursuant to Article 78 of the CPLR

– against –

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

Respondents-Appellants-Appellants.

New York County
Index Nos. 114631/09, 116323/09

NOTICE OF MOTION FOR PERMISSION TO APPEAL TO COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed affirmation of Philip E. Karmel, dated May 11, 2012; the record on appeal in the Appellate Division, First Department, from the order and decision of the Supreme Court, New York County (Friedman, J.), originally entered in the office of the Clerk of the County of New York on July 19, 2011 (the "Supreme Court Order"), which granted in part and denied in part the relief sought by petitioners-respondents-respondents in these Article 78 Proceedings; the Order of the Appellate Division, First Department, entered on April 12, 2012, for which notice of entry was served on April 12, 2012 (the "Appellate Decision"), which affirmed the Supreme Court Order; and upon all the pleadings and proceedings herein, respondent-appellant-appellant Empire State Development Corporation ("ESDC") will move this Court at the Courthouse located at 20 Eagle Street, Albany, New York, on May 21, 2012, at 10:00 a.m. for an order granting ESDC leave to appeal to this Court from the Appellate Decision, pursuant to CPLR § 5602(a)(1)(i), and granting ESDC such other relief as this Court may deem just and proper.

Dated: New York, New York
May 11, 2012

BRYAN CAVE LLP

By: _____

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TO: HON. ANDREW W. KLEIN, CLERK OF THE COURT
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COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of DEVELOP DON'T DESTROY (BROOKLYN), INC., et al., Petitioners-Respondents-Respondents, For a Judgment Pursuant to Article 78 of the CPLR – against – EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC, Respondents-Appellants-Appellants.	New York County Index Nos. 114631/09, 116323/09 **AFFIRMATION IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS**
In the Matter of the Application of PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL, INC., et al., Petitioners-Respondents-Respondents, For a Judgment Pursuant to Article 78 of the CPLR – against – EMPIRE STATE DEVELOPMENT CORPORATION and FOREST CITY RATNER COMPANIES, LLC, Respondents-Appellants-Appellants.	

PHILIP E. KARMEL, an attorney admitted to the practice of law in the State of New York, affirms and declares under penalty of perjury:

1. I am a member of Bryan Cave LLP, attorneys for New York State Urban Development Corporation doing business as Empire State Development Corporation ("ESDC") in these Article 78 proceedings, which challenge ESDC's determinations, made on September 17, 2009 and again on December 16, 2010, not to prepare a Supplemental Environmental Impact Statement ("SEIS") for the Atlantic Yards Project (the "Project") in Brooklyn. I make this affirmation upon personal knowledge of the history of these proceedings.

STATEMENT OF THE PROCEDURAL HISTORY

2. In 2006, ESDC prepared a comprehensive 3,500-page Final Environmental Impact Statement ("FEIS") for the Project and approved the general project plan, establishing the location, size, uses and site plan for the Project's 17 buildings. A1198-3181, A3276-3433.[1] Phase I of the Project entails construction of an arena, five other buildings, below-grade parking facilities, a new subway entrance, a new Long Island Rail Road yard and a surface parking lot. A3846, A3852-3858. Phase II is comprised of improvements to be located east of 6th

[1] Citations to "A___" reference the Joint Appendix filed with the Appellate Division, a copy of which has been filed with the Court of Appeals with this motion.

Avenue, including a platform over the rail yard, 11 predominantly residential buildings, additional below-grade parking facilities to replace the surface parking lot and 8 acres of open space. A3846-3847, A3858-3861. In connection with their approval of the Project in 2006, the ESDC Directors adopted a comprehensive statement of findings under the State Environmental Quality Review Act ("SEQRA"), A3182-3275, which identified a broad range of measures to mitigate the significant environmental impacts of the Project, including those impacts arising from its lengthy construction period. A3227-3252.

3. All lawsuits challenging the FEIS and the other 2006 Project approvals were dismissed. *See, e.g.*, Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp., 59 A.D.3d 312 (1st Dep't) (dismissing challenge to FEIS), *leave to appeal denied*, 13 N.Y.3d 713 (2009); Anderson v. N.Y.S. Urb. Dev. Corp., 45 A.D.3d 583 (2d Dep't 2007) (same), *leave to appeal denied*, 10 N.Y.3d 710 (2008); Goldstein v. N.Y.S. Urb. Dev. Corp., 13 N.Y.3d 511 (2009) (dismissing challenge to use of eminent domain); Goldstein v. Pataki, 516 F.3d 50 (2d Cir.) (same), *cert. denied*, 554 U.S. 930 (2008).

4. By the time the lawsuits had been dismissed, clearing the way for acquisition of the Project site by eminent domain, the economic downturn had adversely affected the real estate market and the availability of financing for development projects.

5. As a result, on September 17, 2009, ESDC approved modifications to the general project plan to allow the private developer – Forest City Ratner Companies ("FCRC") – more time to obtain the financing needed to acquire the land and air rights required for one of the Phase I buildings and seven of the Phase II buildings. The modifications approved by ESDC on September 17, 2009 did not materially alter the location, size, uses or site plan for the 17-building Project analyzed in the FEIS and approved in 2006, but they did give FCRC up to 25 years to complete construction, subject to FCRC's contractual obligation to use commercially reasonable efforts to complete the Project within a 10-year time frame, and certain contingencies. A3852, A3914, A3965.

6. In conjunction with their approval of the modifications in 2009, the ESDC Directors determined that a SEIS was not warranted based on the information in the FEIS and a supplemental environmental assessment prepared in 2009 (the "2009 Technical Memorandum," annexed as Exhibit A).

7. The FEIS had employed a 10-year schedule for the construction-period analysis because ESDC had determined that doing so would "concentrate construction activities at the site and assure[ ] that the reasonable worst-case construction condition is analyzed." FEIS at 24-453 (A3079). ESDC likewise utilized a 10-year construction period as one scenario studied in the 2009 Technical Memorandum. In recognition of the potential for delays as a result of

economic conditions, the 2009 Technical Memorandum also considered the effects of a substantial delay in the Project, assuming that construction would take place over a 15-year period and would not be completed until 2024.

8. On October 16, 2009 and November 18, 2009, petitioners-respondents-respondents commenced these proceedings to challenge ESDC's determination not to prepare a SEIS for the Project.

9. Because the 2009 modifications with respect to the timing of FCRC's acquisition of land and air rights for the Project did not materially alter the Project's location, size, uses or site plan, the focal point of the litigation below was whether the potential for a longer build-out period, in and of itself, warranted a SEIS.

10. On March 10, 2010, the trial court dismissed the proceedings in a written decision annexed as Exhibit B.

11. On November 9, 2010, the trial court granted a motion to renew in a written decision (annexed as Exhibit C) that directed ESDC to make further findings with respect to the potential impacts of a delay in Project construction. As grounds therefor, the trial court cited the development agreement that ESDC and FCRC executed on December 23, 2009 (the "Development Agreement"), which required FCRC to use commercially reasonable efforts to complete the Project by 2019, but set an outside date for Project completion in 2035, which is beyond the

10-year and 15-year time frames studied in the 2009 Technical Memorandum. Exh. C at 9-17.

12. On December 16, 2010, ESDC made the further findings, based upon the FEIS and a second supplemental environmental assessment (the "2010 Technical Analysis," annexed as Exhibit D), which assessed the environmental impacts of a delay in construction all the way to 2035, the outside date allowed under the relevant agreements. ESDC also prepared a document titled "ESDC Response to Supreme Court's November 9, 2010 Order," annexed as Exhibit E. On the basis of these documents, ESDC once again determined that a SEIS was not warranted in connection with the modifications to the general project plan approved in 2009.

13. On July 13, 2011, the trial court, in a written decision annexed as Exhibit F, upheld ESDC's determination not to prepare a SEIS for Phase I of the Project, but required a SEIS for Phase II of the Project. *See* Exh. F at 9, 18. The trial court criticized ESDC for relying upon "common sense" in concluding that "less intense construction will result in lower impacts for conditions such as traffic, noise, and air quality" rather than "technical studies." Id. at 11.

14. On April 12, 2012, the Appellate Division issued a Decision and Order, annexed as Exhibit G, affirming the trial court's decision.

15. The courts below held that ESDC (i) was arbitrary and capricious in examining environmental impacts while continuing to use a 10-year construction schedule as one of the scenarios studied in the 2009 Technical Memorandum, in light of the provisions of the Development Agreement; and (ii) failed to undertake the requisite "hard look" at the environmental impacts of a potential delay in construction beyond the 10 years.

16. More particularly, the Appellate Division held that ESDC's assessment of the potential environmental impacts of a delay in the Project's construction schedule was deficient because ESDC's detailed supplemental environmental assessments (the 2009 Technical Memorandum and 2010 Technical Analysis) lacked unspecified "technical studies." Exh. G (Decision and Order at 10). The lower courts never explained what "technical studies" ESDC should have prepared or what new, useful information such studies would have yielded that is not already available to ESDC in the FEIS and the supplemental environmental assessments it prepared in 2009 and 2010. The lower courts also ignored ESDC's specific determination that a "SEIS would not provide information that would be of material utility in identifying the environmental impacts of the Project or practicable measures to minimize or avoid such impacts beyond those already imposed [by the FEIS]." Exh. E at 37.

17. The Appellate Division's order requiring that a SEIS be prepared to study the impacts of a delay in the Project's construction schedule is an unprecedented expansion of SEQRA that would interfere not only with the progress being made on the Atlantic Yards Project, but with the progress of many other large-scale projects that are subject to delays due to adverse economic conditions or other circumstances.

TIMELINESS OF THIS MOTION FOR LEAVE TO APPEAL

18. ESDC was first served with the Decision and Order with Notice of Entry (annexed as Exhibit H) by overnight mail on April 12, 2012. This motion for leave to appeal is timely served within 30 days of the service of Notice of Entry.

JURISDICTION OF THIS COURT

19. The Appellate Division's Decision and Order is a final order pursuant to CPLR § 5611. This Court has jurisdiction to grant leave to appeal under CPLR § 5602(a)(1)(i).

QUESTIONS PRESENTED FOR REVIEW

20. Whether SEQRA requires a lead agency to prepare unspecified "technical studies," rather than rely upon the information in the FEIS, previous SEQRA findings, a new environmental assessment and the application of agency judgment, when it makes a determination whether to prepare a SEIS to study the

delay of a major real estate development project that is otherwise unchanged in scope?

21. Whether the lower courts erred in giving no weight to the lead agency's determination that a SEIS would not provide information that would be of material utility in identifying the environmental impacts of project delays or practicable measures to minimize or avoid such impacts beyond those already identified in the FEIS?

22. Whether the lower courts erred in ordering that a SEIS be prepared to study the environmental impacts of a delay in the Project's construction schedule, where ESDC had determined that the Project itself would not change materially and the delay would cause construction activities to be of reduced intensity over a longer time period?

WHY THE QUESTIONS PRESENTED MERIT REVIEW BY THIS COURT

23. Reading the Appellate Division decision, one would never guess that ESDC twice undertook detailed, substantive analyses to assess the potential environmental impacts of a delay in project construction, first in the 2009 Technical Memorandum (which assumed a substantial delay to 2024) and subsequently in the 2010 Technical Analysis (which assumed a delay all the way out to 2035).

24. For example, in the 2010 Technical Analysis, ESDC examined three sorts of impacts: (i) those that could occur upon completion of the Project in 2035; (ii) the effects of construction *activities* taking place over an extended period of time; and (iii) impacts associated with the *condition* of the Project site during an extended construction period. Exh. D at 7-71. In doing so, the agency developed a conceptual sequence of construction-related activities consistent with a hypothetical build year of 2035, with the understanding that construction of the Project would proceed on a parcel-by-parcel basis, with each building being individually designed, financed, and built. It also accounted for the fact that during certain periods more than one building could be expected to be under construction simultaneously. In order to thoroughly examine construction-related impacts, ESDC depicted how site conditions would exist at seven stages of Project completion. These seven stages were used as "snapshots" in time, showing how the Project site would appear, and would affect the surrounding area, at certain points in the construction process.

25. Notwithstanding the short shrift paid to ESDC's efforts by the lower courts, the analyses presented in the 2009 Technical Memorandum and 2010 Technical Analysis were painstaking, thorough and sufficient. No prior case has ever required a SEIS-level analysis to determine whether a SEIS should be prepared.

26. The Appellate Division faulted the 2009 Technical Memorandum for its conclusion that construction impacts "would be 'less intense'" if Project construction were to be spread out over a longer period, without providing a "comparison of the environmental impacts of 'intense' construction over a 10-year period with the environmental impacts of construction that continues for 25 years." Exh. G (Decision and Order at 9-10). In making this criticism the Appellate Division turned a blind eye to the fact that the record in this matter contains a detailed examination of the impacts of Project construction over *three* separate time periods: 10 years, 15 years and 25 years. The lower court did not explain what sort of "comparison" beyond that already in the record was required.

27. The Appellate Division devoted only one page of its opinion to the 2010 Technical Analysis. *See* Exh. G (Decision and Order at 10-11). The lower court did not identify any specific elements of ESDC's analysis that were flawed, or any specific environmental impacts that ESDC overlooked, but summarily dismissed the analysis on the ground that it failed to incorporate unspecified "technical studies." The Appellate Division did not explain what type of additional "technical studies" were called for, or what information they might yield.

28. Thus, the Appellate Division, by overturning ESDC's determination for some failure to include additional comparisons or more technical studies, substituted its own judgment for that of the agency as to the nature and extent of the assessment required for a determination as to whether a SEIS should be prepared.

29. This Court has laid down the general rule that, in considering whether an agency has complied with the substantive requirements of SEQRA, the courts should "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." Jackson v. N.Y.S. Urb. Dev. Corp., 67 N.Y.2d 400, 417 (1986) ("Jackson"). At the same time, this Court has further established that this three-pronged test is "tempered" by the "rule of reason," taking into account the particular circumstances of the case. Id. One such circumstance is where the issue before the agency involves whether to prepare a SEIS (rather than an EIS).

30. This Court specifically addressed that circumstance in Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219 (2007). There, this Court emphasized the discretionary nature of an agency's decision on the need for a SEIS, as compared to the determination of whether to prepare an EIS in the first instance. Thus, the Court in Riverkeeper highlighted the fact that "[t]he

relevant SEQRA regulations provide that: '[t]he lead agency *may* require a supplemental EIS,'" as "distinguished from regulations regarding the preparation of a DEIS or FEIS, which a lead agency must ... prepare." 9 N.Y.3d at 231 (emphasis in original) (quoting 6 N.Y.C.R.R. § 617.9[a][7][i]).

31. In sweeping aside ESDC's judgment with respect to the environmental impacts of construction delays, the Appellate Division made no mention of the Riverkeeper standard, which interpreted Jackson in the context of an agency's determination whether to prepare a SEIS.

First Question for Review

32. The Appellate Division's determination that unspecified "technical studies" should have been used to assess the impacts of a delay creates a new SEQRA requirement not heretofore imposed by this Court's SEQRA precedents. The first question presented for this Court's review provides this Court with an opportunity to clarify the law on this point.

33. The first question also provides this Court with an opportunity to provide guidance to lead agencies on the extent of their discretion with respect to the assessment methods that should be used when determining whether to prepare a SEIS to study the potential environmental impacts of a delay in a project's construction.

34. Doctrinally, the first question presented thus provides this Court with an opportunity to explain how Jackson's "hard look" standard should be integrated with this Court's holding in Riverkeeper that particular deference is due to an agency decision not to prepare a SEIS. ESDC asserts that the principles articulated in Riverkeeper result from the logical application of the "rule of reason" under Jackson to a circumstance where a comprehensive FEIS has already been prepared, findings under SEQRA have been issued, and mitigation measures have been established and enforced. At that point in the process, an agency will have been steeped in a project and its impacts for years, and its determination – drawing from a highly developed and comprehensive record – can be based on common sense, agency judgment and a focused environmental analysis deemed by the agency to be appropriate. ESDC contends that such a judgment merits particular deference under the clear language of the SEQRA regulations – and this Court's SEQRA jurisprudence – and should not be overturned for some unspecified failure in making comparisons or providing further unspecified technical studies.

35. The first question presented for review would also give this Court the opportunity to discuss the role of common sense and agency judgment in making determinations about whether project delays merit examination in a SEIS, in the face of the phenomenon known by some practitioners as "SEQRA creep" – where the analysis for every project must be at least as complex as the one for the

project that preceded it. This issue is particularly important because large, complex development projects (such as the 42nd Street Redevelopment Project reviewed in Jackson, Battery Park City, the World Trade Center redevelopment, the "Queens West" project, major university expansions, and other complex developments) are frequently delayed by litigation and economic cycles.

36. The decision of the Appellate Division leaves substantial uncertainty as to the depth of the analysis required to be performed by agencies facing such delays in deciding whether a SEIS is required. ESDC believes that such uncertainty is highly counterproductive to the success of these types of projects.

Second Question for Review

37. In Riverkeeper, this Court held that an agency's "hard look" and determination whether to prepare a SEIS may rely on "material already in its file." 9 N.Y.3d at 233. The second question for this Court's review provides the Court with the opportunity to synthesize that holding with the broader principle articulated in Riverkeeper regarding the discretionary nature of the determination whether or not to prepare a SEIS.

38. Here, the Appellate Division disregarded ESDC's determination that a SEIS would not provide information that would be of material utility in further identifying the environmental impacts of the Project or practicable

measures to minimize or avoid such impacts beyond those already imposed by the FEIS. *See supra* at ¶ 16. In making this determination, ESDC drew upon an extraordinarily comprehensive record – including an FEIS that ran for thousands of pages, with a 100-page chapter devoted to construction impacts assumed to last for a decade, comprehensive SEQRA findings that spelled out a broad regime of construction-related mitigation measures, and two full-blown supplemental assessments prepared in 2009 and 2010.

39. The second question presented for review would allow this Court to define the degree of deference owed to an agency's determination that a SEIS would not be of material utility, in light of extensive environmental analyses already in the record and further consideration in supplemental environmental assessments.

Third Question for Review

40. The third question for review – which asks this Court to consider whether a SEIS should be judicially mandated when a major project is delayed by adverse economic conditions – raises an issue that is critical to the success of major real estate development projects in New York State, many of which are subject to years of delay due to economic conditions or other factors. If the courts were to require a SEIS to address project delays, even where the project has not otherwise changed and the agency has found that the effect of those delays

is to spread less intense construction activities over a longer period, they will trigger the full panoply of SEQRA procedures – and open the door to a renewed round of SEQRA litigation – with every dip in the economic cycle. They will thereby render the process for developing long-term projects in the State, which is already very difficult, virtually impossible.

41. Thus, with respect to the Atlantic Yards Project, the lower court's decision casts a shadow of uncertainty on Phase II of the Project. That shadow is likely to last for years if the decision of the Appellate Division is allowed to stand, while a SEIS is scoped, prepared in draft form, subject to public review and comment, finalized and inevitably challenged in a new round of litigation proceedings and appeals. The adverse effects of such long-term uncertainty well illustrate the disruption to major projects which would result from a court-mandated SEIS to study project delays in the midst of a project's implementation. *See generally* Jackson, 67 N.Y.2d at 425 ("A requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives.").

WHEREFORE, it is respectfully requested that the motion seeking leave to appeal be granted.

Dated: New York, New York
May 11, 2012

PHILIP E. KARMEL

LIST OF SUBSIDIARIES AND AFFILIATES

New York State Urban Development Corporation doing business as Empire State Development Corporation is a public authority of the State of New York created by the Urban Development Corporation Act of 1968. Its subsidiaries or affiliates are as follows:

1. 125th Street Mart, Inc.
2. 260-262 W. 125th Street Corp.
3. HUDC 323 St. Nicholas Realty Corp.
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5. Carlken Manor Houses, Inc.
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12. 42nd St. Development Project, Inc.
13. 900 Woolworth Redevelopment Corporation
14. Apollo Theatre Redevelopment Corporation
15. Archive Preservation Corporation
16. Brooklyn Arena Local Development Corporation
17. Brooklyn Bridge Park Development Corporation
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