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## E-mail and Regular Mail

August 31, 2009

Empire State Development Corp.  
Attn: Steve Matlin, Senior Counsel  
633 Third Avenue, 37<sup>th</sup> Floor  
New York, NY 10017

Re: Comments on the Modified General Project Plan for the  
Atlantic Yards Land Use Improvement and Civic Project

Dear Mr. Matlin:

### **I. Introduction**

We represent Develop Don't Destroy Brooklyn (DDDB) and submit these comments on the June 2009 Modified General Project Plan (MGPP) for the above referenced Atlantic Yards Project. DDDB has long been a critic of the Atlantic Yards Project as an overly ambitious ill-conceived plan which would have a massive negative impact on the surrounding area. DDDB has also criticized the unwarranted use of eminent domain and the local-override powers of ESDC to benefit a private developer without providing the necessary public benefits to warrant such exercises of authority.

The proposed MGPP illustrates the accuracy of DDDB's criticisms and demonstrates that the project is not viable and its alleged benefits are ephemeral and illusory. The MGPP and the supporting documentation significantly understate the nature of the changes to the project and understate the resulting impacts.

The determination to adopt the amended MGPP requires ESDC to undertake two distinct but related actions, it must determine if the proposed changes require a supplementary analysis under SEQRA and it must determine that the project meets the statutory requirements of the UDCA to qualify as a Land Use Improvement Project and Civic Project. Given the significant changes, it should be obvious that a Supplemental Environmental Impact Statement is necessary to evaluate project changes. It is also obvious that where the original project had a questionable

ability to meet the UDCA standards, the changed project with the new evidence that there are no commitments to build Phase II, fails to meet the basic elements of the findings necessary for a Land Use Improvement or a Civic Project.

## **II. ESDC Has Misstated the Nature of the Project Changes and Abandoned the Primary Purpose of the Project.**

Throughout the MGPP and the Technical Memorandum, which purports to support a determination that further SEQRA analysis is unnecessary, ESDC has either understated or misstated the nature of the project's change. Those false or misleading statements serve to hide the ramifications of the changes to the MGPP and are leading to the approval of a project that rather than solving current problems, will exacerbate them.

### **A. Renegotiated MTA Agreement**

The most fundamental omission is a frank consideration of the renegotiated deal between FCRC and the MTA for the purchase of properties constituting the Vanderbilt Yards. As originally established through MTA's RFP process in 2005, FCRC agreed to purchase all of the properties on Blocks 1119, 1120 and 1121 for \$100 M in a single payment and FCRC would also guarantee the payment for the relocation and improvement of the LIRR yards as well as the subway station improvements. While DDDDB and numerous other parties believed then, and continue to believe now, that MTA improperly agreed to sell the yard property rights to FCRC instead of to Extell Development for \$150M, that \$100M from FCRC was a considerable expenditure which evidenced some form of a commitment to see the project through.

FCRC has since renegotiated the agreement with the MTA. Instead of the \$100M payment there will only be a \$20M payment for Block 1119. Thereafter, FCRC must only pay \$2M per year for four years beginning in June 2012. Starting in June 2016 the annual payments increase to \$11M per year and continue to 2030. This is a major restructuring of the deal that effectively allows FCRC to abandon Phase II of the project at any time. It can abandon it before 2012 when the first additional payment is due, or in any of the subsequent years before June 2016 when the payments significantly increase. In essence, FCRC is paying only a minimal fee to secure the rights to the properties without any penalty for a decision to abandon the project.

As the report by Kahr Real Estate Services, LLC, "A Decades Long Project: Atlantic Yards Financial Feasibility Study" explains, the decision by FCRC to seek renegotiated deal to limit its exposure for the whole project, is the clearest evidence that the project will take decades longer to complete, if ever, and that FCRC has found a way to get out of the long-term commitment of the deal.

Any mention of the renegotiated MTA agreement, let alone the details of the agreement, are strikingly absent from the MGPP or the Technical Memorandum. There is no justification for the omission, which is clearly designed to not only mislead the public, but the ESDC Board. The renegotiated purchase agreement has two important considerations. First, if the project takes decades longer than has been projected or is not completed at all then, by definition, the goals

and findings for the Land Use Improvement Project and part of the Civic Project will not be satisfied. Second, the extensive delay already built into the project is markedly different than that recognized in the Technical Memorandum and the entire SEQRA analysis requires reconsideration.

The overriding purpose for the Land Use Improvement Project, in fact the only legally cognizable justification for such a project under the UDCA, is the elimination of blight and blighting conditions that are impairing the development of the property and surrounding properties. DDDDB and numerous other community groups have strenuously objected to ESDC's 2006 blight determination, specifically the determination that the Vanderbilt Yards have a blighting influence on the Blocks, 1127, 1128 and 1129. We continue to voice those objections and are pursuing the appeal with the Court of Appeals where we have requested leave to appeal. Without in any way waiving those objections to the 2006 determination, it must be recognized by ESDC that even if that determination is accepted on its face value, the supposed blighted and blighting conditions will not be alleviated with the MGPP.

The MGPP accepts as a given, without any supporting analysis, that Phase II will be completed within 10 years. However, while there are provisions to assure completion of the arena in Phase I and Building 1 in Phase I, there are no assurances that the other Phase I buildings will be completed or that Phase II will be started or completed. Thus, the statements throughout the MGPP that there is a plan to reconstruct and rehabilitate the area, as required by Section 10 of the UDCA (See, MGPP p. 35) are patently false. There is no plan. There is a general plan for the area, but a plan that has absolutely no assurance that for Blocks 1120 and 1121, the heart of the "blighted" Vanderbilt Yards, that anything will ever be built. The renegotiated MTA agreement has removed any incentive for FCRC to complete the project and allows FCRC to abandon the project without any penalty.

If Phase II is never built then there will not be a platform over the Vanderbilt Yards. Without the platform, the Yards will continue to have the blighting influence on the surrounding neighborhoods that the project was supposedly designed to alleviate. This project has become, not the alleviation of blight, but the perpetuation of the alleged blight.

While FCRC and ESDC may try to argue that Phase II will be built, despite the lack of any financial commitment or incentive by FCRC, it cannot be argued that Phase II will not be completed until after 2030 – more than 10 years beyond the current projection of 2019. By the very terms of FCRC's agreement with MTA, it will not complete the purchase of the air rights on Block 1121 until June 2030 and by the terms of that same agreement, it cannot take title to those rights and begin construction on the development parcel for each of the six buildings on Blocks 1120 and 1121 until payment is made for each parcel. Therefore, even if the project is completed, decades into the future, the interim decades will assure a continuation of the blighting effects not only of the vacant Vanderbilt Yards, but from the extended construction schedule that will discourage any private redevelopment in the area since no one will invest or choose to live in an area that is going to be burdened by a decades long construction project.

The delay or abandonment of Phase II will also exacerbate the alleged blighted conditions by converting a large portion of Block 1129 into a permanent surface parking lot. ESDC has already determined that parking lots are evidence of blight because of their physical condition, the frequent presence of trash, their unsightliness and their underutilization under the New York City zoning code. In accordance with ESDC's established practice in the Blight Study, the context of the use of a parcel is irrelevant for determination of blight and the presence of even one condition, i.e. underutilization is evidence of blight. Therefore, by ESDC's own classification, by allowing the surface parking lot on Block 1129 to continue indefinitely, it will be perpetuating a blighting condition in violation of the UDCA.

Another impact from the uncertainty of the completion of the project is the ephemeral promise of affordable housing. The vast majority of the affordable housing is slated for Phase II, however since there are no guarantees that Phase II will ever be built, there cannot be any basis for maintaining the fiction that the project will result in the creation of thousands of units of affordable housing.

A related effect of the likely delay or abandonment of Phase II is the negative impact upon the supposed economic benefits of the project. The economic projections in the MGPP (p. 33) are based upon the entire project and are not segregated for a partial Phase I project or a partial or abandoned Phase II. Nor does it consider the extended construction schedule for Phase II. In order to justify the claim for the economic benefits from the project there must be a more detailed breakdown of the alleged economic benefits attributable to each development parcel. Only when a clear picture is provided of the economic benefits associated with the Arena, Building 1 and the subsequent buildings can the economic benefits be properly evaluated.

The likelihood that Phase II will not be built also impacts the findings associated with the Civic Project. Besides the arena, the MGPP repeatedly touts the 8 acres of publicly accessible open space as one of the elements of the Civic Project. Again, there is no guarantee that Phase II will ever be built and thus the claimed benefit of the open space is highly speculative.

ESDC's insistence of pursuing this project as a single-developer project to satisfy the ambitions of a single developer has plagued this project from the beginning. ESDC has failed to engage in any objective planning program to identify the needs in the area and design appropriately a project that could redevelop the Vanderbilt Yards. ESDC cannot allow the MGPP to become a classic bait and switch that freezes the development potential of the Vanderbilt Yards for so long as FCRC holds a hope of development or chooses to abandon the project. ESDC should renew the consideration of the project and seek a reconfiguration that allows the development of the important elements of the Vanderbilt Yards by other developers at a scale appropriate for the community and not continue with the ill-informed proposal by FCRC.

If the goal of the project is to alleviate blight, upon the realization that the project will take decades at best to complete, ESDC should have sought alternative scenarios and developers to present a project that would result in the timely redevelopment of Vanderbilt Yards and promote the elimination of blight.

## **B. Changes in Design**

Besides the alleged alleviation of blight and the ideal of affordable housing, both of which have been shown to be illusory, ESDC has long touted the world class architecture of the project by Frank Gehry and the landscape/open space design by Laurie Olin as an important element of the project that would provide unique opportunities for both the project and Brooklyn. However, both Mr. Gehry and Mr. Olin are no longer associated with the project. It is a complete falsehood to say that the project will follow the master plan prepared by Mr. Gehry (MGPP p. 7). Mr. Gehry is not a planner and has never designed a mixed-use community. Mr. Gehry is an architect famous for his iconic designs. While DDDDB never embraced Mr. Gehry's designs, finding them out of place and context for the area, it did recognize his stature. However, those designs of the buildings were found not economically feasible and Mr. Gehry's involvement has been terminated. For the Arena, he has been replaced by a very pedestrian architectural firm and no other architects have been identified for the other buildings.

Similarly Mr. Olin is no longer associated with the project and no information has been provided on his replacement. That is not surprising given that all of the open space has been moved to Phase II and will probably never be built. Nevertheless information should be provided to justify the grandiose claim about the design and benefits of the open space.

Most outrageous is the absence of any renderings or design information concerning the Arena and the initial buildings. Such renderings were an important element of the FEIS and original GPP and served to justify ESDC's determinations. While renderings are provided with the MGPP, FCRC has made it clear those renderings are not accurate. FCRC has said that they have produced new renderings and designs, however they have refused to make them public. If this is a public works project, particularly a Civic Project with public benefits to improve Brooklyn and fit within the contest of Atlantic and Flatbush Avenues, those renderings should have been made available to the public to review the MGPP.

## **III. ESDC Must Prepare a Supplemental EIS**

SEQRA mandates that a supplemental EIS (SEIS) be prepared if there is newly discovered information; changes proposed for the project or a change in circumstances related to the project. 6 NYCRR §617.9(a)(7). In this case all three elements are present. The newly discovered information is the clear realization that the project, will, at best take decades to complete. The project has changed because FCRC is no longer making a significant capital investment in the project which assures its continued involvement and ESDC has chosen to delay the acquisition of all of the properties necessary for Phase II and the changed circumstances are the changes in the financial markets, the limited demand for residential housing and the renegotiated deal with the MTA all as set forth in the Kahr report.

ESDC has attempted to avoid complete SEIS by relying upon a conclusory Technical Memorandum. That memorandum is not a substitute for an SEIS which allows full public comment and forces the lead agency to respond to comments. Moreover, by avoiding the SEIS, ESDC is avoiding a further consideration of alternatives. Had ESDC undertaken the SEIS and considered alternatives, it would have been required to reconsider the feasibility of the project, the diminished likelihood of completion and been forced to look at other means of alleviating the alleged blight. ESDC would have considered how Vanderbilt Yards could be better developed given the public subsidies and whether other developers could have completed an appropriately scaled project limited to Vanderbilt Yards in a timely manner.

ESDC was under no contractual obligation to complete this project with FCRC which clearly was financially stretched when the project was approved in 2006 and which has only seen its condition deteriorate. By relying upon a single company, ESDC is tied to the financial health of that company and has not explored alternative configurations and companies with a broader financial base who could undertake the project.

The Technical Memorandum itself is inconsistent and conclusory. While it purports to consider the potential for further delay it understates the length of the delay and inexplicably fails to recognize the MTA agreement that has a built in delay until 2030. The memorandum simply asserts that if there are financial difficulties with Atlantic Yards, all other projects will face similar delays and the projected growth in background levels will remain constant as all projects are delayed. However, that ignores that fact that no other project has the challenges facing Atlantic Yards and its large infrastructure costs and that while financing may not be available for Atlantic Yards, smaller project with less daunting prospects are likely to gain financing. Therefore background levels are likely to increase over time and not remain stagnant.

## **Conclusion**

The change in the financing of the project and the agreement with MTA puts all of Phase II in jeopardy and belies the findings that this is a Land Use Improvement and Civic Project as most of the project will never be built. If ESDC is determined to pursue consideration of this project it must do so in an objective and transparent manner and must prepare an SEIS as an integral element of that process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffrey S. Baker". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jeffrey S. Baker