YOUNG, SOMMER ... LLC

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC

COUNSELORS AT LAW

ALL WRITTEN CORRESPONDENCE TO
EXECUTIVE WOODS, FIVE PALISADES DRIVE, ALBANY, NY 12205
Phone: 518-438-9907 • Fax: 518-438-9914

Saratoga Office:
468 Broadway, Saratoga Springs, NY 12866
Phone: 518-580-0163

www.youngsommer.com

JEFFREY S. BAKER
DAVID C. BRENNAN
MICHAEL J. MOORE
J. MICHAEL NAUGHTON
KENNETH S. RITZENBERG
DEAN S. SOMMER
DOUGLAS H. WARD
KEVIN M. YOUNG

JOSEPH F. CASTIGLIONE
KRISTIN M. LAVIOLETTE
JAMES A. MUSCATO II
ROBERT A. PANASCI

OF COUNSEL
MICHAEL E. CUSACK
SONYA K. DEL PERAL
ELIZABETH M. MORSS
KRISTIN CARTER ROWE
LAWRENCE R. SCHILLINGER
DAVID R. WOOLEY

PARALEGALS
GREGORY D. FAULKNER
PENELOPE D. HENRY

ENERGY POLICY ANALYST
VALERIE B. STRAUSS

WRITER'S TELEPHONE EXTENSION: 227
JBAKER@YOUNGSOMMER.COM

Via E-mail and Regular Mail

September 29, 2006

Atlantic Yards
Empire State Development Corp.
633 Third Avenue
New York, NY 10017
Attn: Maria Mooney

Re: Comments on Atlantic Yards

Dear Ms. Mooney:

We represent Develop Don't Destroy Brooklyn ("DDDB") and submit these comments pursuant to the July 24, 2006 Public Notice for the Atlantic Yards Project. These comments are submitted on all aspects of the documents released for public review and the relevant laws for which ESDC is seeking comment, including, the State Environmental Quality Review Act, the Urban Development Corporation Act and the Eminent Domain and Procedure Law. These comments are in addition to other comments being submitted separately by DDDB.

Procedural Errors

As an initial point we object to the failure of ESDC to provide the minimum time for public comment as required by the UDC Act. ESDC held public hearings on this project pursuant to Sec. 16 of the UDC Act (Unconsolidated Laws Sec. 6266(3)) and has stated its intention to override the local laws and rules of New York City for the development of the project. Therefore, ESDC is required to hold the public hearing open for a minimum of 30 days following the public hearing. ESDC held a public hearing on August 23rd and subsequently held additional public hearings on September 12 and 18th. While the September hearings were indistinguishable from the August hearing, ESDC unilaterally designated those as "Community Forums" and deemed the public hearing closed on August 23rd. Since the community forums

were on the record and it was made clear that comments made at that time on all aspects of the project would be considered and responded to in the FEIS and as comments on the General Project Plan, there was no difference between the events. It is illegal for ESDC to close the comment period on September 29th. Instead the comment period should have been kept open until October 18th.

While the comment period violated the requirements of the UDC Act, it also violated the spirit of SEQRA by not providing sufficient opportunity for the public to meaningfully comment. Given the enormous amount of information presented to the public, a comment period of slightly more than 60 days is absurd. This is one of, if not the biggest, single project proposed in New York City since the adoption of SEQRA, yet ESDC has chosen to provide the shortest possible comment period (and still violates the UDC Act). This is a demonstration of arrogance toward the public and reinforces the obvious fact that as far as ESDC is concerned, the outcome is pre-ordained. The short comment period must be contrasted with the four month comment period for the Yankee Stadium Project and the more than four months that New York City demanded and that New York State Department of Environmental Conservation granted for the review of the Belleayre Resort Project in the New York City Watershed. While both of those projects are significant, they pale in comparison to Atlantic Yards, and yet far less time is afforded the public to comment on Atlantic Yards.

ESDC has also refused to provide certain back-up materials that are specifically referenced in the DEIS and GPP to permit the public to comment. Our office and others have requested the financial study referenced in the GPP. While ESDC has not responded to our request, we understand that it has responded to others and denied their request either on the grounds that the documents do not exist or are not subject to FOIL. If they do not exist they cannot be the basis for the financial analysis in the GPP. If they do exist, they consist of statistical and factual tabulations and are not exempt from disclosure as intra-agency materials. This is further evidence of ESDC refusal to objectively solicit and consider comments on the project.

We also object to ESDC's serving in the role of Lead Agency under SEQRA. To the best of our knowledge ESDC never prepared an Environmental Assessment Form under SEQRA and never circulated a request to other involved agencies seeking their input on which agency should serve as lead for the environmental review. ESDC's pre-disposition toward the project sponsor, Forest City Ratner (FCR) precludes its ability to undertake an objective review of the environmental impacts of the project, particularly the proper consideration of alternatives.

ESDC also violated the mandate of SEQRA that an agency begin the SEQRA process as early as possible in its consideration of the action to evaluate the environmental impacts before it is so far into the review that meaningful consideration is precluded. FCR, the State and the City announced the project in December 2003. Clearly there had been significant discussions between the parties for some time earlier. In February 2005, FCR, ESDC and MTA entered into a series of Memorandums of Understanding concerning the project. In May 2005, MTA released an RFP for the disposition of the Vanderbilt Yards and in July 2005, MTA accepted the proposal from FCR. It was not until September 16, 2005 that ESDC stated its intent to be Lead Agency

(without circulating notice to other Involved Agencies), issued the Positive Declaration and initiated Scoping. By that time the project had been under active consideration by ESDC for at least 20 months. Moreover, MTA had already committed to going the FCR proposal and was proceeding to contract. Rather than putting SEQRA at the front of the process to assure environmental integrity, ESDC has placed it at the end of the process, violating both the letter and the spirit of SEQRA.

DDDB also reiterates and reserves its objection to the clear conflict of interest concerning ESDC's choice of environmental counsel for this project. ESDC has chosen David Paget and the firm of Sive, Paget & Riesel as its counsel, despite the fact that Mr. Paget and his firm have a long-standing relationship with FCR and represented FCR on this very same project. DDDB believes that the simultaneous and consecutive representation presents, at the very least, a significant appearance of a conflict of interest and taints ESDC's review of the project. While DDDB's case was initially successful, it was subsequently reversed by the Appellate Division and DDDB will be seeking leave to appeal to the Court of Appeals. Regardless of that outcome of that litigation, DDDB reserves the issue as a continuing objection to ESDC's review of the project.

Objections Under the UDC Act the EDPL and the Constitution

As provided under the UDC Act, ESDC has extraordinary powers to undertake projects and override local laws, to as in this case, propose a project that has no relation to the City zoning code and adopted comprehensive and related plans. However, that power is not unlimited. In this instance ESDC is violating both the letter and spirit of the act and is seeking to exercise its powers of eminent domain in violation of the U.S. and New York State Constitutions.

Most fundamentally, this project did not originate from any government or ESDC inspired exercise to identify an area that is blighted, or that needed an arena for professional sports. While Vanderbilt Yards has been included in ATURA, there have not been any proposals or initiatives by any governmental entity to develop the area for at least 30 years. This proposal germinated as a goal of FCR who envisioned the massive mixed-use development with an arena. FCR knew the plan far exceeded what would otherwise be permitted or even conceived of by New York City under existing laws and thus sought out the State to use its powers to override local wishes, procedures and laws to effectuate its goals. FCR also sought the power of ESDC to use eminent domain to assure control of properties from those unwilling to sell. This is a classic instance of using the constitutional power of a taking for a public purpose as a subterfuge for one private party taking another's property for its own gain. There was no existing public planning that lead to this project, no request for proposals and no indication whatsoever that this is anything but to assist the vision of a private developer with preferred access to politicians who can assist his goal.

Ostensibly the project purposes are to provide economic development, remediate a blighted area and provide a venue for a major league sports franchise. Within those broad goals, ESDC has decided to constrain its analysis to further the narrow objectives of FCR without opening up the process to true planning and economic development initiative.

ESDC has characterized this project as both a Civic Project and a Land Use Improvement Project as defined in the UDC Act. It is neither. A Civic Project is defined as one that provides facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes. A civic project must be owned or leased by a public entity. This project will be leased to a private entity. The lease to a subsidiary of ESDC and then a sub-lease to a FCR entity is not permitted. An arena dedicated for for-profit enterprises does not qualify. It will be used for the Nets, concerts and other paying activities. While the DEIS discusses the availability of the arena to local colleges and schools, there is no provision for how it will be available and at what price. The intent of the Legislature to limit ESDC's authority to fund sports arenas is evident by the various acts the Legislature has passed where specific authorization for such facilities was enacted. None of those acts apply to this project. Had the Legislature intended to authorize ESDC to undertake such activities it would have done so. Having desired to do so in certain instances, it did so with special legislation - such legislation would not be required if sports facilities like this were already permitted under the UDC Act.

The project also does not qualify for a Land Use Improvement Project. That is defined as a project to *inter alia* rehabilitate a substandard and insanitary area as provided under Article 18 of the State Constitution. Article 18 ties such activities to the provision of low-income rental housing. It does not permit the funding, approval or facilitation of other types of housing. In fact in 1989 and 1991 there was a proposed constitutional amendment to expand the powers under Article 18 to cover all types of housing. That amendment failed. ESDC cannot use its authority to fund and facilitate what is primarily a market rate based, private-ownership residential and commercial project.

Improper Alternatives Analysis

In both the DEIS and GPP, ESDC has undertaken an improper alternatives analysis. This involves a legally unsupportable and factually misleading characterization of the project goal and purposes and a disingenuous dismissal of the lesser Extell proposal.

As noted, if this is a State project, and if it can qualify as a Civic Project, ESDC can undertake the project anywhere in Brooklyn, where the stated goal is to provide a means for an arena. During the scoping period, DDDB commented that ESDC must consider Coney Island as an alternative location for the arena. The DEIS failed to consider an alternative with the arena at other locations, let alone on Coney Island. Instead, the sole mention of Coney Island is at p. 1-11 of the DEIS where it identifies it as one of the locations identified in a 1974 study but then claims it is not available due to the construction of Keyspan Park, the minor league baseball stadium.

As noted in the report prepared by Simon Bertrang of Barnacle Planning Studio for DDDB, entitled "*Report on Three Decades of Locational Analysis for a Brooklyn Arena"* ESDC has seriously misrepresented the facts. First, ESDC audaciously ignores reports prepared in 1984 and 1994, both of which it had access to, which further identified Coney Island as the preferred location for an arena. Second and even more glaring is the mischaracterization about the ability of Coney Island to accommodate the arena. As, Mr. Bertrang demonstrates there are at least two locations on Coney Island that could accommodate the arena. Mr. Bertrang also demonstrates

that those locations are in many ways preferable to the Prospect Heights location and are consistent with adopted land use and planning documents. While it is possible that one of the sites may be located on designated parkland, that is clearly not an insurmountable obstacle. It would only require an act of the Legislature to approve the alienation of the park, an act that the City and State accomplished just last year to facilitate the construction of Yankee Stadium on Macombs Dam Park and John Mullaly Parks. The bald-faced misrepresentation in the DEIS cannot be cured by trying to address the alternative in the FEIS. This is a significant alternative that can only be addressed in a SEIS.

ESDC skewed the analysis by creating the artificial construct that the arena must be at Atlantic Yards and must be built in conjunction with housing and commercial development. ESDC should have considered the benefits of locating the arena on Coney Island as set forth in myriad other planning documents. Instead, ESDC hid the other documents and consciously mischaracterized the physical ability to locate the arena there.

ESDC Alternative's analysis of the Extell plan is similarly flawed and reflects the predisposition to assist FCR without considering proposals from other developers. The DEIS recognizes that in many instances the Extell plan presents fewer adverse environmental impacts. However it criticizes that plan for either poor design elements or not meeting the requirements of the LIRR. ESDC ignores the very significant fact that Extell produced its plan in less than 30 days in response to the RFP released by the MTA. Extell did not have access to the property to any degree similar to FCR which has exclusive access to the property and design elements required by MTA for many months, if not over a year before the RFP was released. Neither MTA nor ESDC made any attempt to negotiate or discuss the proposal with Extell and did not attempt to explore design alternatives which could address MTA's needs and reduce impacts on the project. Similarly, ESDC's criticism of the stormwater control plan in the Extell proposal is not a function of an inherent design flaw in that proposal, but ESDC's failure to reach out to Extell and Extell's exclusion from an open and transparent planning process.

The goal of the project does not require the grandiose plans adopted by ESDC, but can be accomplished on a smaller scale which puts the Vanderbilt Yards to productive use. With an arena on Coney Island and a reasonable residential and mixed-use development on Vanderbilt Yards the goals can be reached with a less significant adverse impact on the environment. By failing to consider such an alternative the DEIS is fatally flawed.

Blight

The foundation of the DEIS and the GPP is the determination that the project area is substandard and insanitary and thus constitutes blight. As noted in other comments by DDDB and other commentators, the finding is self-serving and unsupportable. ESDC is seeking to designate the area as blighted for two purposes. First, to classify it as Land Use Improvement Project and thus make it an ESDC project which can override local zoning. And second to exercise eminent domain. The record does not support the finding.

The most glaring error is the failure to recognize that the ATURA boundary, which was

reviewed as recently as 2004, after the project was announced - was not altered or extended to include Blocks 1127, 1128 and 1129. Nor were any comments submitted to the City urging such an expansion.

Another glaring error is the mischaracterization in the blight study of what constitutes a blighting characteristic. ESDC includes underutilization of lots as a factor. However there is no legal support for applying that standard to lots such as gas stations that are in active use. There is no legal or planning requirement that a lot be fully built out to the maximum permitted under zoning to avoid being considered blighted.

Section B of the Blight Study presents an overview of the project area to establish the boundaries of the allegedly blighted area. Included in that section are a series of photographs that purport to be representative of the area. The locations of the photographs are shown in Figure 4 with the direction of the photo. The narrative, photos and Figure 4 are intentionally deceiving. The narrative claims that the photos illustrate the blighted conditions on Blocks 1127, 1128 and 1129. However only 3 photos, (C, H and I) are in the vicinity of those blocks. Each of those photos are actually of the northern sidewalk on Pacific Street. While those photos do show overgrown weeds, trash and deteriorated fences and sidewalks – all of those areas are within the existing ATURA boundary and most, if not all are the responsibility of NYCDOT and MTA. They do not demonstrate blighted conditions in the blocks south of Pacific Street. Taken as a whole, the photos and maps in Section B of the Blight Study simply reinforce the determination by New York City to limit the southern boundary of ATURA to the northern line of Pacific Street. There is nothing to support extending a finding of blight farther south. This represents another example of intentional misrepresentation of the conditions in the area.

The section in the Blight Study concerning crime is also in error. ESDC made no effort to acquire crime reports from the Police Report and makes the unsupported claim that crime in the area is greater than crime elsewhere in the precinct or sector. In fact the figures provided by ESDC demonstrate that the primary crime is in the 88th Precinct that comprises the northern part of the project area within ATURA. There are no significant crime figures for that area of the project in Blocks 1127, 1128 or 1129 where ESDC seeks to expand beyond the boundaries of ATURA.

For largely inexplicable reasons the Blight Study includes an August 26, 2005 article from the Brooklyn Heights Article. Ostensibly it is included to show that some homeless people had recently moved into an area on Block 1119, Lot 7. We suspect the real purpose of including the article is to denigrate DDDB as it serves no particular purpose otherwise. However, the article does demonstrate that the presence of the homeless in that area is a recent event – only five months prior to the article and that the property is owned by the MTA who has failed to maintain and police the property. What it also demonstrates is that contrary to the allegations in the Blight Study, the area is not a high-crime area, because the individual interviewed in the article stated that he felt safer living on that lot than he does in the homeless shelter and that the crime level is not particularly high.

Demand on Energy Sources

The DEIS provides only a cursory analysis of the project's demand on electrical needs in New York City. There are many deficiencies.

The DEIS argues that the increased energy use caused by the project is insignificant. However, it fails to accurately portray the extremely strained New York City electricity system, arguing instead that already proposed improvements will prevent any local or city-wide adverse impacts.

The project appears to be depending heavily on Con Edison to prevent adverse consequences on the electricity delivery system. Con Edison has been unable to explain the very significant outages in Queens in July 2006 and its failure to respond in an adequate and timely manner to recent storm-induced outages in Westchester County. The PSC has instituted a proceeding to investigate and has found Con Edison's response to the PSC's requests for information to be lacking. (PSC Case 06-E-0894; in particular see http://www.dps.state.ny.us/06E0894-8-3-06.pdf and http://www.dps.state.ny.us/Rana_Ltr-8-11.pdf)

As the report notes, underground wires are connected to one another and the larger electric grid. Replacing and upgrading the wires in the streets of the project area will not necessarily alleviate the strain on the system at large. Only reduced energy use in New York City and/or additional generation can produce the desired result. This project increases energy demand and does not appear to include any on-site, renewable generation (other than saying that photovoltaics may be considered).

In the section on energy use, the DEIS describes sustainable design features included in the project. These include "energy saving devices such as high-performance glazing and envelope assemblies, solar shading devices, daylight controls, occupancy sensors, energy-efficient lighting and appliances, and cooling heat recovery." However, in other sections of the DEIS, these sustainable practices are only listed as *potential* practices with no commitment whatsoever to their implementation (see pages I-28-29 and 17-13).

The DEIS fails to include a commitment to innovative green building design standards. Energy use can be reduced substantially by implementing LEED and other green building strategies. In addition, the U.S. Green Building Council also is developing a LEED standard for neighborhood development, which would most likely be appropriate for a neighborhood redevelopment on the scale of this proposal.

New York City is working on NYC-specific supplements to the U.S. Green Building Council's LEED system. These supplemental requirements will apply to both public and private developments. The project should therefore include provisions for meeting all relevant LEED standards.

Even commercial structures for large gatherings can be built with energy savings in mind (i.e., the David Lawrence Convention Center in Pittsburgh). Green building practices can

be applied for residential and commercial developments as well as sports facilities. Some examples of Green Building Council certified sports complexes include: a Haverford College athletic center in Pennsylvania, the Detroit Lions headquarters and training center, the Utah Olympic Skating Oval and the Morgan Hill Aquatic Center in California.

The DEIS grossly misrepresents the energy capacity situation of New York City. First, the DEIS references Executive Order 111 but provides no discussion of its implementation nor its relevance here. In fact, implementation of Executive Order 111 has not proceeded as planned and NYSERDA's programs are not meant to substitute for meaningful investment by government and the private sector in energy efficiency and renewable energy use.

The fact that NYPA has had to install numerous micro turbines is a warning sign of the impending energy crisis facing New York City.

The DEIS states that "Currently, there is sufficient capacity within the City to meet this 80 percent goal. However, as energy demand increases over time, additional in-City generation may be needed." Yet it also states that it assumes adequate capacity will be available in 2016 and beyond. As numerous reports have shown, New York City faces a severe energy shortage within several years because energy demand is increasing and supplies are not.

The NY Independent System Operator (who operates the State's electricity markets) has an independent market advisor to provide oversight for its operations. In the independent market advisor's most recent annual report ("New York ISO 2005 State of the Market Report," page viii), the advisor found that New York City was "relatively close to being capacity-deficient in 2005."

"The Comprehensive Reliability Plan 2005" (CRP 2005, NYISO, August 22, 2006) says that 950 MW of new generation in NYC is needed no later than the summer of 2011. The proposed project increases the energy demands of the city without making a contribution to the city's very real need for increased generation.

The NYISO's report "Power Trends 2005" notes that NYC and Long Island demand continues to grow at 1.7% per year and additional generation is needed on an ongoing basis. For the summer of 2005, it notes very slim margins for NYC and Long Island.

According to the New York City Energy Policy Task Force, "(T)he greatest single challenge for the City's energy infrastructure is keeping up with load growth, particularly as it appears to be accelerating in some areas. This is largely a product of increased residential construction, and of sharply lower prices for home air conditioning units. These growth factors, combined with an economic recovery in the commercial and industrial sectors, will place great strain on a system that is already overburdened, despite

Con Edison's efforts to expand and enhance its infrastructure." (*New York City Energy Policy: An Electricity Roadmap*, January 2004, p. 42)

The NYISO noted in a press release this summer that statewide electricity usage reached an all time high of 33,939 MW. The NYISO also noted that special programs had to be implemented to ensure reliability of the system would be maintained, "To maintain operations within reliability criteria, the NYISO called on businesses in its Special Case Resources (SCR) and Emergency Demand Response (EDR) programs from 1:00 – 7:00 p.m. in New York City and Long Island…resulted in load reductions of 416 MW in new York City…." (NYISO Press Release, August 2, 2006).

Reliability of electricity supply is a critical concern in NYC. The price of power is also important. As supplies tighten, prices for energy and electric capacity (the NYISO operates two separate markets) rise, which adversely impacts all New York City residents. Significant private developments can therefore impact the prices paid for power by all city residents.

While the DEIS correctly notes that there is a reliability requirement that 80% of NYC's electricity needs must be capable of being generated within the city, it glosses over the fact that the city is perilously close to not meeting that standard. New development that exacerbates the energy crunch should be required to have on-site, non-polluting generation and the highest of energy efficiency standards. To do otherwise, jeopardizes the reliability of the grid for all residents of the city.

The foregoing demonstrates the DEIS utterly failed to consider the significant implications of the project on the energy needs in New York City.

Conclusion

ESDC is has prepared a biased and misleading DEIS and GPP. It must redo the project in an objective manner looking at the planning and economic needs of the area and not attempt to facilitate a favored project.

Very truly yours,

Jeffrey S. Baker