

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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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, STATE ASSEMBLY MEMBER JAMES F. BRENNAN, 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,

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.

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ALBERT K. BUTZEL, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under penalties of perjury pursuant to Section 2106 of the New York Civil Practice Law and Rules:

1. I am Senior Counsel at the Urban Environmental Law Center, which represents the Petitioners Prospect Heights Neighborhood Development Council *et al.*

Index No. 116323/09

Assigned to
Justice Friedman

**AFFIRMATION OF
ALBERT K. BUTZEL IN
SUPPORT OF APPLICATION
FOR STAY AND FOR
SCHEDULING ORDER**

in this proceeding. I am fully familiar with the facts and circumstances of this case. I submit this affirmation in support of the Petitioners' Motion for a Stay and for an Order setting a schedule for the Empire State Development Corporation ("ESDC") to comply with the Court's recent Decision/Order, entered on November 10, 2010, granting reargument and renewal (the "November 10 Decision"). In footnote 11 of the Decision, the Court noted specifically that it was not staying, and could not stay, construction on the basis of the current record and the lack of focus to date on relevant legal issues. The Petitioners now ask the Court to grant a Stay and also to impose a compliance schedule for implementing the November 10 Decision.

2. The underlying facts of this case and the procedures that have brought it to this point are well known to the Court, and I will not repeat them here. The central event that has led to this Motion is the Court's holding in the November 10 Decision "that ESDC did not provide a 'reasoned elaboration' for its determination not to require an SEIS, based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project [and that] the matter should accordingly be remanded to ESDC for additional findings on this issue." In reaching its Decision, the Court carefully analyzed the terms of the Master Development Agreement ("MDA") for the Atlantic Yards Project, concluding that "Its 25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement . . . , raise a substantial question as to whether ESDC's continuing use of a 10 year build-out has a rational basis."

The Reasons Why a Stay Should Be Granted

3. The Petitioners filed this Article 78 proceeding in November 2009. From the beginning, they argued that the 10 year build-out was not only undercut by the realities of the market but was specifically called into question by the MTA Agreement allowing the Forest City Ratner Companies ("FCRC") until 2030 to acquire the air rights for the Project's Phase II building sites. This contention was dismissed by ESDC and its counsel, who asserted that 2030 was simply a theoretical outside date. However, their claim was belied by the MDA, which the Petitioners attempted to submit to the Court in February 2010, but which counsel for ESDC represented added nothing new. It was as a result of this misrepresentation – and ESDC's failure to provide the Court with a document that it had to know bore directly on the Petitioners' claims – that the Court was misled into concluding that there was enough in the record – albeit barely – to support ESDC's continued use of the 10 year build-out.

4. In truth, as the Court has now held, the MDA was critical, and critical in undercutting ESDC's argument that it had complied with SEQRA in continuing to limit its analysis of environmental impacts to the 10 year schedule it had used in its 2006 EIS. In light of the November 10 Decision, the Petitioners believe that if the MDA had been available to the Court in February 2010, its March 10, 2010 Decision upholding ESDC's analysis and rejection of any need for an SEIS would have been different.

5. Such a different outcome would very likely have had significant consequences in terms of FCRC's ability to move ahead with the Atlantic Yards Project, including the Arena. This is the case because under the complicated terms governing

the escrow of bond proceeds for the Arena, it appears that those proceeds could not have been released if the Court had found, as it has now, the ESDC did not comply with SEQRA and was not authorized to proceed. In the ensuing eight months, this condition of the escrow has lapsed and the bond funds have been released for construction, notwithstanding the November 10 Decision. This would not have been the case but for ESDC's misrepresentations regarding the MDA (which had to be known to FCRC as a party to that Agreement). Nor, but for those misrepresentations, would the Petitioners have been denied a remedy for their claims.

5. ESDC and FCRC should not be rewarded for their misrepresentations to the Court and their concealment of the terms of the MDA. As the Court has now held, taking account of those terms and the expansive completion dates MDA sets out, ESDC has not provided a "reasoned elaboration" for its determination not to require an SEIS. If the MDA had been available to the Court in March 2010, that same conclusion would presumably have followed at that time. The consequence would likely have been to halt or sharply limit continued construction of the Project because of the terms of the escrow (regardless of whatever remedy the Court might have fashioned). It is hard to believe that ESDC and FCRC were not aware of this, but in any case, their misrepresentations had the effect of allowing work to continue when otherwise it might have slowed or ceased. The Petitioners submit that the proper remedy now is to put the parties in the position they would have been but for the misrepresentations. This can and should be achieved by the granting of a stay of further work until ESDC complies with the Court's November 10 Decision.

6. There is a further reason why a Stay should be issued in this instance. This follows from the finding of the Court that, in connection with its approval of the Modified General Project Plan (“MGPP”) and its decision not to prepare a supplemental EIS, ESDC did not provide a “reasoned elaboration” for adhering to a 10 year build-out and confining its analysis of construction impacts to that limited period. This finding imports that ESDC did not comply with SEQRA when it approved the MGPP since at that point, it had not met the third prong of the test set out by the Court of Appeals in *Matter of Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400 (1986). As such, the approval was given in violation of SEQRA and should be regarded as void at this point. That, in turn, means that the work underway is underway illegally. Normally, this would result in the annulment of the prior approval and a remand to the agency to reconsider that approval after remedying the violation. See, e.g., *Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359 (1986); *Matter of Tri-County Taxpayers Association v. Town Board of Queensbury*, 55 N.Y.2d 41 (1982); *Vitiello v. City of Yonkers*, 255 A.D.2d 506 (2d Dept, 1998).

7. Here, the Court has not explicitly annulled ESDC’s approval, but has remanded the matter to ESDC to explain how, if at all, it can justify the 10 year build-out. In the meantime, however, there is no effective approval in place. Moreover, given the terms of the MDA, as well as the realities of the market place and the complexities of any construction (much less the construction of 16 massive buildings), ESDC’s continued adherence to the 10 year schedule would almost certainly be irrational. Instead, an analysis of the impacts for a 20 or 25 year build-out will need to be made – something that has not been done up to now. This evaluation will also have to consider

the significant delay in asserted “benefits” that have been assigned to Phase II of the Project (including the creation of eight acres of new open space) and used to offset the negative impacts of Phase I construction – benefits that, given current realities, could be deferred for 25 years, if not lost entirely. Moreover, unlike the evaluation of construction impacts made previously, the analysis will also have to consider the blighting impacts of such a lengthy construction schedule on the adjoining residential neighborhoods. Only then will ESDC be in a position to determine whether an SEIS is appropriate and act with respect to the MGPP. In the interim, neither it nor FCRC should be permitted to proceed as if ESDC had already complied with the law. Rather, the Court should stay further work, subject to the equitable considerations discussed below.

The Tests for A Stay/Injunction Are Met in This Case

8. When a court has ruled on the merits of a claim, a stay or injunction is appropriate when there is (1) the danger of irreparable injury in the absence of an injunction and (2) a balance of equities in the moving party’s favor. In this case, the Court has ruled on the merits, holding that ESDC failed to provide a reasoned elaboration for its determination to adhere to a 10 year build out. The Petitioners submit that the both branches of the test described above are also met here

9. Absent a Stay, FCRC will continue with construction of the Atlantic Yards Project. The construction process itself generates irreparable injury. Noise, dust, construction traffic, and all the other concomitants of a large scale construction project are disrupting the lives of neighbors, including the Petitioners and members of the

Petitioner organizations. That damage cannot be undone, and money cannot adequately compensate for it. See e.g. *Lattingtown Harbor Property Owners Ass'n, Inc. v. Agostino*, 34 A.D.3 536, 825 N.Y.S. 86 (2d Dep't 2006) (affirming issuance of preliminary injunction to prevent construction of piers, fences or gates). In addition, if FCRC is permitted to continue with work on the Project, it will later claim that it would suffer inordinately if required to dismantle what has been done or to stop the process. Such an argument potentially weakens the Petitioners' litigation position, even as continued construction worsens the Petitioners' injuries.

10. Of equal or greater importance, the Petitioners are threatened with *specific* irreparable injury that extends well beyond the current area of work involving construction of the Arena. As set forth in the accompanying affidavit of Danae Oratowski, Chair of the Prospect Heights Neighborhood Development Council, FCRC has stated at recent meetings that it intends to clear the site known as Block 1129 and convert it into a parking lot for 1100 vehicles. Even more specifically, in the most recent "Construction Update" issued by ESDC to the "Atlantic Yards Community" (relevant excerpts of which are attached to the Affirmation as Exhibit A), the agency has announced that the remaining buildings on that Block will be demolished as soon as demolition permits are issued. This work will not only involve a further commitment of resources – it will expand the area of disruption to a new area deeper into the Prospect Heights residential neighborhood and immediately adjacent to the Prospect Heights Historic District.

11. Furthermore, if this huge open parking lot is built, it is likely to remain that way far longer than assumed in the original EIS (or in the 2009 Technical Memorandum) because of the extended build-out of the remainder of the Project. This, in turn, would have significantly greater impacts on surrounding residential neighborhoods than has been analyzed up to now. Such greater impacts include the presence of a massive expanse of asphalt over many years (a situation that, in its “blight” analysis for the Project, ESDC identified as indicative of that condition), as well as heavy vehicle traffic generated when the Arena is open. Because the Court’s decision requires ESDC to address the implications of this situation, among others, FCRC should not be permitted to build (or begin to build) the Block 1129 parking lot until the analysis directed by the Court has been completed and the Court has had the opportunity to pass on its adequacy.

12. With regard to the balancing of equities, the Petitioners acknowledge that FCRC has already invested a large amount into the Arena portion of the Project and that construction of that structure is in full swing. However, this is not for want of the Petitioners’ efforts to stop it. They initiated this lawsuit promptly after ESDC’s approval of the MGPP, and they joined in the motion of DDDDB Petitioners for a preliminary injunction. As a result, by early 2010, FCRC was fully aware of the Petitioners’ claims and the risk that a judicial ruling could require it to stop or even reverse the work. See, e.g., *Vitiello v. City of Yonkers*, 255 A.D.2d 506 (2d Dept, 1998); *Matter of Watch Hill Homeowners Assn v. Town Board*, 226 A.D.2d 1031 (3d Dept 1996). Thus, any injury to FCRC by reason of a stay of construction would be self-created. In contrast, the

Petitioners, through no fault of their own, are being adversely impacted every day by the ongoing construction.

13. Furthermore, while FCRC has invested a large amount in the Project in absolute terms (much of it in the form of “soft costs”), the only structure on which work has begun is the Arena, and as of August 31, 2010, that facility was only 10 percent complete, as reflected on page 6 of Site Observation Report 5 (relevant excerpts of which are attached hereto as Exhibit B). It is not yet too late to modify the Project, including the Arena, if necessary or appropriate to mitigate adverse impacts. However, each day that construction is permitted to continue limits the options.

The Scope of any Stay

14. There is ample New York authority that a stay or injunction is appropriate when an agency has failed to comply with SEQRA. See, e.g., *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dept 1996); *Matter of Powis v. Giuliani*, 216 A.D.2d 107 (1st Dept 1995); *Vitiello v. City of Yonkers*, 255 A.D.2d 506 (2d Dept, 1998); *State of New York v Town of Horicon*, 46 A.D.3d 1287 (3d Dept 2007); and see *Matter of Dickinson v. County of Broome*, 183 A.D.2d 1013, 1015 (3d Dept 1992), where the court concluded that an injunction was unnecessary because “SEQRA mandates that the required environmental review be completed before respondents may act . . . and respondents cannot approve, fund or carry out any construction relating to the proposed complex until they have fully complied with SEQRA [citations omitted].” In this instance and at this point, ESDC has not complied

with SEQRA and thus there is no effective approval for the ongoing work. Accordingly, an injunction against *all* continuing work would be appropriate.

15. In some cases, however, where construction of a large scale public project is underway, the courts have issued injunctions but stayed their effectiveness for several months to allow compliance with SEQRA. See, e.g., *H.O.M.E.S v. New York State Urban Development Corp.*, 69 A.D.2d 222 (4th Dept 1979)(four month stay where project was nearing completion); *Matter of UPROSE v. Power Authority of the State of New York*, 285 A.D.2d 603 (2d Dept 2001)(Injunction stayed for six months where project was almost complete). The Petitioners do not believe that these cases have application to this one, because, as noted above, the first part of the Atlantic Yards Project – the Arena – is only 10 percent complete, and the overall Project, including both Phase I and Phase II, is only one percent complete. If, however, in the exercise of its discretion, the Court were to decide that ESDC should be given a limited amount of time to comply with SEQRA, then the injunction should be stayed *only* for continued work on the Arena, but all other work, including any attempt to convert Block 1129 to a parking lot, should be absolutely enjoined unless and until there is full compliance with SEQRA and ESDC has reconsidered its approval of the MGPP.

The Importance of a Compliance Schedule

16. As matters stand now, ESDC has no incentive to move forward with dispatch to comply with the Court's November 10 Decision. Because the Court has not explicitly annulled the approvals given for the Project and because there is no stay

in place, ESDC can take a leisurely approach to pursuing the steps that the Court has ordered. In the meantime, it can proceed in exactly the same way that it could before the November 10 Decision.

17. The granting of a Stay will ensure that ESDC proceeds expeditiously to reevaluate the build-out schedule and the impacts of a longer period of construction than it has analyzed up to now. However, if the Court does not grant a full Stay, the Petitioners ask it to set a schedule for ESDC to comply with the November 10 Decision. This would include a specific period, not longer than 45 days, for ESDC to decide whether a 10 year build-out remains realistic and if it does not (as Petitioners believe to be the case) to identify a realistic construction schedule for the Project. At that point, ESDC should be required to report to the Court its plans and schedule for further study, evaluation and decision making, including the opportunity it will provide a public hearing and comment. If a full Stay has not been granted, the Court would then be in a position, if the Petitioners ask, to reassess the necessity or appropriateness of further interim relief pending ESDC's completion of the environmental review process.

Conclusion

18. For the reasons set forth above, the Petitioners ask the Court to stay further work on the Atlantic Yards Project pending ESDC's compliance with SEQRA, or, in the alternative, to stay all work other than direct work on the Arena. If the Court does not grant a full stay, the Petitioners respectfully request that the Court set a Compliance Schedule for ESDC, as set forth in paragraph 17 above, with Petitioners'

given the opportunity to seek a full stay once the agency has reported its plans to the Court. The Petitioners also request such other and further relief as the Court may deem just and proper.

Dated: November 23, 2010



Albert K. Butzel

ATLANTIC YARDS CONSTRUCTION UPDATE
Weeks of November 22, 2010 through December 5, 2010

In an effort to keep the Atlantic Yards Community aware of upcoming construction activities, ESD and Forest City Ratner provide the following outline of anticipated upcoming construction activities.

Please note: the scope and nature of activities are subject to change based upon field conditions. In addition, during the utility work water shut offs may be required; these shut downs are done under the oversight of DEP and property owners will be given advance notice. All work has been approved by appropriate City and State agencies where required.

If you have any questions please feel free to contact our project Ombudsperson, Forrest Taylor, at: 212-803-3233 or AtlanticYards@empire.state.ny.us

Weeks covering November 22, 2010 through December 5, 2010

Long Island Rail Road/Vanderbilt Yard Work

- Contractor has completed the work required for the installation and load testing of piles. The contractor will now commence the work necessary to install 7'x7' spread footing and perform the required load tests. This work is taking place approximately 100 feet east of the Carlton Ave Bridge in block 1121.
- Work related to the demolition of the Carlton Ave Bridge and the associated piers located in the north side of the existing LIRR yard located within blocks 1120 & 1121 will continue during this period. Work consists of the abatement of the lead paint which will be limited to approximately one foot on either side of cut lines for the removal of the steel. A chemical peel process will be used; if this is unsuccessful the contractor will use a process involving needle scalers to remove the paint in these areas. In either case, the removed paint will be captured and disposed of appropriately.
- Contractors have commenced the construction of the AO1-2 concrete vault and transformer pad along with the associated electrical duct banks. This work will take place in the north side of Block 1120 just east of lot 19. This work activity has an estimated duration of 4 weeks.
- Work will commence to drill and install 17 soldier piles required to remove the north abutment of the Carlton Avenue Bridge. These piles are required to be installed so that the demolition of the remaining portions of the bridge can be completed.

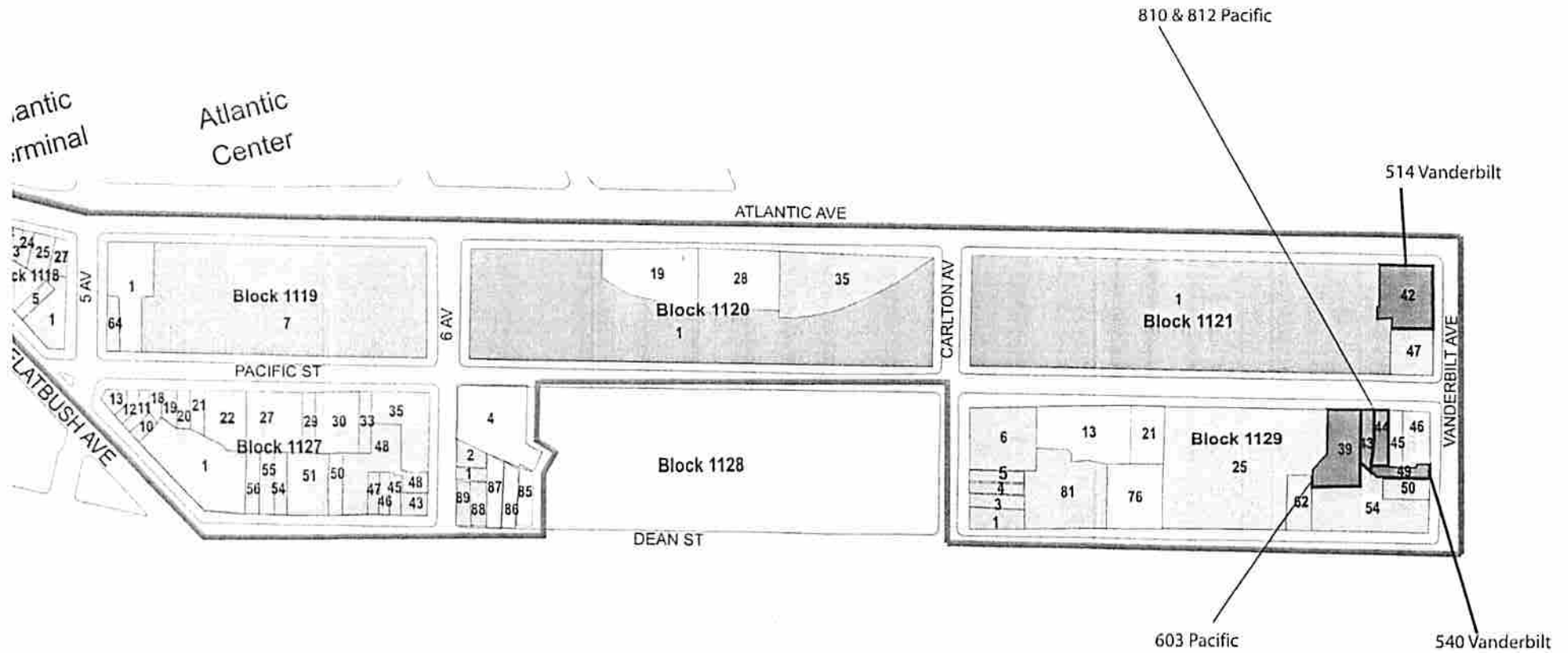
Demolition

- All buildings in the arena footprint have been demolished and are awaiting sign off by the Department of Buildings. Arena Excavation will continue into the former demolition work zones as soon as sign-offs are received. Asbestos abatement is complete at 802 Pacific and 514 Vanderbilt.
- Demolition applications have been submitted to the Department of Buildings for 810 and 812 Pacific and 540 Vanderbilt and are in the review process. Demolition applications are being prepared for 802 Pacific and 514 Vanderbilt. Demolition will begin when permits are received.

Arena

- Excavation for the arena perimeter foundation in the area of Atlantic Avenue and within the BL1119 portion (at the closed 5th Avenue and Pacific Street) of the Arena footprint has been completed. Waterproofing and backfilling along the outside of the arena Atlantic Avenue foundation wall will continue during this reporting period. Excavation for the crane pad been completed. Excavation for structural steel lay down continues.
- Installation of SOE along the western portion of the arena building, continuing down Flatbush to Dean continues during this period; additional rakers and sheeting is required in this area, as well as revisions to some existing SOE to accommodate utility contractor underpinning of TA tunnel wall and place of sewer pipe. Within this same area, excavation will continue within the footprint of the arena (block 1127). During this period drilling for soldier piles and lagging will continue east of the Dean Street and Flatbush Avenue intersection at the Dean Street. .
- Work related to the SOE installation and related excavation within the southeast and southwest quadrants of the arena block, paralleling Dean Street, will continue during this reporting period. VOC monitoring as required by the CAMP, as well as use of enhanced personal protective equipment (PPE) in some instances, will continue during SOE installation and excavation work on Block 1127 Lot 1. A concrete slab of approximately 2'-4' (cap") will be placed at grade within the area where VOC releases have been elevated to allow work to continue without enhanced PPE and to limit as much emissions as possible at this location. Monitoring by Hunt as well as the Onsite Environmental Monitor (OEM) is being done on a real time, continuous basis to confirm a safe working environment as well as to confirm that there are no elevated VOC emissions migrating outside the project perimeter.

Atlantic Yards Demolition Status



it lot
 ement or Demolition Underway
 Yard

23-041A

October 1, 2010

Ms. Linda Chiarelli, Senior Vice President
Deputy Director of Construction
Forest City Ratner Companies
1 Metro Tech Center
Brooklyn, New York 11201
E-mail: lchiarelli@frc.com

Mr. Joseph M. Lawlor, Vice President (By Hand)
The Bank of New York Mellon,
as PILOT Bond Trustee
101 Barclay Street, Floor 7W
New York, New York 10286
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Mr. Steve Matlin, Senior Counsel (By Hand)
New York State Urban Development Corporation
d/b/a Empire State Development Corporation,
as Lease Administrator
633 Third Avenue
New York, New York 10017
E-mail: smatlin@empire.state.ny.us

Re: **New Nets Arena**
Barclays Center and Transit Connection
Brooklyn, New York

Dear Ms. Chiarelli, Mr. Lawlor, and Mr. Matlin:

Enclosed is our Site Observation Report 5 for the referenced project, based on our visit of August 31, 2010. James G. Cockinos, AIA, Senior Associate, performed the observation and prepared the report.

Please refer to Section II - "Executive Summary" for a brief overview of the project.

M&H

If you have any questions regarding this report, please call.

Very truly yours,

MERRITT & HARRIS, INC.



James G. Cockinos, AIA
Senior Associate
Group Leader Construction Monitoring

JGC:nn
Enclosure

- cc: **Forest City Ratner Companies**
- | | |
|-----------------------|---------------------------|
| Attn: Lauren Du | E-mail: ldu@fcr.com |
| Attn: Jim Lester | E-mail: jlester@fcr.com |
| Attn: Dalia Schwartz | E-mail: dschwartz@fcr.com |
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- STV Construction Inc.**
- | | |
|-------------------------|-----------------------------------|
| Attn: Charles S. Ludlow | E-mail: Charles.ludlow@stvinc.com |
| Manny P. Kratsios | |

SECTION II - EXECUTIVE SUMMARY

This section is intended to be a brief overview of the project, based on our current site visit. Please read the report in its entirety for a complete understanding of our comments and opinions as presented herein.

Conformance to Plans and Specifications and Workmanship

Construction Documents (Drawing Volumes 1 - 6, Specifications Volumes 1 - 3) marked "Not for Construction," dated July 31, 2009, were provided for our review. 60% CD drawings, dated to include the Arena façade have been made available. The 100% CD drawings have been made available as of August 18, 2010.

Mass Transit Improvement documents, (plans and specifications Volumes 1 - 5) labeled "90% Submission," dated August 28, 2009, were provided for our review.

The work is proceeding in general accordance with the plans, specifications, and other pertinent documents that we have reviewed to date.

The overall quality of workmanship is good.

Summary of Hunt GMP Costs

Arena

The following summary is based upon the General Contractor's Application and Certificate for Payment 8, covering the period through August 31, 2010:

Current Contract Value (Design/Build with GMP)		\$472,485,452
Total Work Completed and Stored to Date	8.3%	\$ 39,424,866
Current Payment Due and Recommended by Merritt & Harris, Inc.		\$ 7,868,811 *

* Current Payment Due includes Hard Costs (\$6,150,265), GC/CM Fee (\$1,254,405), and associated A/E Soft Costs (\$464,141)

In our opinion, the remaining Contract Value funds of \$433,060,586, together with the remaining Developer's Arena Design/Scope Contingency, are sufficient to complete the work as it is currently defined.

The Guaranteed Maximum Price (GMP) was based on the "Scope Set" drawings, dated July 31, 2009.

Transit Connection

The following summary is based upon the General Contractor's Application and Certificate for Payment 1, covering the period through August 31, 2010:

Current Contract Value (Lump Sum)		\$50,581,000
Total Work Completed and Stored to Date	1.7%	\$ 848,700
Current Payment Due and Recommended by Merritt & Harris, Inc.		\$ 763,830

In our opinion, the remaining Contract Value funds of \$49,732,300, and the Developer's Design/Scope Contingency are sufficient to complete the work as it is currently defined.

Summary of Total Project Hard Costs:

The following summary is based upon the Developer's Application and Certificate for Payment 5 covering the period through August 31, 2010:

<u>Description</u>	<u>Budget</u>	<u>Previously Completed</u>	<u>Current Request</u>	<u>Total Completed</u>	<u>% Complete</u>	<u>Remaining Balance</u>
Arena	\$507,193,011	\$47,137,908	\$7,491,770*	\$54,629,678	10.8	\$452,563,333
Transit Connection	66,507,554	3,035,470	763,830	3,799,300	5.7	62,708,254
Arena Site Work	20,143,349	346,032	0	346,032	1.7	19,797,317
Arena Mitigation	<u>2,685,886</u>	<u>0</u>	<u>80,690</u>	<u>80,690</u>	3.0	<u>2,605,196</u>
Totals	\$596,529,800	\$50,519,410	\$8,336,290	\$58,855,700	9.9%	\$537,674,100

The \$8,336,290 being requested for these line items under the Requisition, covering August 2010, was reviewed by our office and found to be reasonable.

* Current Request is part of the Hunt Construction Design-Build contract and includes the trades, GC/CM Fee Costs, and miscellaneous other Hard Costs.

Summary of Total Project Soft Costs

The following summary is based upon the Developer's Application and Certificate for Payment 5, covering the period through August 31, 2010:

Current Revised Budget		\$183,606,869
Total Amount Incurred to Date	82.2%	\$150,912,160
Current Payment Due and Recommended by Merritt & Harris, Inc.		\$ 2,506,572

The overall Soft Cost budget includes the following Soft Cost related items:

<u>Description</u>	<u>Budget</u>	<u>Previously Completed</u>	<u>Current Request</u>	<u>Total Completed</u>	<u>% Complete</u>	<u>Remaining Balance</u>
Arena	\$174,827,003	\$142,729,644	\$2,201,667	\$ 144,931,311	82.9	\$29,895,692
Transit Connection	5,066,098	3,032,874	83,528	3,116,402	61.5	1,949,696
Arena Site Work	3,667,307	2,613,619	221,377	2,834,996	77.3	832,311
Arena Mitigation	<u>46,461</u>	<u>29,451</u>	<u>0</u>	<u>29,451</u>	63.4	<u>17,010</u>
Totals	\$183,606,869	\$148,405,588	\$2,506,572	\$150,912,160	82.2	\$32,694,709

The \$2,506,572 being requested for these line items under the Developer's Requisition, covering August 2010, was reviewed by our office and found to be reasonable.

In our opinion, the remaining budget funds of \$32,694,709 which includes the remaining Development Contingency are sufficient to complete the work as it is currently defined.

Additional costs not included within the Hard or Soft Cost Requisition includes the following:

<u>Description</u>		<u>Previously Completed</u>	<u>Current Request</u>	<u>Total Completed</u>	<u>% Complete</u>	<u>Remaining Balance</u>
Accounts Payable (AP)	\$ 4,950,367 ⁽¹⁾	\$ 4,517,503	\$ 0	\$ 4,517,503	91.3	\$ 432,864
Financing	<u>29,715,483⁽²⁾</u>	<u>29,713,221</u>	<u>0</u>	<u>29,713,221</u>	99.9	<u>2,262</u>
Totals	\$34,665,850	\$34,230,724	\$0	\$34,230,724	98.7	\$ 435,126

(1) Costs incurred prior to closing

(2) Costs of financing

Summaries of Recommended Payment Due

<u>Description</u>	<u>Amount</u>
Hard Costs - Arena	\$ 7,491,770.74
Hard Costs - Transit Connection	763,829.21
Hard Costs - Mitigation	80,690.00
Soft Costs	2,506,571.47
Accounts Payable (AP)	0.00
Financing	<u>0.00</u>
Total	\$ 10,842,861.42

Scheduled Completion

According to the Developer, the project began in January 2010, with initial mobilization by the General Contractor. A Notice to Proceed was executed as of March 15, 2010, with a contractual completion date of July 15, 2012, for a 28-month construction term.

A target substantial completion date of June 1, 2012, has been established with the following criteria to be met:

- a. Owner may use and occupy the Arena,
- b. Only punch list items remain,
- c. The Architect of Record has issued a Certificate of Substantial Completion
- d. A TCO has been issued

Punch list work and Subcontractor close-outs may extend the construction term to a final completion date of February 28, 2013.

Based on our computerized progress chart which compares the cash flow amount to the projected construction progress, the project is currently slightly ahead of schedule.

Open Issues/Comments

- 5.1 The following construction items are not critical in nature and are noted for monitoring purposes:
 1. Premium time authorized by Hunt to Foundations Subcontractor in Areas D and E
 2. Revised start of steel erection point being reviewed (Column 10 vs. Column 35)
 3. Revised and greater detailed excavation activity in southeast quadrant being implemented
 4. Alt. 2 #4 for SOE and CIP concrete work in southeast quadrant being secured
 5. The Developer is to secure limited exclusion zone requirements from NYC DOB

Previous Periods

- 4.1 The following construction items are not critical in nature and are noted for monitoring purposes:
 1. Rebar installation at Pier P3
Update: The rebar inspections are proceeding and being conducted by Thornton-Tomasetti Structural Engineers
 2. Anchor bolts at Column Lines G-15.5, D-15, F-16, D-12, and F-12
 3. Stress crack on grade beam
 4. Concrete placement at Elevator 2A walls located at Grid Line 13.75/F.75
Update: Work has been completed
 5. Water damage occurring at perimeter footing, interior grade beams and footings
Update: Waterproofing operation at all perimeter footings, grade beams, and footings continue to take place