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November 27, 2006

**VIA FEDERAL EXPRESS**

Atlantic Yards c/o Planning & Environmental Review  
Empire State Development Corporation  
633 Third Avenue  
New York, NY 10017

Re: **Comments on "Final Environmental Impact Statement"  
(FEIS) for proposed "Atlantic Yards Arena  
and Redevelopment Project"**

Ladies and Gentlemen:

We are the attorneys for A. J. Richard & Sons, Inc., which is the owner of certain property located at 4th Avenue, Pacific Street, and Flatbush Avenue in Brooklyn, which property is designated as Section 4, Block 927, Lot 1, and is one of the parcels proposed to be included in the proposed "Atlantic Yards Arena and Redevelopment Project." We understand that the above-referenced "Final Environmental Impact Statement" (hereinafter the "FEIS") has been the subject of a public hearing and that written comments are also being received in connection with the FEIS.

On behalf of A. J. Richard & Sons, Inc., we have requested that Theresa Elkowitz, President of the environmental and planning consulting firm of Freudenthal & Elkowitz Consulting Group, Inc. of Commack, New York, review and comment upon the subject FEIS. Ms. Elkowitz is a highly-regarded expert with respect to environmental review of proposed land use actions in the State of New York.

Ms. Elkowitz's comments with regard to the aforesaid FEIS are set forth in a letter to me dated November 27, 2006, a copy of which is also submitted herewith. We respectfully submit Ms. Elkowitz's November 27, 2006 letter, and the comments and concerns raised therein, as the comments of our client, A. J. Richard & Sons, Inc., with regard to the FEIS.

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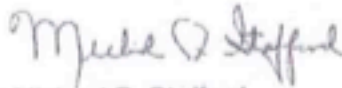
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Thank you for your consideration. Please contact me if you have any questions.

Very truly yours,



Michael P. Stafford

MPS:jmp  
Enclosures  
cc: Thomas P. Pohmer  
Theresa Elkowitz

# FREUDENTHAL & ELKOWITZ CONSULTING GROUP, INC.

Theresa Elkowitz, President  
November 27, 2006

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Re: Atlantic Yards Arena and Redevelopment Project  
Final Environmental Impact Statement ("FEIS")

Dear Mr. Stafford:

In accordance with your request, we have reviewed the *Final Environmental Impact Statement - Atlantic Yards Arena Redevelopment Project*, which was accepted as complete on November 15, 2006 by the Empire State Development Corporation for purposes of advising whether same complies with the relevant requirements of (a) the State Environmental Quality Review Act ("SEQRA") and its implementing regulations at 6 NYCRR Part 617 (hereinafter "SEQRA Regulations"), and (b) the "City Environmental Quality Review Technical Manual (hereinafter "CEQR Technical Manual"). Our comments are set forth below.

## THE PROPOSED ACTION HAS NOT BEEN PROPERLY FORMULATED

In our previous correspondence dated October 27, 2005, regarding the Draft Scope of Work, we indicated that Draft Scope of Work did not provide for a properly formulated proposed action. In pertinent part, we noted:

"6 NYCRR §617.2(b) defines 'Actions' as:

*'(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:*

*(i) are directly undertaken by an agency; or*

*(ii) involve funding by an agency; or*

*(iii) require one or more new or modified approvals from an agency or agencies;*

*(2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;*

*(3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and*

*(4) any combinations of the above.'*

*"As indicated above, in this case, the proposed 'action' is an arena construction and redevelopment project that is proposed by Atlantic Yards Development Company, LLC and Brooklyn Arena, LLC. That 'action' is a 'project' or 'physical activity' that 'may affect the environment.' The definition of 'action,' above, does not contemplate a menu of possible options evaluated in a site-specific DEIS, such as that contemplated herein. Moreover, the definition of 'action' does not contemplate approximations with respect to the magnitude and type of proposed development. An "action" must be defined and evaluated in the environmental review process -- an action cannot be a moving target."*

We respectfully assert that the FEIS still provides no clearly-defined proposed action. Although revisions have been made to the residential and the commercial office space components of the program (among other changes), the EIS still presents both a "residential mixed-use variation" and a "commercial mixed-use variation" as well as a bifurcated analysis of the two distinct scenarios. As noted on Page S-15 of FEIS:

*"Each section of the EIS presents full analysis of the program variation (residential mixed-use or commercial mixed-use) with the greater potential to cause significant adverse environmental impacts for that particular technical area (i.e., the Reasonable Worst-Case Scenario) and a less detailed analysis for the other program variation, when relevant."*

In addition, Page I-18 of the FEIS explains that:

*"To allow the project to respond to market forces and to address needs for housing and commercial office space, the project would permit some flexibility in the development program for portion of the site within or close to the Special Downtown Brooklyn District."*

As detailed, our previous correspondence (dated October 27, 2005) states:

*"Based on the fact that the project sponsors have not properly defined the proposed 'action,' and it appears that the proposed action is more of a 'master plan' than a site-specific 'action,' it would be more appropriate for the lead agency to require the preparation of a generic environmental impact statement ('GEIS') instead of a site-specific DEIS."*

*Pursuant to 6 NYCRR §617.10:*



*'(a) Generic EISs may be broader, and more general than site or project specific EISs and should discuss the logic and rationale for the choices advanced. They may also include an assessment of specific impacts if such details are available. They may be based on conceptual information in some cases. They may identify the important elements of the natural resource base as well as the existing and projected cultural features, patterns and character. They may discuss in general terms the constraints and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur*

*A generic EIS may be used to assess the environmental impacts of:*

- (1) a number of separate actions in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts; or*
- (2) a sequence of actions, contemplated by a single agency or individual; or*
- (3) separate actions having generic or common impacts; or*
- (4) an entire program or plan having wide application or restricting the range of future alternative policies or projects, including new or significant changes to existing land use plans, development plans, zoning regulations or agency comprehensive resource management plans .*

*Review of the above indicates that the project sponsors' proposal is best defined as "an entire program or plan . . . including new or significant changes to existing land use plans, development plans . . ."*

This notion that this is a "program," rather than specific action is definitively indicated in FEIS Response to Comment No. G-1 (page 24-463) which states:

*"The GPP [General Project Plan] includes both Phase I and Phase II development and governs the development of the entire proposed project. It is this program that is subject to environmental analysis under the SEQRA process. Any significant changes to the GPP would be subject to additional environmental review."*

Therefore, we continue to assert that the appropriate vehicle for evaluation of environmental impacts of the project sponsors' proposal is a generic environmental impact statement. As noted in our previous correspondence:

*"This conclusion is supported by various commentary in The SEQR Handbook (New York State Department of Environmental Conservation, November, 1992). For example, Page 77 of The SEQR Handbook states that:*

*'Generic EIS's are useful when there is need to:*

- Account for the cumulative impacts, regional influences and secondary effects of an overall group of actions or overall program; . . .*
- Set forth conditions, criteria or thresholds under which future site-specific actions may be undertaken;*
- Provide sound environmental planning, particularly the consideration of mitigation and alternatives at a time when there is greater flexibility;*
- Establish baseline data for reference and scoping of supplemental site-specific EIS's, thus avoiding duplication, reducing costs and paperwork;*
- Limit extent of future project reviews by providing early guidance on significance determinations; or*
- Provide public disclosure of agency considerations used in environmental decision-making.'*

*Moreover, page 78 of The SEQR Handbook states that:*

*'Generic EIS's are commonly used for the following types of activities:*

- phased residential development; . . .*
- planned unit developments;*
- industrial/commercial parks; . . .*
- development of broad geographic area.'*

*Page 78 of The SEQR Handbook further states that:*

*'For project sponsors, a generic EIS may be helpful to discuss important preliminary issues prior to the investment of money and time in engineering plans or detail. For example, if rezoning is required for a specific project and the result of that decision could reshape the project, a generic EIS on issues related to alternative site uses and impacts from those uses may allow early decisions to be made before investments reduce sponsor willingness or ability to change the project' [emphasis added]*

*The instant proposal is one that includes phased residential development, commercial development and development of a broad geographic area. Moreover, the project sponsors have not proposed a site-specific plan. Rather, they have proffered 'alternative site uses,' and it is incumbent on the lead agency to evaluate these alternative uses, and ultimately, to select an 'action' (i.e., a development plan) that, pursuant to 6 NYCRR §617.11(d)(5):*

*'... consistent with social, economic and other essential considerations from among the reasonable alternatives available, ... is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable....'*

*For all the foregoing reasons, the lead agency should require the preparation of a GEIS to evaluate the impacts of the proposed Atlantic Yards Arena and Redevelopment Project."*

#### THE FEIS MAKES CONCLUSORY AND SELF-SERVING STATEMENTS

Many of the statements made in the FEIS are conclusory and unsupported. For example, Comment No. 1-19 on page 24-43 of the FEIS requests the following:

*"EIS should address impacts of on surrounding neighborhoods before, during and after events"*

The FEIS responds, in pertinent part:

*"In general, any crowd noise surrounding the arena would be expected to be masked by noise from vehicles on adjacent streets and would not be a major noise source."*

No evidence is presented to support that crowd noise would be masked by vehicle noise, and no attempt is made at any analysis to address that comment. Clearly, such response does not satisfy, the "hard look" requirements of SEQRA.

In another example, Comment No. 4-71 (page 24-116) is as states:

*"Affordable housing is a continuation of rent control and rent stabilization, which is supposedly on its way out in New York City. Both mean the boosting of city rents by taking much of the rental housing off the market. The price of what is left goes up thereby creating the very situation that it is trying to eliminate. In this way, affordable housing for some creates unaffordable housing for others. Any type of aid eventually just becomes another expense and does not provide the fix it was originally intended to."*



The FEIS provides the following response to this comment:

*"Rental rates for affordable housing are not expected to increase sales prices for market-rate condominium units or rental rates for market-rate rental units."*

No evidence is presented in the EIS to support this statement. The response is merely conclusory and self-supporting, and does not present the necessary "hard look" to address this important issue.

Other responses within the FEIS are presented as fact, but are not supported by any data or analysis. For instance, Comment No. 4-74 (page 24-117) suggests:

*"People who are paying market rate for their apartments and people who are paying a subsidized rate may not like the idea of living next door to one another. Also, if the number of market rate units is cut, there is a possibility that a negative tipping point will be reached such that the remaining market rate apartments will no be attractive, since there are so many affordable housing units in the mix."*

Response No. 4-74 notes:

*"Combined market rate and affordable housing projects are common throughout New York City. The integration of low-income, moderate-income and high-income units into single buildings has proven successful across the City and is required by many of the affordable housing programs currently used in the City."*

This response provides no examples of either projects within New York City that have been or are successful with income integration, or any examples of any New York City programs that require income integration. Again, this alleged "response" is non-responsive and does not satisfy the "hard look" requirements of SEQRA.

Comment No. 5-32 (page 24-139) states:

*"The proposed health facility may mitigate part of the new demand for health care, but the DEIS does not describe the proposed service provision or potential funding sources."*

Response No. 5-32 offers a listing of potential services and notes that "the proposed project would not result in a significant adverse impact to health care facilities; therefore, no mitigation is required." The response indicates that the health care facility is an amenity and not a mitigation measure. The last sentence in the response indicates "the source of funding for the health care center amenity is not necessary for impact assessment." This is clearly untrue. Even if the construction of the health care facility is an amenity proposed by the developer, it must be considered in the EIS's economic evaluation. Furthermore, the funding for the continuing operation of the health care is not addressed in this response. Again, the "response" is self-serving and non-responsive.



The same argument holds true for Comment No. 5-37, which indicates:

*"The day care center that is spoken of in the CBA agrees only to construct the facility, but there is no provision for the operating funds. The remains to be supported by public subsidy—another drain on the public pocketbook.*

*There is no information on who will run and fund the community facilities [day care center]."*

The response to this comment No. 5-32 states:

*"The source of funding for the day care center amenity is not necessary for impact analysis."*

Again, the FEIS relies on the argument that the day care center is an amenity and not a mitigation measure. The questions regarding funding of the day care center, the cost of operating the day care center and of who will run the center are ignored. As the day center is proffered as an amenity, the question of funding and viability is relevant. An "amenity" that is not funded is not an amenity. Provision of answers to these questions could influence the outcome of the economic analysis presented in the EIS. Therefore, the response is self-serving.

In another example, Comment No. 9-2 (page 24-210) states:

*"Shadows may cause downward pressure on house prices."*

The response provided states, in pertinent part, that "the shadows created by the proposed project's buildings are not expected to affect property values." This "response" is not supported by any data or analyses. Again, the "hard look" requirements is not satisfied.

Comment No. 11-40 (page 24-239) suggested that:

*"The DEIS makes no concerted effort to implement the NYC SWMP objectives on this site."*

The FEIS responds as follows:

*"The proposed project would comply with all City initiatives in the SWMP with respect to recycling."*

No supporting information is provided to substantiate this response.

In response to numerous comments regarding the creation of wind impacts due to the proposed project (Comment No. G-7: page 24-465 to 24-466), the response in the FEIS states:

*"In response to comments, an evaluation of wind conditions was conducted, and indicated that although some increases in wind speed at pedestrian levels would be expected, the proposed project would not result in adverse wind conditions in or around the project site."*

Supporting documentation is neither provided nor referenced in the response to the myriad comments regarding wind. No analyses is presented to justify the self-serving response.

#### THE FEIS PROVIDES NON-RESPONSIVE ANSWERS

The EIS provides answers that are not responsive to the comments made. For example, the group of comments known as Comment No. 8 (Page 24-25) questions why New York City's ULURP process was not used in the review of the project. The response to Comment No. 8 is as follows:

*"The proposed project is a land use improvement and civic project under the UDC Act. Additionally, much of the project site is owned by the MTA, a State authority."*

This response does not indicate whether any portion of the project is subject to ULURP. Furthermore, New York City's CEQR process was chosen as the evaluation tool for the EIS. If one City process was used, why not another? No explanation is provided in the response.

Comment No. 6-27 (page 24-163) requests, in pertinent part, that:

*"For the public to adequately review the open space analysis, the lead agency should disclose the methodology, including the field survey instruments used and the criteria for determining 'condition' and 'use level' of open space."*

Response No. 6-27 inadequately indicates that:

*"The primary source of data pertaining to open space inventory and conditions are field observations that accurately characterized conditions present when the open space visits were conducted. In addition, some existing data from previously approved environmental studies (e.g., Downtown Brooklyn Development Plan EIS) with overlapping study areas were referenced as supporting documentation."*

The field survey instruments requested by the commentator are not presented, nor is any reference made to the specific type of instrument used in the field survey, other than that there were observations made. Furthermore, the specific data used from the "previously approved environmental studies" and the dates of such studies are not indicated.

### INCONSISTENT RESPONSES

The FEIS presents responses that are internally inconsistent. For example, Comment No. 4-16 (page 24-97) states:

*"The project doesn't guarantee that people of low income are going to get an affordable replacement apartment in the neighborhood."*

Response No. 4-16 indicates:

*"As indicated under the detailed analysis for indirect replacement, the proposed project is not expected to lead to indirect residential displacement in the areas identified as containing potentially at-risk population."*

Yet, Response No. 4-21 (page 24-98) indicates:

*"While the indirect residential displacement analysis presented in the DEIS does identify 10 Census tracts containing 2,929 households that are potentially vulnerable to indirect displacement pressures...it is unlikely that the proposed project would actually lead to significant residential displacement in these tracts "* [emphasis added]

Again, in response to a comment regarding indirect residential displacement, Response No. 4-31 (page 24-102) notes that:

*"...overall, the proposed project has limited potential to affect real estate values (or tax assessments) in the 10 Census tracts identified as containing at-risk population, and the project is not expected to lead to indirect residential displacement in these tracts "*

Two responses indicate no indirect residential displacement, another response indicates no "significant" residential displacement. These responses are inconsistent.

Comment No. 11-30 (page 24-234) notes:

*"The DEIS's implicit approach - determining an impact's significance assessment by merely comparing the incremental addition of pollution by the project to pollution contributed by other sources - is an inappropriate method of analysis for CSO pollution and violates SEQRA and CEQR."*



Response No. 11-30:

*"Analyses under SEQRA/CEQR typically and reasonably examine an incremental change associated with a proposed action (e.g., traffic, air quality, noise) for the purpose of determining significance. The analyses performed for the DEIS are consistent with those performed for other development projects within New York City and also are in accordance with standard methods for impact analysis."*

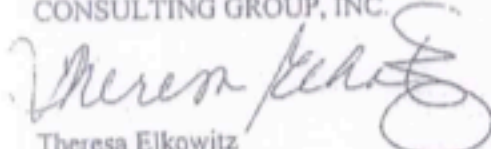
This response improperly ignores the potential cumulative impacts from this and other projects, which is required in both the SEQRA and CEQR regulations. The preparer of the EIS is obligated to study how the incremental impacts, together with the incremental impacts of other development projects, cumulative affect the overall environment.

For the reasons set forth above and numerous others, we respectfully submit that the FEIS for the "Atlantic Yards Arena and Redevelopment Project" is deficient in a number of respects including the failure to define specific proposed action, the provision of conclusory and self-serving statements, the failure to take the requisite "hard look" at significant environmental issues, and the presentation of non-responsive answers to many of the substantive comments made during the public comment period.

Should you wish to discuss this matter, please do not hesitate to contact either of the undersigned.

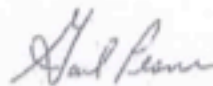
Sincerely,

FREUDENTHAL & ELKOWITZ  
CONSULTING GROUP, INC.



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Principal

TE/GP/ba



Gail Pesner  
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