

FOR CONSIDERATION

December 16, 2010

TO: The Directors

FROM: Dennis Mullen

SUBJECT: New York (Kings County) – Atlantic Yards Land Use Improvement and Civic Project

REQUEST FOR: Adoption of Findings Related to the Atlantic Yards Land Use Improvement and Civic Project (the “Project”)

Background and Prior Environmental Review

The Project, located in Brooklyn at Flatbush and Atlantic, includes development of: an approximately 18,000 seat sports and entertainment venue; improved and reconfigured subway facilities and Long Island Rail Road train yard; 16 new buildings for residential, office, retail, and potentially hotel uses; and eight acres of publicly accessible open space. A Project Site Plan is attached hereto as Exhibit A.

The Corporation (acting as SEQRA lead agency), with the City and MTA (acting as involved agencies), conducted an environmental review of the Project as described in a 2006 Modified General Project Plan (“2006 MGPP”), resulting in the Project’s 2006 Final Environmental Impact Statement (“FEIS”). On December 8, 2006, the Directors adopted SEQRA Findings (the “Findings Statement”), which concluded SEQRA review of the 2006 MGPP.

In connection with further modifications of the 2006 MGPP proposed in 2009, the Corporation prepared a June 2009 Technical Memorandum (“Tech Memo”) to assess whether such proposed further modifications (including changes to the Project’s schedule, and the potential for further delay due to prolonged adverse economic conditions) would result in any new or substantially different significant adverse impacts than what had been described in the FEIS and the Findings Statement. The Tech Memo assumed a final completion date (or Build Year) for the entire Project (Phase 1 and Phase 2) of 2019. The Tech Memo (at Section F) also considered a scenario (the “Further Delay Scenario”) in which the Project’s full build out would be further delayed as a result of prolonged adverse economic conditions. The Tech Memo concluded (based on a 2019 Build Year, and also under the Further Delay Scenario) that the proposed modifications would not result in any new or substantially different significant adverse impacts than those addressed in the FEIS, and that therefore there was no need for a supplemental environmental impact statement (“SEIS”).

On September 17, 2009, the Directors, among other things: (a) affirmed the Project’s further Modified General Project Plan (“2009 MGPP”); and (b) authorized the Corporation to enter into Lease and related acquisition and development agreements with the Project’s

developer (affiliates of the Forest City Ratner companies; collectively, “FCRC”). Pursuant to such authorization, the Corporation and FCRC entered into, among other documents, a Development Agreement, dated as of March 4, 2010, pursuant to which the Project is to be constructed as described in the 2009 MGPP (the “Development Agreement”).

Current Status

In accordance with the 2009 MGPP, in March 2010 ESDC acquired, by direct acquisition and condemnation, the land required for initial Project construction, including all land on the arena block. As of May 12, 2010, ESDC effectively achieved vacant possession of the acquired parcels, thereby triggering the “Project Effective Date”, whereby all funds for the arena construction (inclusive of transit improvements, Carlton Avenue Bridge replacement, and other infrastructure improvements) were deposited and made immediately available for eligible Project costs.

The arena and related improvements are now actively under construction. Specifically, foundations for the arena have been laid and erection of initial steel support has begun. The current Project schedule is for the arena and its related improvements to be completed in 2012 in time for the 2012-2013 basketball season.

Project Documents, Recent Litigation, and Further Review

The Development Agreement requires FCRC to use “commercially reasonable efforts” to complete the entire Project (Phase 1 and Phase 2) by 2019, the Build Year analyzed in the Tech Memo. However, the Development Agreement also established an outside date by which the Project’s Phase 2 must be completed, defined as the “Outside Phase II Substantial Completion Date”, or 25 years after the Project Effective Date, or May 12, 2035. Further, certain contemporaneous agreements generally between FCRC and the Metropolitan Transportation Authority (and/or its sister agencies; collectively “MTA”) established an outside date for FCRC’s last purchase of MTA air rights at 2031 (hereafter collectively, the “MTA Agreement”).

In light of these outside dates, a recent court decision questioned the continuing reasonableness of the Tech Memo’s assumed 2019 Build Year and Further Delay Scenario (which did not expressly extend to 2035). While staff believes that the 2009 Tech Memo assumptions were valid and reasonable (and thus ESDC has sought leave to appeal the court decision), nonetheless ESDC staff and consultants have analyzed an additional delay scenario extending through and including an explicitly assumed outside completion date of 2035. Such analysis (“Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project”; hereafter, the “Technical Analysis”) is attached hereto as Exhibit B. Similar to the conclusion of the Tech Memo, the Technical Analysis concludes that a further modification of the Project’s construction schedule, to an outside completion date of 2035, would not result in any new or substantially different significant adverse impacts than those addressed in the FEIS, and that therefore there is no need for an SEIS for the Project.

Recommended Findings

Based on further review and the Technical Analysis, it is recommended that the Directors make the following three findings (“Further Findings”). The background and explanation for such Further Findings is attached hereto as Exhibit C.

1. The Development Agreement and MTA Agreement (collectively, the “Development Contracts”) do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project. As was the case when the ESDC Directors approved and affirmed the 2009 MGPP, a key factor in the ultimate pace of development of the Project will be the market demand for the Project’s buildings. The Development Contracts contemplate that the Project will be constructed on a 10-year schedule, but they do not establish 10 years as the outside date for Project completion. The Development Contracts require that: (i) FCRC use commercially reasonable effort to achieve Project completion by 2019; and, in any event (ii) the Project be completed not later than a 25-year outside date, subject to certain specified contingencies. The fact that the Development Contracts have outside dates for development that go well beyond 10 years was publicly disclosed by ESDC when it approved the 2009 MGPP.
2. As of the date of these findings, it appears unlikely that the Project will be constructed on a 10-year schedule, because the construction of the Project’s residential buildings has lagged behind the 10-year schedule provided by FCRC to ESDC in 2009, and because of continuing weak general economic and financial conditions.
3. A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS and 2009 Technical Memorandum and would not require or warrant an SEIS. The analysis of the potential environmental impacts of a 25-year construction schedule – a delay more lengthy than that considered in the 2009 Technical Memorandum – confirms the conclusion reached by ESDC in 2009 that an SEIS is not required or warranted for the 2009 MGPP. Similarly, the Development Contracts do not require or warrant an SEIS.

Requested Action

Based on the foregoing, the Directors are requested to adopt the above findings.

Recommendation

I recommend approval of the requested action.

Attachment

Exhibit A – Project Site Plan

Exhibit B – Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project

Exhibit C – ESDC Response to Supreme Court’s November 9, 2010 Order

December 16, 2010

New York (Kings County) – Atlantic Yards Land Use Improvement Project and Civic Project - Adoption of Findings Related to the Atlantic Yards Land Use Improvement and Civic Project (the “Project”)

RESOLVED, that, based upon review of: (a) the materials presented to this meeting and attached hereto, which are ordered to be filed with the records of the Corporation; (b) the Project’s FEIS and Tech Memo; and (c) other findings, statements of facts and conclusions, and determinations previously made by the Corporation in connection with the Project, the Corporation hereby makes the following findings:

1. The Development Agreement and MTA Agreement (collectively, the “Development Contracts”) do not have a material effect on whether it is reasonable to use a 10-year construction schedule for the purpose of assessing the environmental impacts of the Project. As was the case when the ESDC Directors approved and affirmed the 2009 MGPP, a key factor in the ultimate pace of development of the Project will be the market demand for the Project’s buildings. The Development Contracts contemplate that the Project will be constructed on a 10-year schedule, but they do not establish 10 years as the outside date for Project completion. The Development Contracts require that: (i) FCRC use commercially reasonable effort to achieve Project completion by 2019; and, in any event (ii) the Project be completed not later than a 25-year outside date, subject to certain specified contingencies. The fact that the Development Contracts have outside dates for development that go well beyond 10 years was publicly disclosed by ESDC when it approved the 2009 MGPP.
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3. A delay in the 10-year construction schedule, through and including a 25-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the FEIS and 2009 Technical Memorandum and would not require or warrant an SEIS. The analysis of the potential environmental impacts of a 25-year construction schedule – a delay more lengthy than that considered in the 2009 Technical Memorandum – confirms the conclusion reached by ESDC in 2009 that an SEIS is not required or warranted for the 2009 MGPP. Similarly, the Development Contracts do not require or warrant an SEIS.

; and be it further

RESOLVED, that such findings do not require any modification to the Tech Memo, and do not disturb the prior determination of the Corporation that no Supplemental Environmental Impact Statement is required for the Project’s Modified General Project Plan; and be it further

RESOLVED, that the President and Chief Executive Officer, or any Senior Vice President of the Corporation be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation, and to take any and all such actions as may be necessary or appropriate to effectuate the foregoing resolutions

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