



NEW YORK STATE SENATOR

Bill Perkins

Letter to Governor Paterson: Challenges the Legality of the Brooklyn Arena LDC's Bond Issuance

BILL PERKINS December 20, 2009

| **ISSUE:** **ECONOMIC DEVELOPMENT, CORPORATIONS, ESDC (EMPIRE STATE DEVELOPMENT CORPORATION), COMMUNITY DEVELOPMENT**

| **COMMITTEE:** **CORPORATIONS, AUTHORITIES AND COMMISSIONS**

December 18, 2009

Hon. David A. Paterson
Governor, State of New York
State Capitol
Albany, New York 12224

Dear Governor Paterson:

On Tuesday, December 15, 2009, the Brooklyn Arena Local Development Corporation (BALDC) sold \$511 million of tax exempt bonds to help finance the Atlantic Yards arena. BALDC is a not-for-profit corporation and was created by the Job Development Authority under section 1411 of the Not-For-Profit Corporation Law. The Job Development Authority (JDA) is a mostly defunct public authority that exists, along with the Urban

Development Corporation, as part of Empire State Development Corporation (ESDC).

It appears that ESDC chose to have the JDA create the BALDC so as to avoid creating an ESDC subsidiary, which would have required approval from the Public Authorities Control Board (PACB) and the Comptroller to issue the arena bonds. Pub. Auth. § 51. PACB approval in this case would have been disadvantageous for two reasons: (1) it would have required the PACB to undertake a substantive review of the financial merits of the bond issue, which are questionable; and (2) it would have delayed the bond issue, likely past the December 31 deadline set by the IRS for issuing tax exempt bonds (after December 31, a rule change will not permit tax exempt bonds to be issued for stadiums).

However, as a local development corporation, and not an ESDC subsidiary, the BALDC cannot legally finance the arena using the convoluted financing methods applied in this case. Of particular importance, the BALDC does not have the authority to grant a real property tax exemption for the land that it will lease to Arena Co., which is Forest City Ratner's arena management company. The BALDC is subject to Real Property Tax Law (RPTL) § 420-a, a different section than the one that applies to public authorities and their subsidiaries, § 412. Under § 420-a, not-for-profit property is tax exempt only if the corporation is "organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes".

In June, 2009, the Court of Appeals addressed § 420-a and its application to LDCs. The court held that land leased by an LDC to a manufacturing company, for economic development purposes, was not eligible for the property tax exemption. *Lackawanna LDC v. Krakowski*, 12 N.Y.3d 578 (2009). Accordingly, if economic development does not fall within § 420-a as a basis for an LDC's tax exemption, there would seem to be little basis for the BALDC to claim tax exempt status for the Atlantic Yards arena land.(*see footnote)

[1. It should be pointed out that the BALDC's bond issue was only for the arena block, and not for the entire Atlantic Yards project, so it does not encompass the bulk of the affordable housing planned as part of the development (which could possibly be considered "charitable").]

Additional support for the arena not having a valid tax exemption is provided by two Fourth Department cases involving stadiums. In the first, *County of Erie v. Kerr*, 49 A.D.2d 174 (4th Dept. 1975), the court held that the county-owned facility was tax exempt because it served the "public" purpose of providing entertainment facilities for Erie County residents. However, being a "public use" for purposes of RPTL §406 does not automatically satisfy the more restrictive provisions of § 420-a. In *Syracuse University v. Syracuse*, 92 A.D.2d 46 (4th Dept. 1983), the court acknowledged as much by holding that the university was not entitled to a full tax exemption under § 420-a where the stadium was used for commercial events, in addition to events connected with the university's educational purposes. Moreover, there are separate exemptions in the RPTL for stadium uses. In particular, subsection 10 of § 420-a exempts stadium facilities

owned by educational institutions. Basic tenets of statutory construction indicate that had the legislature intended to generally exempt not-for-profit property used for stadiums from property taxes, it would have done so. Furthermore, RPTL § 429 exempts stadiums housing both: (1) a professional basketball team; and (2) a major league hockey team. Not only will the Atlantic Yards arena be too small to support a major league hockey team, there is no such contractual obligation, as required under § 429.

In light of this analysis, the BALDC property is not tax exempt if used for arena purposes. Consequently, payments-in-lieu of taxes cannot be used to secure the bonds, and they are effectively worthless. If ESDC knowingly misrepresented the legitimacy of these bonds, this raises the spectre of fraud.

ESDC could have easily avoided this result if it had created the BALDC as a formal subsidiary under section 12 of the Urban Development Corporation Act, as it would then qualify for a tax exemption under RPTL § 412. There is no reason for using the JDA to create an independent non-subsidiary local development corporation, except to create a loophole and avoid review by the PACB and the New York State Comptroller.

Although ESDC has not represented the BALDC as one of its subsidiaries, the exact corporate nature of the BALDC is unclear. It is clear that the BALDC is either a subsidiary or not a subsidiary, and in either case, the bond issuance is illegal. If it is a subsidiary, the Public Authorities Law required approval by the PACB as a precondition to the bond issuance. There

was no such approval. If BALDC is not a subsidiary, it has no real property tax exemption to back the bonds.

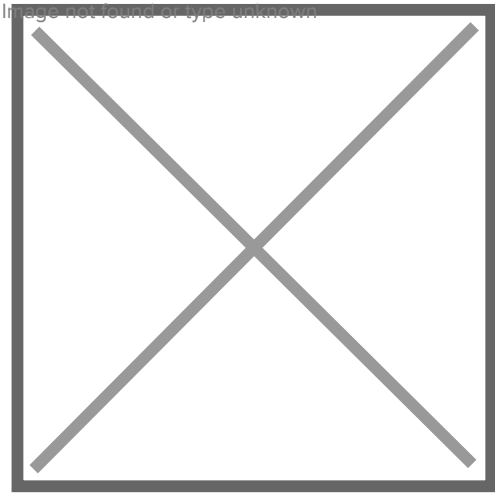
In the Lackawanna case, the Court of Appeals “decline[d] LCDC's invitation to read the Real Property Tax Law together with the Not-for-Profit Corporation Law in such a manner as to establish a ‘tax loophole’ where one would not otherwise exist”. The same logic applies here: ESDC should not be permitted to establish a loophole to avoid PACB review where no loophole should exist.

ESDC’s murky and exotic financing methods vitiate the longstanding efforts of the Legislature to reform public authorities and make them more accountable and transparent.

On December 2, you promised “an objective and thorough review” of the Atlantic Yards project and its financing. I urge you now to keep that promise. You should also act immediately to halt the closing of the bond issuance scheduled for next Wednesday, and to stay the condemnation proceedings. The project should not be permitted to go forward until the serious questions raised in this letter are addressed.

Thank you for your attention to the very important matter. I look forward to hearing from you at your earliest convenience.

Very truly yours,



Senator Bill Perkins

30th District

cc: Andrew Cuomo, Attorney General

Thomas P. DiNapoli, State Comptroller

Peter Kiernan, Counsel to the Governor

* It should be pointed out that the BALDC bond issue was only for the arena block, and not for the entire Atlantic Yards project, so it does not encompass the bulk of the affordable housing planned as part of the development (which could possibly be considered charitable)