To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2022-05170

In the Matter of the Application of

ELIZABETH STREET GARDEN, INC., RENEE GREEN, ELIZABETH STREET, INC., ELIZABETH FIREHOUSE LLC, and ALLAN REIVER,

Petitioners-Respondents-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

THE CITY OF NEW YORK, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, MARIA TORRES-SPRINGER, in her capacity as Commissioner of the Department of Housing Preservation and Development, NEW YORK CITY COUNCIL, and NEW YORK CITY PLANNING COMMISSION,

Respondents-Appellants-Respondents.

REPLY BRIEF FOR PETITIONERS-RESPONDENTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

PRELIMINARY STATEMENT

In a well-reasoned decision, the Supreme Court, New York County (James, J.) annulled and vacated Respondents-Appellants' (hereinafter the "City") approval of the Haven Green housing project (hereinafter "Haven Green" or the "Project"), on the ground that the City's "determination that the project would have no significant adverse impact upon open space is not rationally based" and remanded the matter to the City "to conduct a full EIS (Environmental Impact Statement) of the project's impacts." (R.27a)[1]. Haven Green, as proposed, will destroy a 20,000 square foot, beautifully landscaped, publicly accessible, loved, community garden, which has serviced the local community for years.

The City has appealed the lower court's decision and Petitioners-Respondents Elizabeth Street Garden, Inc., Renee Green, Elizabeth Street, Inc., Elizabeth Firehouse LLC, and Allan Reiver (hereinafter "ESG") have cross-appealed. ESG's cross-appeal seeks a remand to the lower court to consider the merits of zoning issues raised in its Article 78 petition, as well as an annulment of Haven Green's approval on the alternate grounds that the city failed to take a hard look at neighborhood character, public policy, and cumulative impact.

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[1] The prefix R.___ denotes references to the page or pages of Joint Record on Appeal in this proceeding.

The City's appeal has been fully briefed. The City's Reply Brief adds nothing of substance to support its contention that the lower court's decision should be reversed. Rather, on this issue, the City's Reply Brief boils down to an argument that at stake here is a mere "difference in opinion", between the City and ESG, as to how the Haven Green space should be utilized. For example, the City attempts to minimize the conceded open space reduction by arguing that it is offset by "longer opening hours in perpetuity." (City Reply Brief, pp. 3-5.)

The City's response to ESG's Cross-Appeal does not persuade. As for the zoning issues, the City does not dispute (nor can it) that Haven Green, as proposed, cannot comply with the applicable zoning regulations. Unless applicable zoning laws are amended or if an authorization to modify them is granted by the City Planning Commission, Haven Green cannot lawfully move forward. For this reason, this case is governed by the exception permitting court review under the State Environmental Quality Review Act (hereinafter "SEQRA"), as set forth in *Matter of WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd*, 79 NY2d 373, 382 ("… except that where the proposed action is a zoning amendment").

The City's argument that ESG failed to exhaust its administrative remedies is equally unavailing. Exhaustion it is not required where, as here, only an issue of law is involved. *Chelsea Business & Property Owners' Ass'n, LLC v. City of New York,* 30 Misc.3d 1213(A) (Sup. Ct. NY Co. 2011), *citing, New York Botanical*

Garden v. Board of Standards and Appeals of the City of New York, 91 N.Y.2d 413, 419 (1998).

Moreover, the negative declaration relied upon to approve Haven Green was issued pursuant to an Environmental Assessment Statement (EAS), rather than after conducting an EIS. Thus, in connection with the SEQRA review, ESG challenged the EAS findings and conclusions in the Article 78 court filing.

In the Uniform Land Use Review Procedure (hereinafter "ULURP") proceeding, which is not impacted by *Matter of WEOK Broadcasting Corp.*, the zoning issue was raised several times during the public hearings before the City Planning Commission. (R. 1152).

Therefore, the court below has jurisdiction to determine the merit of all of ESG's zoning claims, whether brought under SEQRA (fourth and seventh causes of action) or independently thereof (third and tenth causes of action). This Court should remand this matter so that ESG's zoning claims may be adjudicated.

ESG's Cross-Appeal further argues that an annulment of the project's approval is indicated on the alternate grounds ESG pleaded: (i) the City failed to take a hard look at neighborhood character (seventh cause of action), (ii) public policy (eighth cause of action), and (iii) cumulative impact (ninth cause of action). The court below ignored ESG's eighth and ninth causes of action in their entireties and its analysis of the project's impact on neighborhood character is lacking, in

part, because in dismissing this claim the lower court pointedly ignored its own conclusion that the City's EAS analysis of open space (one of the neighborhood character factors) is irretrievably flawed.

The City's attempt to rehabilitate the lower court's decision fails. As for ESG's contention that the City's EAS did not address public policy concerns, including climate change, all the City can offer is that SEQRA, CEQR or the CEQR Technical Manual (hereinafter "CEQR TM") does not require a detailed analysis of the impact of climate change. The CEQR TM does, however, require an analysis of a proposed project's "compliance with, and effect on, the area's . . . applicable public policies." CEQR TM, Ch. 4 at 4-1. The City's public policies concerning climate change and related issues are documented in the record. (ESG Brief, at pp. 48-50.) No such analysis was conducted.

As for the court's neighborhood character analysis, the City repeats the lower court's error ignoring that, at minimum, the project's adverse effect on open space (as found by the lower court) mandates a comprehensive assessment on the project's impact on the neighborhood character.

Finally, the City's contention that the project's cumulative impact, taken as a whole, will be "positive" does not persuade. The record refutes the City's unsupported and erroneous remark that "a few dozen people … who live in the neighborhood would prefer to maintain the status quo." In fact, the petitions to

maintain the Garden were signed by over 12,000 signatories, (R. 77, 87-91), the Community Board overwhelmingly voted in favor of maintaining the Garden, (R. 1029-1036), and the public hearings saw testimony and submissions by many of neighborhood residents favoring retention of the Garden. (R. 75-88, 1152).

The simple fact remains, the City failed to follow proper procedures in approving the project. As Justice James has ruled, a proper EIS, must be conducted.

REPLY ARGUMENT - IN SUPPORT OF ESG'S CROSS-APPEAL

A. THE MERITS OF ESG'S ZONING CLAIMS ARE PROPERLY BEFORE THE SUPREME COURT

1. Haven Green, as Proposed, Requires an Amendment or Authorization to Modify the Zoning Regulations, to Proceed

The facts underlying ESG's zoning claim are fully set forth in ESG's Brief, at pp. 35-37. In brief, the proposed Project is a single building that would be constructed at the front lot line of the property that faces Elizabeth Street and would be set back significantly (at least 60 feet) from the front lot line of the property that faces Mott Street. The fact that the building wall facing Mott Street would be set back from the Mott Street front lot line violates the Special Little Italy District (hereinafter "SLID") zoning regulations, which are applicable to the property.

In pertinent part, SLID zoning regulations require:

> The front *building* wall of any *building* shall extend along the full length of its *front lot line* not occupied by existing *buildings* to remain and shall rise without setback up to a height of six *stories* or 65 feet, or the height of the *building*, whichever is less. (Italics in original.)

ZR § 109-131. Under the Zoning Resolution, a "front lot line" is defined as a "street line," which is in turn defined as "a lot line separating a street from other land." ZR § 12-10.

The Elizabeth Street Garden property is partially a "through lot," meaning that it "adjoins two street lines opposite to each other and parallel or within 45 degrees of being parallel to each other." *Id*. Because this portion of the Garden property has "two street lines," it has two "front lot line[s]." *Id*. In turn, because there are two "front lot line[s]," the proposed building will have two "front building wall[s]," i.e., two walls facing front lot lines, both of which must "extend along the full length of [the] front lot line . . ." and neither of which may be set back from the front lot line. § 109-131.

The EAS expressly confirms that the SLID zoning regulations apply to the Proposed Project, stating that it conforms to SLID with regard to the Elizabeth Street lot line. *See,* EAS D-2 ("The proposed new building would be built-out to the lot line on Elizabeth Street without lower-level setbacks, continuing the continuous streetscape which is a defining element of the surrounding historic district.") (R. 337); *accord,* EAS D-12 (R. 350). The EAS further recognizes the

neighborhood character: "most buildings in the district are brick and built out to the lot lines *without setbacks* or front yards, creating a cohesive streetscape." EAS D-7 (R.342) (*emphasis added*). ESG does not disagree with the analysis as to the Elizabeth Street side of the proposed project. But the EAS is silent on the Mott Street lot line.

There are no issues of fact here that require the expertise of an administrative agency. What is required is an interpretation of the zoning regulations, to wit, whether a "through lot" has one or two front lot lines. This is solely a question of law that can readily be resolved by a court. *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 419 (1996)

At the Supreme Court level, the City argued that the cited zoning regulation does not govern because there will not be a building on the Mott Street lot line. (R. 2308-2309). Nowhere does the City address, much less refute, the foregoing analysis that where a property is a "through lot", (as is the case here), there are two front lot lines.

Because there are two front lot lines, and the project, as proposed, would be set back at least 60 feet from the Mott Street front lot line, it cannot comply with the applicable SLID zoning regulations. A zoning change is required.[2]

[2] Alternatively, the Project, as proposed, could only be developed if an authorization to modify Section 109-131 was granted by the City Planning Commission under ZR § 109-514. (R.169c). That was not requested and it has not happened.

2. The City Failed to Take a Hard Look at the Zoning Issue

A brief synopsis of the approval process is required to fully illustrate the deficiencies in the approval process for Haven Green, as it pertains to zoning. After the NYC Department of Housing Preservation & Development was appointed the lead agency, it issued "Notice of Lead Agency Determination and Review," on October 12, 2018 ("Lead Agency Letter") (R.812-814). The Lead Agency Letter stated that HPD proposed to assume lead agency status for the CEQR and SEQRA review process. (R. 812) HPD further sought disposition authority for the property to facilitate the construction of the proposed development. Such disposition requires approval pursuant to the ULURP. (R. 813).

On November 2, 2018, HPD prepared the Land Use Application for the project. (R. 816-842) In the “Property Disposition” section, the document requires an explanation of the restrictions and conditions of the disposition, if any. The two options are “a. Pursuant To Zoning” and “b. Restricted”. HPD checked option “a”. (R. 818). The document identifies the property as being in the C6-2 zoning district and confirms that it is subject to the zoning requirements of the SLID. (R. 820).

On November 13, 2018, HPD released an Environmental Assessment Statement (EAS) (R.844-997) and Negative Declaration (R. 999-1002), both dated November 9, 2018. The EAS identifies the property as a “through-block Development site”, identifies the applicant as Pennrose, LLC and identifies the

zoning district as C6-2; Li (Little Italy Special District). (R. 848-849). In response to the inquiry "Does the proposed project involve changes in zoning on one or more sites", the "No" box is checked. (R. 848).

Pennrose, LLC certified under penalty of perjury that the information provided in the EAS is true and accurate (R. 861) and HPD was required to review the EAS for accuracy and completeness and, prior to certifying it, consider the impact of the development across 19 separate categories, including Zoning. HPD checked the "No" box for all the categories, including zoning and certified the EAS. (R. 862).

In the "Land Use and Zoning" analysis, the EAS states "The Proposed Actions would not directly displace any land uses so as to adversely affect surrounding land uses, nor would it generate land uses or structures that would be incompatible with the underlying zoning or cause a substantial number of existing structures to become nonconforming." (R. 876) (*emphasis supplied*).

Both the ULURP application as well as the EAS, identify the applicable zoning regulations. A proper review and analysis of these regulation, as discussed *supra*, should have raised a red flag that Haven Green, as proposed, cannot comply with these regulations. Instead of rejecting the ULURP application and not certifying the EAS, HPD approved both. This demonstrates clearly that HPD (and the City) failed to take a hard look at the zoning issues raised.

3. The Supreme Court is Empowered to Address The Merits of ESG's Zoning Claims

ESG claims with respect to zoning are set forth in the third, fourth, tenth, and (to some extent) seventh causes of action. Of these, only the fourth and seventh causes of action allege a violation of SEQRA. The Supreme Court declined to consider the merits of ESG's claims with respect to zoning, as set forth in the third and fourth cause of action, "because binding precedent compels that '*except where the proposed action is a zoning amendment*, SEQRA review may not serve as a vehicle for adjudicating legal issues concerning compliance with local government zoning. *Matter of WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd*, 79 N.Y.2d 273, 382 (1992)" (*emphasis supplied*). Thus, to the extent that petitioners seek to challenge the project's zoning and compliance therewith, this proceeding is not the litigation to do so and the court has no power to determine whether or not such claims have any merit." (R. 22-23).

WEOK Broadcasting differs from the present case. Initially, as noted at the Appellate Court level, zoning compliance was, at best, a secondary issue. *See*, *WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd*, 165 A.D.2d 578, 581 (3d Dep't 1991), *affirmed*, 79 N.Y.2d 273 (1992) ("It is acknowledged by both parties that respondent denied petitioner's application for aesthetic reasons alone.")

Here, Haven Green, as proposed, cannot conform with SLID zoning regulations. As stated *supra*, to proceed as proposed, Haven Green requires an amendment or authorization to modify the zoning regulations. This fits this case into the express *WEOK Broadcasting* exception. Accordingly, although the fourth and seventh causes of action concern a SEQRA review, the lower court has jurisdiction over these claims.

The third and tenth causes of action also are within the jurisdiction of the court below. Misreading the scope of *WEOK Broadcasting Corp.*, the court below refers to the tenth cause of action as one "challeng[ing] the ULURP approval on zoning grounds." (R. 15). The lower court's decision does not otherwise address this cause of action, either on the merits or on jurisdictional grounds. Even if *WEOK Broadcasting Corp.* is applicable to ULURP review, in addition to SEQRA review, the "zoning amendment" exception applies. At minimum, the issue should be remanded to the lower court to rule on the merits of this claim.

The third cause of action alleges that the EAS finding that Haven Green, as proposed, would not result in "a change in zoning different from the surrounding zoning" or "structures that would be incompatible with the underlying zoning" is "neither in compliance with nor compatible with applicable zoning regulations" (Complaint, ¶114, R. 60, 61), "is an error of law because the Proposed Project is neither in compliance nor compatible with zoning regulations." (Complaint, ¶115,

R. 62). Specifically, the third cause of action alleges that the EAS conclusion is incorrect because the Proposed Project is impermissibly set back from the Mott Street front lot line and, therefore, violates the applicable Zoning Resolution (Complaint ¶¶116-119, R. 62).

ESG submits that the Supreme Court has misread the third cause of action, as it is not a SEQRA claim. Therefore, *Matter of WEOK Broadcasting Corp.* does not control and the court is not foreclosed from exercising jurisdiction over this claim.

In short, the court had jurisdiction over all of ESG's zoning claims, and this matter should be remanded to permit a determination thereof on the merits.

The City Brief adds little if anything to this jurisdictional issue. It simply argues that the lower court properly dismissed ESG's zoning claims, because SEQRA and ULURP are not zoning compliance tools. To support its contention, it cites to various cases, including *Matter of WEOK Broadcasting Corp.*, none of which are controlling, as none involve a required change to the zoning regulations.

The fact that the developers here did not seek a zoning amendment or authorization to modify the SLID zoning regulations is telling. They clearly should have. A HPD review should have flagged this issue and rejected the ULURP application and the EAS, as Haven Green, as proposed, does not comply with

SLID zoning regulations. That the City approved a non-conforming application, does not foreclose a challenge to the project on zoning grounds.

4. **ESG's Zoning Claims Are Neither Unripe Nor Unexhausted**

The City Brief further argues that the record is insufficient for this Court to consider ESG's zoning. Clarifying this preliminary issue, ESG is not asking this Court to make this determination. Rather it simply is asking this Court to remand the matter to the lower court to do so.

The City's exhaustion of administrative remedies argument is meritless. Exhaustion is not required where, as here, only an issue of law is involved. *Chelsea Business & Property Owners' Ass'n, LLC v. City of New York,* 30 Misc.3d 1213(A) (Sup. Ct. NY Co. 2011), *citing, New York Botanical Garden v. Board of Standards and Appeals of the City of New York*, 91 N.Y.2d 413, 419 (1998); *see, also, Coleman v Daines*, 79 A.D.3d 554 (1st Dept. 2010), *aff'd on other grounds*, 19 NY 3d 1087 (2012). As discussed *supra*, the issue here is one of pure legal interpretation of the applicable zoning regulation, *e.g.*, whether, pursuant to the SLID zoning regulations, the property has one front lot line or two front lot lines.

While in zoning matters, the Board of Standards and Appeals (BSA) is entitled to deference, so long as its interpretation is neither "irrational, unreasonable nor inconsistent with the governing statute," (*Matter of Trump–Equitable Fifth Ave. Co. v. Gliedman*, 62 N.Y.2d 539, 545 (1984), this principle

does not apply where "the question is one of pure legal interpretation of statutory terms." (*Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 419 (1996).

The City's allegation that ESG's raising of the zoning issue constitutes an "ambush" (City Brief, at p. 17) is misplaced. The zoning issue has been part of the record since its filing in March 2019 and, upon being named an additional defendant in August 2019 (ESG's Amended Petition), HPD has been on notice of this claim. In fact, the issue was repeatedly raised in the City Planning Commission's public hearing, held on March 13, 2019. As noted in the Commission's Report, dated April 10, 2019, "[t]wo attorneys representing Elizabeth Street Garden Inc. raised objections to certain technical aspects of the proposed development's environmental review documents and zoning analysis"; "a representative from the Friends of Elizabeth Street Garden raised issues about the history of the site and the proposed development's zoning compliance"*;* and "[a]n architect raised questions about the proposed development's zoning analysis…" (R. 1152, *emphasis supplied*). Of course, as the negative declaration relied upon to approve Haven Green was issued pursuant to an Environmental Assessment Statement (EAS), rather than after conducting an EIS, ESG challenge the EAS findings and conclusions in the Article 78 court filing.

The cases relied on by the City do little to support its position. In *Jackson v. New York State Urban Dev. Corp,* 67 N.Y.2d 400, 427 (1986), the issue in

question was never raised during the hearing and comment period before the EIS was issued (here, of course, there is no EIS), while in *Matter of Coalition for Cobbs Hill v. City of Rochester*, 194 A.D.3d 1428, 1433 (4th Dep't 2021), the issue in question only was raised in reply papers at the appellate level. *In Matter of Save Harrison, Inc. v. Town/Village of Harrison*, 168 A.D.3d 949, 952 (2d Dep't 2019), the issue was a procedural one, namely a challenge to the lead agency status during the administrative proceeding.

Because the zoning issue solely is a question of law, exhaustion of ESG's administrative remedies was not required. The zoning issues were raised before the City Planning Commission in its public hearing. (R. 1152.)

B. THE NEGATIVE DECLARATION MUST BE ANNULLED ON THE ALTERNATE GROUNDS THAT THE CITY FAILED TO TAKE A HARD LOOK AT NEIGHBORHOOD CHARACTER, PUBLIC POLICY AND CUMULATIVE IMPACT

1. The Supreme Court Decision

As discussed in detail in ESG's Brief on Appeal, at pp. 40-53, the Supreme Court's analysis of the proposed project's impact on the neighborhood character, public policy considerations, and its cumulative impact, is sketchy, at best. The court's conclusion that ESG's claims are not sustainable relies entirely on the fact that the EAS allegedly considered these areas and did not find significant adverse impact. The court's analysis of these issues is devoid of any assessment as to

whether the EAS determinations of "no adverse impact" in these areas is arbitrary and capricious or rationally based.

In its cursory analysis of the neighborhood character assessment, the court stresses that the environmental elements in this area are derivative of other impacts considered in the EAS (citing to eleven factors listed in the CEQR TM [3]). (R. 27c). Relying solely on the fact that these eleven areas are examined in the EAS, and that the EAS did not find significant impacts in these areas, the court concludes that ESG's claim, namely, that the City failed to take a hard look at neighborhood character, cannot be sustained. ESG submits that the court's conclusion is in error, particularly, as the court disregards its own conclusion that the EAS analysis of the open space factor is irretrievably flawed.

The Supreme Court does not even address ESG's Eighth Cause of Action, namely, that the City failed to take the required hard look at the project's impact on public policy, including the City's own climate change policy. Nor does the court address the cumulative impact of the proposed project (Ninth Cause of Action).

The Supreme Court's limited analysis of the EAS assessment of the proposed project's impact on Neighborhood Character is deficient. ESG respectfully submits, had the court done an appropriate review of this issue, it

[3] The factors are A) Land Use, Zoning, and Public Policy; B) Socioeconomic Conditions; C) Community Facilities; D) Open Space; E) Historic and Cultural Resources; F) Urban Design and Visual Resources; G) Shadows; H) Transportation; and I) Noise.

should have concluded that the Negative Declaration is not rationally based. At a minimum, the lower court's dismissal of this claim is inconsistent with its holding that the project will have an adverse impact on open space, one of the factors to be considered in a project's impact on Neighborhood Character.

2. **The Project will Adversely Affect the Neighborhood Character**

The Supreme Court dismissed ESG's claim that the project will adversely affect the Neighborhood Character, based on a finding that the EAS did not find significant impacts in the eleven relevant factors, set forth in footnote 3, above. As already noted, the court's conclusion is in error, particularly, as the court disregards its own conclusion that the EAS analysis of the open space factor is irretrievably flawed.

Moreover, other factors such as zoning, public policy and shadows will adversely affect the neighborhood character. For example, as ESG argued in their Memorandum of Law in the Supreme Court (R. 255), and in its Brief, at pp. 17-19, sunlight plays a critical role in the use and enjoyment of Elizabeth Street Garden.

The enjoyment of the Garden will be all but eliminated by the proposed Haven Green building, which will occupy most parts of the Garden that receive significant amounts of sunlight. The remaining open space will be in shadow for much of the day during most of the year caused by the proposed building and by adjacent buildings for neighboring properties. *Id.* The shadow will greatly impede

current uses of the Elizabeth Street Garden, making the remaining space unable to sustain the lush plantings, and possibly entirely unusable in winter. *Id.*

The City's Reply Brief attempts to minimize ESG's shadow arguments when it misleadingly states, "petitioners' own expert conceded that the environmental reviews determinations on shadows are 'factually true' and meet the minimal requirements for a shadow analysis under CEQR". (R.109) What the expert was referring to is the EAS conclusion that "no sunlight-sensitive resources would receive project-generated shadows." His statement was a limited one not a general one. Moreover, the City omits the expert's next sentence which states "However, the remaining open space will be significantly shaded, and to claim it as open space that is equivalent to the Garden is inaccurate." (R.109)

The City Reply Brief also takes umbrage when Petitioners claim that the EAS does not "analyze" the Garden's "current uses". (*See*, City's Reply Brief p.9). Although the City lists 13 record cites to support its argument, none analyzes the garden's current uses such as workshops in the garden and hosting large community events which significantly add to making the garden a "defining feature" of the community warranting a neighborhood character assessment.

The City's Reply Brief compounds the lower court's error by arguing that because no adverse impact was found in any of the eleven relevant factors, there was no basis to even conduct a preliminary assessment of the project's impact on

neighborhood character. (City Reply Brief, at p. 20.) The City (as did the lower court) conveniently ignores the finding that adverse impact in the "open space" category has been determined. The City cannot be permitted to simply ignore this important factor on the ground that it has discretion about "which matters require investigation."

The City's relentless characterization of Elizabeth Garden as having minimal impact on the neighborhood is belied by the extensive record confirming "defining feature" and significant contributions to the neighborhood character.

3. A Hard Look at Public Policy Requires a Determination as to the Project, as proposed, is Compatible With City Policy

The City has promulgated significant public policies to expand green infrastructure. (*See*, ESG Brief at pp. 48-50.) The City's Reply Brief, at pp. 18-19, contends that "because climate change considerations are amorphous" and "there are few sustainability standards to apply appropriately in assessing a proposed project", the City was not required to conduct a detailed analysis of the proposed project's climate change implications.

This conclusion is incorrect. Under CEQR, a proposed project's "compliance with, and effect on, the area's . . . applicable public policies" should be analyzed. CEQR TM, Ch. 4 at 4-1. HPD failed to do so, ignoring entirely the City's own policy as set forth in Mayoral Executive Orders, and the City's environmental policy. Because the EAS did not even make a cursory analysis of these relevant

environmental factors, such as climate change, including, rising heat, trees, sewer overflows (CSO) and stormwater runoffs (*see*, ESG Brief at pp. 48-51), it cannot be said that the City took a hard look at these public policy issues.

The City Brief belittles ESG's contention that in the context of climate change policy "every square foot of green space and every tree is critical." (R. 31f, R. 2415). But the City provides no real explanation to excuse its failure to even consider these environmental factors. Because of the City's failure to take the required hard look, the Supreme Court should have concluded that the Negative Declaration had no rational basis and ordered the preparation of an EIS to evaluate the significant impacts of the destruction of an open green space.

4. **The Cumulative Impacts of the Project are Negative**

The City Reply Brief, at p. 21, asserts, incorrectly, that ESG has failed to "identify what combination of factors, insufficient on their own, add to a substantial environmental impact." This statement ignores ESG's express reference to prior sections of its Brief. ("As set forth in the preceding sections, Proposed Project may have a significant adverse impact in several technical areas." ESG Brief at p. 52.)

The EAS failed to assess the cumulative impact of the destruction and development of Elizabeth Street Garden. Consequently, HPD failed to satisfy the hard look requirement. The sole action taken by the City in connection with

considering the "cumulative impact" was HPD checking the box on the EAS Full Form for no cumulative effects. (R. 862). This is not a hard look. This demonstrates that the City's action on this issue was arbitrary and capricious, The Supreme Court should have annulled the Negative Declaration on this ground also.

In its Reply Brief, the City contents that the project's cumulative impact, taken as a whole, will be "positive". Providing affordable housing to seniors is an admirable goal, but it cannot be achieved by destroying a valuable neighborhood resource, let alone not following the applicable law of SEQRA, CEQR, ULURP, and SLID. Despite the City's statement to the contrary, there is wide-spread recognition by the neighborhood residents that Elizabeth Garden must be preserved. This is amply established by the more than 12,000 petitions' signatories, (R. 77, 87-91), the Community Board's overwhelming vote in favor of maintaining the Garden, (R. 1029-1036), and testimony and submissions by many of neighborhood residents at the public hearings favoring retention of the Garden. (R. 75-88, 1152).

CONCLUSION

For the reasons set forth above, as well as in ESG's prior Brief, this Court should affirm the Decision, Order and Judgment of the Supreme Court annulling and vacating the approvals given to the Project by the City Planning Commission and City Council and requiring the preparation of a full EIS. Additionally, the

Negative Declaration should be annulled and vacated on the alternate grounds stated. Alternatively, as to the zoning analysis, the decision, order, and judgment below should be vacated and remanded with instructions for the Supreme Court to determine the issue on the merits.

Dated: New York, New York
April 28, 2023

Respectfully submitted,

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