SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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 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.

APPELLATE DIVISION
Docket No. 2022-05170

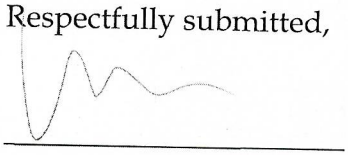
New York County
Index No.: 15234/2022

PLEASE TAKE NOTICE, that upon the affirmation of Vittoria M. Fariello sworn on April 28, 2023 and all exhibits attached thereto including a copy of the proposed brief of the amici curiae, the undersigned will move this Court at 27 Madison Avenue, New York, New York, on May 15, 2023, at 10:00 AM, or as soon thereafter as is practicable, for an order granting leave to New York City Councilmember Christopher Marte to file with this Court a brief of amicus curiae in support of Petitioners-Respondents-Appellants,

Elizabeth Street Garden, Inc., Renee Green, Elizabeth Street, Inc., Elizabeth Firehouse LLC, and Allan Reiver in the above-styled action.

Dated: April 28, 2023
New York, New York

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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AFFIRMATION OF VITTORIA M. FARIELLO IN SUPPORT OF THE MOTION BY NEW YORK CITY COUNCILMEMBER CHRISTOPHER MARTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Vittoria M. Fariello, an attorney admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury:

1. On behalf of New York City Councilmember Christopher Marte, I submit this affirmation in support of the within motion for leave to file the attached brief as amicus curiae in support of the Elizabeth Street Garden, Inc., and the other Petitioners-Respondents-Appellants.

2. Christopher Marte is the duly elected New York City Councilmember for New York City District 1, which encompasses Elizabeth Street Garden, the subject matter of this case.

3. Because of the impact of this decision on Elizabeth Street Garden, and the potentially far-reaching precedent of this case, Councilmember Christopher Marte respectfully seeks the Court's permission to file the attached Amicus Curiae Brief.

Date: April 28, 2023
New York, New York

Respectfully submitted,

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Exhibit A

To Be Argued By:
Vittoria M. Fariello
15 Minutes

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.

BRIEF OF *AMICUS CURIAE* NEW YORK CITY COUNCIL MEMBER, DISTRICT 1, CHRISTOPHER MARTE IN SUPPORT OF PETITIONERS-RESPONDENTS-APPELLANTS

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Dated: April 28, 2023

Printed on Recycled Paper

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INTRODUCTION AND INTEREST OF AMICUS

New York City Councilmember Christopher Marte ("Marte") submits this brief in support of Petitioners-Respondents-Appellants, Elizabeth Street Garden, Inc., Renee Green, Elizabeth Street, Inc., Elizabeth Firehouse LLC, and Allan Reiver (the "Petitioners"). Councilmember Marte respectfully asks the Court to affirm the Supreme Court's decision to vacate the Negative Declaration of Respondents-Appellants-Respondent (the "City") because the City's conclusion that the proposed project would not have any significant adverse impact on open space has no rational basis and does not follow lawful procedures.

Christopher Marte was born and raised in Lower Manhattan and is the New York City Councilmember for District 1 which encompasses the site of Elizabeth Street Garden (the "Garden") in Little Italy that is the subject property of this matter. Since September 2021, when Christopher Marte was the Democratic nominee for City Council District 1, he has received *over 28,000 letters* in support of preserving the Garden.[1] While extraordinary, this is not surprising since the Garden is not only strikingly beautiful, but it is the only significant passive open space with foliage and vegetation in an area that is drastically underserved by open space. The City's proposed project eliminates nearly 70% of the open space of the Garden. As the current City Councilmember, Marte has a duty to represent the communities of District 1 and to promote and protect their needs.

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[1] This was reported in The Architect's Newspaper, December 27, 2021, Aaron Smithson. https://www.archpaper.com/2021/12/soho-noho-rezoning-puts-elizabeth-street-garden-on-rockier-footing/ (last viewed, April 27, 2023).

As these facts and the letters attest, the preservation of this extraordinary garden is essential to protecting Little Italy's minimal green space.

Moreover, Councilmember Marte has a vested interest in ensuring that the City properly adheres to the procedures required to develop City-owned land, especially as it applies to projects in District 1. These procedures serve to protect and to ensure that the needs of the communities are met. Failure to follow these procedures exposes our residents to the whims of overzealous developers and politically motivated projects that trample the needs of existing communities. Furthermore, members of the City Council rely on the analyses presented by City agencies to make an educated decision on the proposals put before them. When the City fails to follow lawful procedures, Councilmembers' decisions are based on misinformation.

PRELIMINARY STATEMENT

The Supreme Court's order annulling the City's decision to issue a Negative Declaration should be affirmed because the City irrationally determined that its project would not impose any significant adverse impact on the environment which would require an Environmental Impact Statement. The City unreasonably found that the reduction in open space did not have a potential negative impact on the environment. Furthermore, the City's proposed increase in hours of public access and the need for affordable housing do not negate the City's obligation to conduct an Environmental Impact Statement.

The City seeks to destroy a heavily used open green space and in doing so fails to follow the rules and regulations that govern the use and disposal of City-owned property

by building on the site of the Garden. The Garden provides the community a necessary oasis from the surrounding concrete in a neighborhood desperately lacking in greenery. The City's proposed project would eliminate *nearly 70% of the open green space* occupied by the Garden. The City's disregard for the lack of open space in the area violates the mandate of applicable regulations, warranting the Supreme Court's annulment of the Negative Declaration.

The City wants to circumvent the procedurally mandated Environmental Impact Statement. The State Environmental Quality Review Act ("SEQRA") sets the standard for environmental review. Discretionary actions by an agency may fall under a Type I category in SEQRA. A Type I category - as is the case here - presumptively has a significant adverse impact, but permits the City to do an initial study, and then publish an Environmental Assessment Statement ("EAS"), to determine whether a subsequent Environmental Impact Statement ("EIS") is required. 6 NYCRR § 617.4 (a) (1). When conducting an EAS, the City is guided by the City Environmental Quality Review Technical Manual (the "Technical Manual"). Based on the EAS, if the City finds that there is a potential for a significant adverse environmental impact, it must conduct a subsequent, more in depth study, the EIS. If, instead, the City determines that there will be no adverse environmental impact, it issues a Negative Declaration, and no further environmental studies are performed. In this case, the City's own initial EAS shows that the reduction in open space itself is likely to have a significant negative environmental

impact.[2] Therefore, the Supreme Court correctly held that a subsequent EIS is required.

The City cannot show that the proposed project, deceptively called "Haven Green," will mitigate the negative environmental impact of exacerbating the deficiency in open space. The City only offers an increase in hours of access to the public as potential compensation for the loss of space. The City is the landlord of a month-by-month lease for the lot where the Garden exists. If public accessibility were a true concern for the City, it would need only to include a provision in the lease—now—regarding reasonable hours of public accessibility. But it has failed to do so. Instead, the City puts forth the proposition that an entire building must be developed on the site to provide more public access. Even if the space is open to the public for a greater number of hours, the reduction in open space severely limits the number of people who can access it, necessarily reducing public access. Therefore, the hours of public access to green space *per se* cannot mitigate the elimination of nearly 70% of the existing green space. The City cannot justify the reduction in open space.

To distract the Court from the issue at hand, the City insinuates that the need for affordable housing necessitates the reduction of open green space. Yet, the City fails to mention there are other potential sites that provide the opportunity to build a greater number of affordable units without reducing green space in the district. (*see e.g.*, R52.) Perhaps no local official understands the need for affordable housing better than Lower

[2] The initial EAS used by the City was prepared in accordance with the City Environmental Quality Review Technical Manual ("CEQRTM") of 2014. All references to the Technical Manual herein refer to the 2014 CEQRTM unless otherwise noted.

Manhattan community leader Councilmember Christopher Marte, whose district has been struggling to maintain affordable housing. But by simply noting the laudable goal of increasing affordable housing, the City does not negate the need for open space, which its plan shall eliminate. Indeed, the greater the number of residents, the greater the need for large open spaces. The Court cannot excuse the City's failure to follow lawful procedures and thus destroy the only significant green space in the study area in order to build affordable housing.

QUESTIONS PRESENTED

1. Did the Trial Court correctly find that the City's issuance of a Negative Declaration was irrational and fail to follow lawful procedure?

Yes.

2. Did the Trial Court have the power under the CPLR to vacate the city's Negative Declaration?

Yes.

STATEMENT OF FACTS

The Elizabeth Street Garden is a spark of life amid a concrete desert in the heart of one of New York City's most treasured neighborhoods, historic Little Italy. The Garden not only provides desperately needed greenery in a district hurting from the lack of open spaces, it also has proven to be a haven for the surrounding community. The COVID-19 Pandemic highlighted the essential need for a place where people could spend time outdoors amidst foliage and vegetation in a space shared safely with their neighbors. Through its many uses – from teaching hundreds of public-school children urban

agriculture to Tai Chi classes, to poetry readings and musical events that draw seniors and people of all ages – the Garden is a lush, vibrant, outdoor community center.

The Garden sits on a City-owned lot that was previously abandoned by the City. (R. 51.) In 1991, the lot was leased to Allan Reiver through his entity, Elizabeth Street, Inc. (R. 2334.) Mr. Reiver transformed the lot into a lush garden with an outdoor art gallery and opened it to the public in 2005. (R. 2335.) However, the Garden was only accessible through the Elizabeth Street Gallery, in a building adjacent to the lot, owned by Mr. Reiver. (R. 51.) In 2013, with the help of community members, Mr. Reiver began to staff the Garden and grant access directly from Elizabeth Street. (R. 2336.) Since then, the Garden has become a central feature of the neighborhood, welcoming community members and visitors alike. The Garden is open to the public most days and has hosted hundreds of community events, from movies and live music, to educational sessions for public school children, to the Annual Harvest Fest which was attended by over 2,000 people in 2018. (R. 29d, 105.)

In 2013, community members learned that the City intended to build on the Garden's site. Manhattan Community Board 2, which encompasses the site, issued four separate resolutions calling for the preservation of the Garden and suggesting alternate sites to build affordable housing (2 Howard Street and 388 Hudson Street). (R. 1030–1031.) Nevertheless, the City moved forward with the plan, and, on November 13, 2018, released the EAS and the Negative Declaration, both dated November 9, 2018. (R. 844, 999.)

Petitioners filed a Petition on March 5, 2019, seeking relief pursuant CPLR Article 78, asking the Trial Court to find that the City's issuance of the Negative Declaration was impermissible. (R. 34.) The Parties agreed to a stay in the action pending action by the City Council and, on August 16, 2019, Petitioners filed their Amended Petition. (R. 34, 40–78.) On November 1, 2022, the Supreme Court granted the Petition, vacated the Negative Declaration, and ordered "the matter remanded for respondents to conduct a full EIS of the project's impacts." (R. 27a.) On November 9, 2022, the City filed a Notice of Appeal.

ARGUMENT

I. THE SUPREME COURT CORRECTLY VACATED THE CITY'S NEGATIVE DECLARATION BECAUSE IT IS IRRATIONALLY BASED.

A. The Supreme Court Correctly Found That the City's Issuance of the Negative Declaration Was Irrationally Based Because the Reduction in Open Space Has A Potential Significant Adverse Environmental Impact.

The Supreme Court correctly found that the City irrationally concluded that the proposed project would have no significant impact on the environment. The relevant law, SEQRA, requires that an EIS be prepared for any Type 1 action, like here, that "may include the potential for at least one significant adverse environmental impact." 6 NYCRR § 617.7 (a) (1). A project like the one the City proposes "carries with it the presumptions that it is likely to have a significant adverse impact on the environment" and "may require an EIS." 6 NYCRR § 617.4 (a) (1).The City's initial study, the EAS, shows that the project would eliminate two-thirds of the site's open space, creating a negative adverse impact on the area. The Little Italy neighborhood is so starved for open space that it is

deemed to be "underserved" by the Technical Manual, as noted in the EAS. (R. 876.) The EAS study area for the proposal contains 0.15 acres of open space per 1,000 residents, one tenth of the City's average of 1.5 acres per 1,000 residents, which itself is woefully short of the optimal benchmark of 2.5 acres per 1,000 residents (R. 908). In sum, there is barely any open space in the study area as it stands. The EAS reveals that the current open space of approximately 20,265 square feet will be reduced to approximately 6,700 square feet (R. 277.) The proposed project will decrease the current open space *and* increase the number of residents, thereby exacerbating the open space to resident ratio. Because the open space in the study area is already so minimal, any decrease in ratio of open space to residents is bound to have a potential negative impact. To find otherwise is irrational. As stated by the Supreme Court

> Therefore, petitioners are correct that based upon the quantitative analysis of the effect of the Project on open space as analyzed within the EAS sets forth that, under the guidelines of the CEQRTM 1, the reduction in open space ratios is sufficient to indicate the presence of a significant adverse impact. (R. 26.)

The Supreme Court correctly vacated the City's Negative Declaration in this case and this Court should affirm.

B. The City's Purported Mitigating Factors Are Inadequate.

The City cannot show that any supposed benefits of their plan would mitigate the loss of open space. As the Trial Court aptly wrote:

> Even if, assuming arguendo, the qualitative assessment identified factors that would mitigate the impact of the significant decline in the open space ratio caused by the project, there is no evidence that in the current record that such mitigations are sufficient to overcome such significance. *See* Matter of Merson v. McNally, 90 NY2d 742, 754 (1997) ("mitigating measures will not obviate the need for an EIS unless they clearly negate the

continued potentiality of the adverse effects of the proposed action."). (R. 27–27a.)

Nothing the City has proposed can compensate for the loss of the Garden's critical green open space. The Supreme Court correctly annulled the Negative Declaration.

1. **The City's proposed increase in hours of public access cannot mitigate the loss of nearly 70% of the open space occupied by the Garden in an area underserved by open space.**

The City wants this Court to reverse the Trial Court which heard evidence on the issue and to now find that the loss of nearly 70% of the Garden's current open space can be mitigated by increasing the number of hours of public accessibility. This fails for several reasons. Even if there is an increase in the number of hours of public accessibility, the reduction of over two-thirds of the open space will limit the number of people who will be able to visit the Garden at any given time. This negates the purported benefit of having a greater number of hours open to the public. Additionally, the City can right now require the Garden to maintain specific hours of public accessibility because it is the landlord of a month-to-month lease for the Garden. (R1009.) The City can simply make public accessibility a condition of the lease and only shows the irrational quality of the City's project. The City's argument is without merit and the Supreme Court's annulment of the Negative Declaration must be affirmed.

2. **The need for affordable housing does not negate the City's obligation to conduct a proper environmental impact statement.**

The Court cannot allow the City's need for affordable housing to invalidate the established procedures for an environmental impact statement. There is no denying the affordability crisis that the City faces, but solutions cannot come at the cost of violating

required procedures that are meant to protect our environment and the quality of life of existing and future communities. There are multiple publicly-owned sites that are not green spaces in Lower Manhattan – as well as throughout the city – that can and should be dedicated to permanent affordable housing.[3] Indeed, Community Board 2, which encompasses the Garden, put forth two alternative publicly-owned sites that would provide a much greater number of affordable units if the City chose to (including 388 Hudson Street). (R. 1030–1031.) Regardless, the City does not cite any rule or regulation—since there is not one—that supports the proposition that the need for affordable housing means that there is no environmental impact to the project, or that the City does not have to follow the law. The Supreme Court correctly vacated the Negative Declaration.

II. THE SUPREME COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT THE CITY HAD NO RATIONAL BASIS TO ISSUE A NEGATIVE DECLARATION AND THAT THE CITY FAILED TO FOLLOW LAWFUL PROCEDURE.

The Supreme Court appropriately exercised its discretion in finding that the City improperly issued a Negative Declaration in this case. CPLR § 7803 (3) permits a court to review an agency's decision if it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .." As noted by the Court of Appeals,

> Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process. Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436 (1986).

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[3] *See* Manhattan Borough President Mark Levine's Report Housing Manhattanites, A Report on Where and How to Build the Housing We Need, at https://www.manhattanbp.nyc.gov/wp-content/uploads/2023/01/Housing-Report-01.31.2023.pdf (last seen on April 28, 2023)

See also Matter of Tri-County Taxpayers Association v. Town Board of Queensbury, 55 N.Y.2d 41 (1982) (SEQRA must be "strictly" complied with). As previously discussed, after a thorough review of the evidence, the Trial Court properly found that the City's issuance of the Negative Declaration was irrational.

Furthermore, the Trial Court reviewed the record and the procedures for an initial study, the EAS, set forth in the Technical Manual, and found in pertinent part that:

> [R]ather than following the [Technical Manual] and using the qualitative assessment in relation to the quantitative assessment's finding of a significant decline in the open space ratios, the respondents instead fail to explain how the qualitative assessment reduces the significance of the quantitative reduction in open space caused by the project. (R. 27.)

In sum, the Trial Court found that the City issued the Negative Declaration "in violation of lawful procedure" which falls squarely within its purview. The Supreme Court properly annulled the Negative Declaration.

The City would like this Court to find that there is no room for judicial review. The Trial Court here did not substitute its opinion for that of the agency, but instead did its job in holding that the City must adhere to the lawful procedures and cannot irrationally determine that there is no need for an EIS.

CONCLUSION

The Supreme Court properly vacated the City's Negative Declaration in this case and was within its power to do so. The City did not follow lawful procedures and the issuance of the Negative Declaration was irrational. Respectfully, this Court should affirm.

Date: April 28, 2023
New York, New York

Respectfully submitted,

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