SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

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

Petitioners,

Index No. _____

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, and MARIA TORRES-SPRINGER, in her capacity as Commissioner of the Department of Housing Preservation and Development,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' VERIFIED PETITION

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PRELIMINARY STATEMENT

Elizabeth Street Garden is a much-loved heavily-used open green space in a part of Manhattan that is sorely starved for any kind of open space, let alone green space. Nevertheless, while nearby lots owned by the City of New York (the "City") lay vacant and minimally used, Respondents have chosen this location for a proposed seven-story mixed use building that will include 123 studio-size units of affordable senior housing, as well as office and retail space.

Appropriately, the proposed destruction and development of Elizabeth Street Garden was subject to environmental quality review under the State Environmental Quality Review Act ("SEQRA") and related regulations and the City's implementing procedures, City Environment Quality Review (CEQR). However, HPD arbitrarily, capriciously and in violation of law did not fulfill its legally mandated obligation to take a "hard look" at and to thoroughly analyze the potential adverse environmental impacts that would result from Respondents' proposal to destroy and develop Elizabeth Street Garden. More particularly, Respondents' Environmental Assessment Statement ("EAS") and Negative Declaration fail to adequately assess the potential for adverse environmental impacts in the areas, among others: Zoning, Open Space, Historic and Cultural Resources, Neighborhood Character and Public Policy.[1] [2] These lapses led to Respondents' failure to acknowledge the need for and to prepare an Environmental Impact

[1] SEQRA refers to an "environmental assessment form," while CEQR uses the term "environmental assessment statement." Under SEQRA, with which CEQR must comply, an environmental assessment form ("EAF") "means a form used by an agency to assist it in determining the environmental significance or non-significance of actions. A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment." 6 NYCRR 617.2(m). Hereinafter, when discussing SEQRA and/or CEQR, "environmental assessment statement" or "EAS" will be used.

[2] Relevant portions of the EAS are attached to this Memorandum as Appendix 1 and the Negative Declaration is attached as Appendix 2. Upon request, Petitioners will provide the Court with a full copy of the EAS.

Statement ("EIS") which was clearly indicated by the EAS.[3]

The EAS and Negative Declaration were also affected by an error of law because they failed to assess the proposed development against the correct zoning regulations. In addition Respondents did not comply with the procedures required by State law, which are strictly enforced. The Negative Declaration was not published, as required, in the Environmental Notice Bulletin ("ENB").[4] It was also impermissibly conditioned on measures specified in the Negative Declaration itself and required in the Land Disposition Agreement and funding agreements.

Consequently, the EAS and Negative Declaration should be declared null and void, and an EIS should be ordered.

STATEMENT OF FACTS

For a more detailed statement of the facts, the Court is respectfully referred to the Verified Petition, and the Affidavit of Joseph Reiver in Support of Verified Petition, sworn to March 5, 2019 ("Reiver Aff."), and the Affidavit of Geoffrey K. Clark in Support of Petitioners' Verified Petition, sworn to March 5, 2019 ("Clark Aff."), submitted in support of the Verified Petition.

Elizabeth Street Garden

Elizabeth Street Garden (also the "Garden") is a beautifully landscaped, publicly-available green open space located in a part of Community District 2, a community that is sorely lacking in open space, let alone green open space.

The Garden is a sunny space landscaped with a large lawn of lush green grass, seasonal flowers, bushes, and numerous trees including two mature pear trees, one mature royal empress

[3] "An EIS provides a means for agencies, project sponsors and the public to systematically consider significant adverse environmental impacts, alternatives and mitigation. An EIS facilitates the weighing of social, economic and environmental factors early in the planning and decision-making process." 6 NYCRR 617.2(n).
[4] The ENB is a weekly publication of the New York State Department of Environmental Conservation. 6 NYCRR 617.2(o).

tree, and several young trees. Reiver Aff. ¶¶ 8-9; Reiver Aff., Exhibit ("Ex.") A, Figure ("Fig.") 1-2. Also situated throughout Elizabeth Street Garden are a large number of statues and sculptures, several of significant historical value. These works of art contribute to Elizabeth Street Garden's unique character as not only a garden but also a cultural destination. Reiver Aff. ¶ 10; Reiver Aff., Ex. A, Fig. 3-4.

Local organizations, such as the YMCA, branches of the New York Public Library, and the Lower East Side Ecology Center, as well as public schools host events and workshops in the Garden. Over the past twelve to fifteen months, alone, at least 200 events were hosted at the Garden. Over the past two years, the Garden has collaborated with Public School 1 and Public School 130 for educational events and has hosted workshops in fall, winter and spring for more than 750 public school students. Reiver Aff. ¶¶ 18-21; Clark Aff. ¶ 12(c).

Elizabeth Street Garden has a long history as a site used for public education and recreation. Its history dates back at least as far as 1822 when it was established by the Free School Society (the "Society"), later renamed the Public School Society, which established its fifth school on a portion of the site of the Garden. In 1853 the Public School Society transferred its property to the City of New York and the school, which continued to operate the school until 1902. A larger school, Public School 21 reopened in 1903 and remained in operation until the 1970s, approximately, when it was torn down. *See* Verified Petition ¶¶ 33-41.

The lot lay vacant until 1981 when affordable housing was built on a portion of the site, with the remaining portion reserved exclusively for recreational use. In 1991, through a wholly-owned company, Petitioner Allan Reiver began leasing the property. *See* Verified Petition ¶¶ 42.

Mr. Reiver overhauled the property. He cleaned and beautified the lot, eventually turning it into an attractive garden where he stored and displayed art works and statuary from his gallery

in the historic firehouse at 209 Elizabeth Street. In 2005, Mr. Reiver made the garden publicly accessible without fee through the gallery. But it was in 2013 that the community came together to manage and operate the garden, enabling the gates on Elizabeth Street to be opened for direct public access. *See* Verified Petition ¶¶ 42-44.

Today Elizabeth Street Garden is operated and maintained by Petitioner Elizabeth Street Garden, Inc. a volunteer-based not-for-profit organization. Elizabeth Street Garden is accessible seven days a week throughout the year, weather permitting, and offers educational and recreational programming to the community, in keeping with the property's history and long term use. Reiver Aff. ¶¶ 16-21.

Procedural History

In or around the summer of 2013, Community Board 2 discovered that City Council Member Margaret Chin had, in conjunction with the 2012 Seward Park Mixed Use Development Project (now Essex Crossing) in Community District 2, negotiated a non-public letter agreement with the City of New York for affordable housing to be built at the site of Elizabeth Street Garden, which would be destroyed. From 2013 through 2016, Community Board 2 responded by issuing four resolutions expressing support for the permanent preservation of Elizabeth Street Garden in its entirety and urging the City and HPD to consider alternate development sites within Community District 2 for the creation of affordable housing.

Essentially ignoring the local community and its Community Board, HPD, on September 14, 2016, issued a Request for Proposals ("RFP") for a "mixed-use affordable housing development for seniors" at Block 493, Lot 30 in Manhattan, the site of Elizabeth Street Garden. HPD announced on December 8, 2017 that the site would be developed by Penrose Properties, LLC, Habitat for Humanity New York City (Habitat NYC), and RiseBoro Community

Partnerships, Inc. The next month, HPD issued a "Notice of Lead Agency Determination and Review," by letter to Hilary Semel of the Mayor's Office of Sustainability, dated October 12, 2018 ("Lead Agency Letter"). The Lead Agency Letter stated that HPD proposed "to assume lead agency status for the CEQR review."

The Lead Agency Letter provided a short description of the Proposed Project. The Proposed Project, according to the Lead Agency Letter, would include conveying city-owned property to private developers, destroying Elizabeth Street Garden, and constructing a mixed-used building that would include 123 units of affordable housing, 4,454 ground square feet ("gsf") of retail space, and 12,885 gsf of office space for Habitat for Humanity, one of the developers. A small amount of open space—6,700 square feet—would also be included. The Lead Agency Letter also, for the first time, publicly revealed that HPD planned to have the Garden designated as an Urban Development Action Area ("UDAA") pursuant to the Urban Development Action Area Act ("UDAA Act"), General Municipal Law Chapter 24, Article 16. The UDAA was passed to enable municipalities to better address and ameliorate municipally-owned areas that are slum or blighted or are becoming slum or blighted. *See* Gen. Mun. L. § 691.

Subsequently, on November 13, 2018, HPD publicly released the full-form EAS, dated November 9, 2018, that was required under CEQR because the proposed destruction of the Garden is a Type I action. The same day, HPD released the Negative Declaration, dated November 9, 2018, declaring, "HPD has completed its technical review of an Environmental Assessment Statement (EAS) dated September 24th, 2018 [sic] and has determined that the proposed actions will have no significant effect on the quality of the environment." Also on November 13, the City Planning Commission certified the Application for the Proposed Project as complete under the Uniform Land Use Review Procedure ("ULURP").

On or about January 24, 2019, Community Board 2 adopted, by an overwhelming majority, a Resolution to deny the proposed destruction and development of Elizabeth Street Garden, citing, *inter alia*, concern over significant adverse environmental impacts, especially the loss of open space in the open-space deprived area where the Garden is located. *See* Manhattan Community Board 2, *Resolution to Deny the City's Application for the Disposition of City-Owned Land and UDAAP Designation for the Proposed Haven Green Development on the Elizabeth Street Garden site and in Support of Permanently Saving the Garden and Building Substantially More Senior Housing at an Alternative Site, Only if the Garden is Saved in Its Entirety,* at 2, 4-5 (Jan. 24, 2019) ("2019 CB2 Resolution").

On or about February 26, the Manhattan Borough President issued a Recommendation to the City Planning Commission concerning the proposed destruction and development of Elizabeth Street Garden. The Manhattan Borough President recommended "approval with conditions," including that a serious effort be made to increase the amount of open space by at least 30 percent and that the open space be mapped as parkland and managed by the New York City Department of Parks and Recreation. *See* Gail A. Brewer, *Borough President Recommendation on ULURP Application No. C 190184 HAM, HPD Haven Green Senior Housing, by Department of Housing Preservation and Development*, at 7 (Feb. 26, 2019).

The City Planning Commission has scheduled a hearing regarding the proposed destruction and development of Elizabeth Street Garden for March 13, 2019.

LEGAL FRAMEWORK

The destruction and development of ESG is an agency action subject to the State Environmental Quality Review Act ("SEQRA") and New York City's procedures implementing SEQRA, the City Environmental Quality Review ("CEQR") process.

"SEQRA's primary purpose 'is to inject environmental considerations directly into governmental decision making.'" *Matter of City Council of City of Watervliet v. Town Bd. of Colonie*, 3 N.Y.3d 508, 515 (2004) (quoting *Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 NY2d 674, 679 (1988)). By enacting SEQRA, the Legislature intended that "[s]ocial, economic, and environmental factors shall be considered together in reaching decisions on proposed activities." N.Y. Envtl. Conserv. Law § 8-0103(7) (McKinney).

Further, "The Legislature adopted SEQRA with the express intent that . . . SEQRA's policies statutes and regulations should be implemented 'to the fullest extent possible,'" *New York City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347 (2003) (quoting N.Y. Envtl. Conserv. Law § 8-0103(6)), creating "an elaborate procedural framework," *Id.* at 347 (internal citation omitted), and requiring "strict compliance." *City Council of City of Watervliet*, 3 N.Y.3d at 515 (quoting *Matter of Merson v McNally*, 90 NY2d 742, 750 (1997)).

The EIS lies at the "heart" of SEQRA. *Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 69 (1996), *as modified* (Oct. 1, 1996) (internal citations omitted). SEQRA requires that an EIS be prepared for any action that "may include the potential for at least one significant adverse environmental impact." 6 NYCRR 617.7(a)(1). This is a "relatively low" threshold. *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 364 (1986). An EIS can be avoided only where there will be "no adverse environmental impacts" or "the identified adverse environmental impacts will not be significant." 6 NYCRR 617.7(a)(2).

Under SEQRA, actions are classified as Type I, Type II or Unlisted, "depending on the potential effects on the environment." *City Council of City of Watervliet*, 3 N.Y.3d at 518 n. 8. "A Type I action 'carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS'" *Id.* (quoting 6 NYCRR 617.4(a)(1)).

Pursuant to SEQRA, and as acknowledged by Respondents in the EAS, the destruction and development of Elizabeth Street Garden is a Type I action because it is an action "occurring wholly or partially within . . . any historic building, structure, facility, site or district . . . that is listed on the National Register of Historic Places." 6 NYCRR 617.4(b)(9). Elizabeth Street Garden is located entirely within the nationally registered Chinatown and Little Italy Historic District.

In order to determine whether an action will require an EIS, an Environmental Assessment Statement must be prepared. For Type I Actions, a full EAS is required. 6 NYCRR 617.2(2). The lead agency—here, HPD—must then "review" the EAS, [5] "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." 6 NYCRR 617.7 (b)(2)-(4). SEQRA requires the lead agency to take a "hard look" at "the relevant areas of environmental concern." *Chinese Staff and Workers Ass'n*, 68 N.Y.2d at 363.

In making its determination of significance, a lead agency "must study the same areas of environmental impacts as would be contained in an EIS, including both the short-term and long-term effects as well as the primary and secondary effect of an action on the environment." *Chinese Staff and Workers Ass'n*, 68 N.Y.2d at 364. "A determination not to undertake a full environmental review will be set aside where the agency fails to address affected areas of environmental concern." *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, 33 Misc. 3d 330, 346 (Sup. Ct. N.Y. Cnty. 2011), *aff'd*, 94 A.D.3d 508 (1st Dep't 2012).

[5] SEQRA defines "lead agency" as "the agency principally responsible for undertaking, funding or approving an action." 6 NYCRR 617.2(u).

If, after undertaking the required hard look, the lead agency determines that the proposed action will have "no adverse environmental impacts" or "the identified adverse environmental impacts will not be significant," 6 NYCRR 617.7(a)(2), the lead agency is required to issue a negative declaration. The negative declaration must be in written form and must "contain[] a reasoned elaboration and provide[] reference to any supporting documentation." 6 NYCRR 617.7(b)(4). When a negative declaration is issued with respect to a Type I Action, SEQRA requires that it be published in the Environmental Notice Bulletin ("ENB"), which is maintained by the New York State Department of Environmental Conservation ("DEC"). 6 NYCRR 617.12(c)(1).

For Unlisted Actions only, a lead agency may issue a conditioned negative declaration ("CND"), if it has, *inter alia*, completed a full EAS, 6 NYCRR 617.7(d)(1)(i), undertaken a hard look at relevant areas of environmental concern, 6 NYCRR 617.7(b), (d)(1)(v), and imposed conditions that have "mitigated all significant adverse environmental impacts and are supported by the full EA[S] and any other documentation." 6 NYCRR 617.7(d)(1)(iii). The lead agency is also required to publish notice of a CND in the ENB and to provide a minimum 30-day public comment period. 6 NYCRR 617.7(d)(1)(iv).

In the City of New York, technical guidance and methodologies for carrying out mandated environmental review is provided in the CEQR Technical Manual, which "provides guidance . . . in the procedures and substance of the City's Environmental Quality Review (CEQR) process." CEQR TECHNICAL MANUAL, Introduction, at Introduction-1 (Mar. 2014, revised Apr. 2016).[6]

[6] An electronic copy of the CEQR Technical Manual is available at https://www1.nyc.gov/site/oec/environmental-quality-review/technical-manual.page.

ARGUMENT

Courts review a SEQRA/CEQR determination for whether 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." *Chatham Towers, Inc. v. Bloomberg*, 6 Misc. 3d 814 (Sup. Ct. N.Y. Cnty. 2004), *aff'd as modified on other grounds*, 18 A.D.3d 395 (2005) (internal citation omitted). More specifically, judicial review of a negative declaration addresses "whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination." *New York City Coalition to End Lead Poisoning, Inc.*, 100 N.Y.2d at 348 (internal quotation and citation omitted). Court review, though limited, is "meaningful," "ensur[ing] that, in light of the circumstances of a particular case, the agency has given due consideration to the pertinent environmental factors." *Develop Don't Destroy (Brooklyn)*, 6 Misc.3d at 346 (internal citations omitted.).

As will be shown below, in this matter, (i) HPD's determination was made in violation of lawful procedure because HPD's Negative Declaration was impermissibly conditioned and was not published in the ENB, (ii) was affected by an error of law because the EAS applied the wrong zoning regulations in its zoning analysis, and (iii) was arbitrary, capricious and an abuse of discretion because HPD failed to take a hard look at a number of relevant areas of environmental concern; if HPD had taken a hard look, it would have concluded that an EIS was required.

I. HPD'S NEGATIVE DECLARATION VIOLATED LAWFUL PROCEDURE

A. HPD's Negative Declaration Was Impermissibly Conditioned.

The Negative Declaration issued by HPD impermissibly imposes conditions in order to prevent significant adverse impacts related to historic resources and hazardous materials.

Specifically, With respect to hazardous materials, the Negative Declaration requires:

(i) A Phase II Subsurface Investigation must be performed and will be required in the Land Disposition Agreement between HPD and the Project Sponsor ("LDA").

(ii) Following the Phase II investigation, a Remedial Action Plan ("RAP") and Construction Health and Safety Plan ("CHASP") must be prepared and implemented during site redevelopment activities. "No property disposition, funding, or construction will proceed without DEP's [the Department of Environmental Protection] written approval of the RAP and CHASP." The RAP and CHASP will be required in the LDA.

(iii) Upon completion of construction a Closure Report must be submitted to and approved by HPD and DEP and demonstrate that all remediation activity has been conducted in accordance with the DEP-approved RAP and CHASP.

See Negative Declaration at 3-4. With respect to historical resources, the Negative Declaration requires:

(iv) The final building design must be submitted to the Landmarks Preservation Commission ("LPC") for review and approval to ensure consistency with the historic context and this measure will be required in the LDA.

(v) A Construction Protection Plan, compliant with the New York City Department of Buildings Technical Policy and Procedure Notice No. 10/88 and LPC guidelines described in "Protection Programs for Landmark Buildings," shall be submitted to LPC for review and comment and implemented in consultation with a licensed professional engineer. This measure will be required in the LDA.

See Negative Declaration at 2-3. And, with respect to both hazardous materials and historical resources, the above-described requirements will also be required through provisions in the "applicable funding agreements between HPD and the Project Sponsor. *See* Negative Declaration at 4.

A conditioned negative declaration ("CND") may not be issued for a Type I Action: a CND is "permitted only in unlisted actions," *Merson*, 90 N.Y.2d at 752 (referencing 6 NYCRR 617.2(h)). As recognized by HPD in the Negative Declaration, Negative Declaration at 1, the destruction and development of Elizabeth Street Garden is a Type I action. Consequently, it is

impermissible for the negative declaration to be conditioned. Nevertheless, the Negative Declaration explicitly imposes conditions "in order to ensure that there are no significant adverse impacts associated with historic resources and hazardous materials." Negative Declaration at 2. The Negative Declaration was therefore issued in violation of SEQRA and should be vacated and annulled. In fact, because HPD has recognized that there may be the potential for significant adverse impacts associated with historic resources and hazardous materials, under SEQRA, an EIS should have been prepared and this Court should now order an EIS. Clark Aff. ¶ 38.

The Court of Appeals conducts a two-part test to determine whether a negative declaration has been impermissibly conditioned. The Court asks, "(1) whether the project, as initially proposed, might result in the identification of one or more 'significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration." *Merson*, 90 N.Y.2d at 752–53.

The first prong of the test is satisfied "where the lead agency has identified potentially significant impacts, or where the record supports the inference that the identified impacts would have to be considered potentially significant, or where the identified impacts fall within typically environmentally sensitive areas or locations, the second prong of the test must be examined." *Id.* at 753 (internal citations omitted). Here, the Negative Declaration imposed conditions with respect to historical resources and hazardous materials for the express purpose of ensuring that there would be no significant adverse impacts, thereby recognizing that there may in fact be such adverse impacts. *See* Negative Declaration at 2. And, Elizabeth Street Garden is located in Chinatown and Little Italy Historic District and Special Little Italy District, environmentally sensitive areas. For these reasons, the first prong of the test has been met.

Additionally, as set forth below, *see infra* Part III, the destruction and development of Elizabeth Street Garden may cause significant adverse impacts not only with respect to historical resources and hazardous materials, but also with respect to neighborhood character, open space, zoning and public policy. This, too, is sufficient basis to proceed to the second prong. *See Citizens Against Retail Sprawl ex rel. Ciancio v. Giza*, 280 A.D.2d 234, 238 (4th Dep't, 2001) (The court proceeds to the second phase of analysis after the finding that the record "establishes that, in issuing a negative declaration. . . the Town Board failed to address critical issues. . .").

With respect to the second prong, the Court of Appeals recognized that a valid negative declaration might still be issued for a revised proposal that incorporated mitigating measures "as part of an open and deliberative process" and that in such a situation, "mitigating measures could be viewed as part of the 'give and take' of the application process, and would be less of a concern than those revisions or mitigation measures made after final submission of the EAF." *Merson*, 90 N.Y.2d at 753. However, the Court clearly prohibited certain arrangements:

> a lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself. Nor could the lead agency achieve the same end by other means, such as supporting the negative declaration with a statement that conditions would be imposed only on an underlying special use permit to reduce environmental impacts; extracting concessions from the developer as necessary prerequisites to the issuance of the negative declaration; or requiring specific mitigation measures, and then approving a proposal that has been revised in compliance with the mandate of the lead agency.

Id. (internal citation omitted).

The Negative Declaration issued by HPD falls afoul of the second prong's proscriptions. First, HPD issued the Negative Declaration "on the basis of conditions contained in the declaration itself," expressly stating that the destruction and development of Elizabeth Street

Garden "would be implemented in conformance with the following measures in order to ensure that there are no significant adverse impacts associated with historic resources and hazardous materials," Negative Declaration at 2, and concluding that "with implementation of the [specified] measures, no significant adverse impacts . . . would be expected to occur," Negative Declaration at 3-4. Similarly, in *Ferrari v. Town of Penfield Planning Bd.*, 181 A.D.2d 149 (4th Dep't 1992), the negative declaration "indicated at least one potentially negative impact and stated that 'all potentially negative impacts have been substantially mitigated or eliminated' by the conditions imposed in the declaration." *Id.* at 151. The court ruled that the negative declaration constituted an impermissible conditional negative declaration.

Second, the Negative Declaration is supported by the imposition of "measures related to historic resources and hazardous materials" in the land disposition agreement and funding agreements between HPD and the project sponsor. Negative Declaration at 4. In so doing, HPD is conditioning the negative declaration "by other means," much like the negative declaration, explicitly prohibited by the Court of Appeals, that is supported "with a statement that conditions would be imposed only on an underlying special use permit to reduce environmental impacts." *Merson*, 90 N.Y.2d at 753.

Citizens Against Retail Sprawl ex rel. Ciancio, 280 A.D.2d 234, addressed a similar situation. There, a developer sought approval from the Town Board of a rezoning and a development project. The Town Board issued a negative declaration and adopted a resolution based on the negative declaration to rezone the area. The resolution provided that "any appropriate mitigation measures proposed by [the applicant] or other interested and involved persons should be reviewed and established in connection with the Site Plan Review process." *Id.* at 236. The Town Board then adopted another "conditional rezone" resolution approving the

application while requiring preparation of a development site plan subject to approval by the Town Board. The court regarded the mitigating measures listed in the two resolutions as part of the negative declaration, and ruled that "the Town, as lead agency, improperly issued a negative declaration on the basis of conditions contained in the declaration itself that it hoped to ameliorate by a conditional rezoning of the subject property." *Id.* at 239.

Additionally, in *Miller v. City of Lockport*, 210 A.D.2d 955 (4th Dep't 1994), the applicant sought a special use permit. The Common Council, the lead agency, issued a negative declaration. "In support of the negative declaration, the Common Council stated that, to better ensure reduced environmental impacts, conditions were being imposed on the special use permit for the facility." *Id.* at 956–57. The court ruled that the negative declaration was an impermissible conditional negative declaration.

In short, the Negative Declaration issued by HPD was impermissibly conditioned in violation of SEQRA. It should therefore be vacated and annulled and an EIS should be ordered to address, at a minimum, the adverse environmental impacts related to historic resources and hazardous materials that the Negative Declaration recognizes may result from the destruction and redevelopment of Elizabeth Street Garden.

B. HPD Failed to Publish its Negative Declaration As Required by SEQRA.

The Negative Declaration issued by HPD should be annulled for noncompliance with SEQRA's mandated procedures.

When a negative declaration is issued for a Type I Action, SEQRA requires that notice of the Type I negative declaration be published in the Environmental Notice Bulletin (ENB). 6 NYCRR 617.12(c)(1). The lead agency is required to provide notice to the ENB directly. *Id.* The Negative Declaration at issue here was never published in the ENB.

SEQRA notices are published weekly by region in the ENB. New York County is in Region 2. Therefore, notice of the Negative Declaration should have appeared among the Region 2 notices published in the ENB. HPD issued the Negative Declaration on November 9, 2018 and made it public on November 13, 2018. Nevertheless, as of March 5, 2019, notice of the Negative Declaration was not contained in any issue of the ENB issued after November 9, 2019 up until and including March 5, 2019. *See* Affirmation of Kate Fletcher in Support of Verified Petition, dated March 5, 2019 ("Fletcher Aff."), Exhibit A.

"SEQRA's policies, statutes, and regulations should be implemented 'to the fullest extent possible.'" *New York City Coalition to End Lead Poisoning, Inc.*, 100 N.Y.2d at 347 (quoting N.Y. Envtl. Conserv. Law § 8-0103(6)). The Court of Appeals has made clear the importance of literal adherence to SEQRA's procedures:

> SEQRA's policy of injecting environmental considerations into governmental decisionmaking is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations. Strict compliance with SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

Id. (internal quotations and citations omitted). Moreover "where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified." *Id.*

The court in *Dillon v. Town of Montour*, 18 Misc. 3d 1109(A) (unreported) (Sup. Ct. Schuyler Cnty. 2007) (attached as Ex. B to Fletcher Aff.), addressed a negative declaration that failed to comply with the publication requirement in 6 NYCRR 617.12(c)(1). While the *Dillon* court found failure to publish did not invalidate a negative declaration, it improperly relied on inapplicable cases. First, the court cited *Village of Skaneateles v. Board of Educ.*, 180 Misc. 2d

591, 594 (Sup. Ct. Albany Cnty. 1999). In that case, although petitioner alleged that the negative declaration should be rescinded in part because it was not published in the ENB, the court never reached this issue, dismissing the case without prejudice as premature. *See Id.* at 594–598. *Village of Skaneateles* is hardly support for the *Dillon* court's holding. Second, the court relied on cases concerning timing requirements and the distinction between directory and mandatory timing requirement. However, the publication requirement is not a timing requirement, and each of the cases cited by *Dillon* concerned delay rather than failure to act.[7]

In a more recent case, *Tuck-It-Away Associates, LP et al. v. City of New York et al.*, No. 104415/2008 (unfiled judgment) (Sup. Ct. N.Y. Cnty. Sept. 24, 2008) (attached as Ex. C to Fletcher Aff.), the court held that publication in the ENB is a "threshold matter" because SEQRA procedures are strictly enforced. *Id.* at *4. While the court decided not to invalidate the negative declaration, the reasoning behind this decision was inconsistent with the SEQRA regulations. The court did not invalidate the negative declaration on the grounds that, unlike 6 NYCRR 617.12(c)(2) which imposes a publication requirement, 6 NYCRR 617.12(c)(1) "refers only to notice to the Environmental Notice Bulletin (ENB), and not to publication in the ENB." *Id.* at *4. This ruling is, however, contradicted by the plain language of the regulation: "Notice of a Type I negative declaration . . . must be published in the Environmental Notice Bulletin." It cannot be

[7] *Grossman v. Rankin*, 43 N.Y.2d 493, 501 (1977) ("With respect to time limitations, New York courts have consistently held that if the language used in a provision does not indicate that the provision was intended as a limitation on the power of the body or officer, the provision is to be interpreted as directory rather than mandatory."); *Omabuild USA No. 1 v. State*, 207 A.D.2d 335, 335 (3d Dep't 1994) (finding that although the Town's request for lead agency status was submitted late, the New York State Department of Environmental Conservation "was not required to reject the request as a matter of course"); *Seaboard Contracting & Material, Inc. v. Dep't of Envtl. Conservation of State of N.Y.*, 132 A.D.2d 105, 108 (3d Dep't 1987) (upholding a negative declaration issued approximately one month after the statutory deadline). It is questionable whether the court's reliance on *Nicklin-McKay v. Town of Marlborough Planning Board*, 14 A.D.3d 858 (3d Dep't 2005) was appropriate even with respect to time limitations. In that case the court found that the negative declaration was timely and no time limitation imposed by SEQRA had been violated because, although the negative declaration was issued 853 days after the application was submitted, the Planning Board issued the negative declaration at its next regularly scheduled meeting after the deadline for submissions expired. *Id.* at 861.).

the case that this language does not impose a publication requirement while 6 NYCRR 617.12(c)(2) does require publication when it similarly states, "A notice of hearing must be published, at least 14 days in advance of the hearing date, in a newspaper of general circulation . . . ."

The Negative Declaration issued by HPD was required to be published in the ENB. It was not. Given the well-settled rule that SEQRA procedures are strictly enforced and the plain language of the regulation, the Negative Declaration should therefore be annulled.

II. HPD'S NEGATIVE DECLARATION WAS AFFECTED BY AN ERROR OF LAW IN THE EAS

According to the EAS Full Form, Elizabeth Street Garden is zoned C6-2. This would be the applicable zoning classification were it not for the fact that Elizabeth Street Garden is located within the Special Little Italy District (SLID) as defined and regulated in Article X, Chapter 9 of the Zoning Resolution. Yet, the EAS assumes that the C6-2 zoning regulations apply, despite the SLID designation. For example, it states,

> The Development Site is zoned C6-2 and is located within the Special Little Italy District. C6-2 districts permit residential development up to a maximum floor area ratio (FAR) of 6.02, commercial development up to a maximum FAR of 6.0, and community facility development up to a maximum FAR of 6.5. Building height and setback are controlled by a sky exposure plane, which begins at 65 feet above the street line.

EAS, Attachment A: Project Description, A-1-A-2. Subsequently, the EAS's total "analysis" of potential adverse impacts with respect to zoning simply states that the proposed actions would not "generate . . . structures that would be incompatible with the underlying zoning." EAS, Attachment B: Supplemental Screening, B-2. While the Negative Declaration acknowledges that the SLID regulations are applicable, it nevertheless relies on the EAS and fails to address or correct the EAS's error of law.

It is readily apparent that the EAS and Negative Declaration are affected by an error of law with respect to the applicable zoning regulations and the proposed development's conformity therewith:

- Under the SLID regulations, Elizabeth Street Garden is located in Area A, the Preservation Area. Zoning Resolution ("ZR") § 109-03. The bulk regulations for Area A allow a maximum FAR of 4.1 for through lots, such as that of Elizabeth Street Garden. ZR § 109-121. The EAS indicates that the Elizabeth Street Garden site is 20,265 square feet. On a parcel of that size, a FAR of 4.1 permits the maximum floor space of a building to be 83,100 square feet. Clark Aff. ¶ 9(a). The proposed building will be 92,761 square feet and is therefore in violation of the SLID regulations. Clark Aff. ¶ 9(a).
- The bulk regulations also cap the maximum lot coverage at 60 percent for through lots. ZR § 109-122. The Elizabeth Street Garden site is a through lot, running from Elizabeth Street Garden through to Mott Street. Given a lot size of 20,265 square feet, a maximum 60 percent lot coverage requires that approximately 8,100 square feet (forty percent) of the lot be outside the building footprint. With the proposed building, only 6,700 square feet will be outside the building footprint, again in violation of the SLID regulations. Clark Aff. ¶ 9(b)
- SLID regulations also require all buildings built after February 3, 1977 to have a rear yard that is at least 30 feet deep. ZR § 109-122. With the proposed building, there would be no rear yard behind the northern portion of the building. Clark Aff. ¶ 9(c).

- The City Planning Commission may not authorize a modification of the FAR, lot coverage, and rear yard requirements. ZR § 109-514.
- The SLID regulations also impose a maximum height of 75 feet or 7 stories, whichever is less. ZR § 109-124. The proposed development will be seven stories high and will have a maximum height of 86 feet when the bulkhead is included. Clark Aff. ¶ 9(d). The SLID regulations do not exempt mechanical bulkheads from the 75 foot height limit. Therefore the building violates this zoning regulation as well. These height restrictions may be modified by the CPC, ZR § 109-124, but modification requires notification to Community Board 2 and certification by the CPC to the Commissioner of Buildings that there is a "compelling need for such modification and that such modifications are consistent with the objectives of the Special Little Italy District." ZR § 109-514.

As the zoning analysis, minimal though it was, was itself in error and relied on an error of law, this Court should declare the EAS and Negative Declaration null and void. C.P.L.R. § 7803(3); *Cf. Kuzma v. City of Buffalo*, 45 A.D.3d 1308, 1309 (4th Dep't 2007) (noting "the State has effectively conceded that the 1998 negative declaration cannot stand because it was based on erroneous information"); *Matter of LaDelfa v. Village of Mt. Morris*, 213 A.D.2d 1024, 1025 (4th Dep't 1995) (annulling negative declaration "based on environmental assessment forms that erroneously stated that the proposed action complied with existing zoning and other land use restrictions"). Further, in light of the numerous ways in which the proposed development violates the Zoning Resolution, this Court should order a full EIS to be prepared to assess the adverse impacts that may result from the proposed development with respect to zoning.

III. THE NEGATIVE DECLARATION WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW: HPD FAILED TO TAKE A HARD LOOK AT ADVERSE IMPACTS ON THE ENVIRONMENT THAT MAY RESULT FROM THE PROJECT

An EAS that fails to "adequately address" a relevant environmental issue does not comply with the "'hard look' requirement" of SEQRA and CEQR. *See Chatham Towers*, 6 Misc.3d at 823. The EAS prepared in connection with the proposed destruction and development of Elizabeth Street Garden failed to adequately identify and address environmental issues in a number of technical areas identified by the CEQR Technical Manual. Taken individually, the potential for adverse impacts on the environment in any one of these areas is sufficient to require an EIS. Moreover, even if the adverse impact with respect to any one technical area is alone not sufficient to be "significant," when considered cumulatively, there can be no doubt that the destruction and development of Elizabeth Street Garden is likely to have an adverse impact on the environment, necessitating preparation of an EIS.

A. HPD Failed to Take a Hard Look at Zoning

Under CEQR a zoning analysis "considers the projects compliance with, and effect on, the area's zoning." CEQR TECHNICAL MANUAL, Chapter 4: Land Use, Zoning and Public Policy, at 4-1. As discussed above, see *supra* Part II, the EAS failed to assess the proposed development against the correct zoning regulations. Consequently, the EAS failed to conduct any analysis of the project's compatibility—or, in this case, incompatibility—with the Zoning Resolution, specifically the SLID regulations, discussed in detail *supra* Part II. Respondents failed to meet the hard look standard of SEQRA and CEQR with respect to zoning, and should be annulled. *See* Clark Aff. ¶¶ 9-10.

Furthermore, the proposed development's noncompliance with the SLID regulations may result in potential adverse environmental impacts. The SLID regulations were passed to "permit

[] new development consistent with the residential character and scale of the existing buildings." ZR § 109-00. Additionally, the SLID regulations were intended to provide public open space and "to improve the physical environment." *Id.* The proposed development runs contrary to these aims. Its bulk will be out of step with the scale of existing buildings and it will destroy a public open space that contributes significantly to the physical environment. Neither the EAS nor the Negative Declaration acknowledged or analyzed these potential adverse impacts.

B. HPD Failed to Take a Hard Look at Open Space

The open space analysis included in the EAS is both flawed and substantively incomplete and therefore fails to meet the hard look requirements of SEQRA and CEQR. Had the EAS taken a hard look at open space, it would have concluded unavoidably that the destruction and development of Elizabeth Street Garden would have a significant adverse impact on the environment because it will decrease the ratio of open space to the population by a significant amount, and will cause "a substantial change in the use, or intensity of use, of land including . . . open space or recreational resources, or in its capacity to support existing uses." 6 NYCRR 617.7(c)(1)(viii); CEQR TECHNICAL MANUAL, Chapter 7: Open Space, at 7-18.

The destruction and development of Elizabeth Street Garden will have a significant impact on the amount of open space. The CEQR Technical Manual evaluates the direct loss of open space in terms of open space ratio—the acres of open space per 1,000 residents in the study area. In New York City, an area is considered underserved by open space if the open space ratio is under 2.5 acres per thousand residents. Elizabeth Street Garden is located in an area that is underserved by open space. CEQR TECHNICAL MANUAL, Open Space Appendix: Maps, at 1. Further, the EAS indicates that the study area is severely underserved, with an open space ratio of approximately 0.15 acres per thousand residents, well below the citywide average of 1.5 acres

per thousand residents. EAS, Attachment C: Open Space, C-17. Under the CEQR Technical Manual, "the existing open space ratio may be so low that even an open space ratio change of less than one percent may result in potential significant open space impacts." CEQR TECHNICAL MANUAL, Ch. 7, at 7-8. Here, as measured in the EAS, the extremely low open space ratio in the study area will decrease by more than two percent, EAS, Attachment C: Open Space, C-17; *see also* Clark Aff. ¶¶ 22-23, indicating that there may be significant adverse open space impacts. Consequently, an EIS is required. Clark Aff. ¶ 25.[8]

Moreover, the EAS improperly argues that various "qualitative" "mitigating factors" can overcome the potential significant adverse impacts on open space. Clark Aff. ¶ 26; EAS, Attachment C, C-17-18. For example, the EAS argues that the proximity of "Washington Square Park" will mitigate the loss of open space. However, this argument fails to consider that Washington Square Park may already be heavily used. Clark Aff. ¶ 27. As a study area is expanded, guidelines indicate that the open space ratio should increase to account for the larger population that the open space is expected to serve. Clark Aff. ¶ 27. Moreover, even if Washington Square Park is considered, the study area is still "drastically underserved" by open space. Clark Aff. ¶ 27. Washington Square Park does not mitigate the significant adverse impacts on open space due to the destruction and redevelopment of Elizabeth Street Garden. Nor do the eight private—therefore largely inaccessible—community gardens or bike lanes cited by the EAS. Clark Aff. ¶ 33.

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[8] Additionally, the EAS Full Form and Attachment C to the EAS, which addresses open space, are inconsistent. The Full Form indicates that the open space ratio will not decrease by more than one percent, Full Form 4(g). At the same time, the quantitative analysis performed in Attachment C to the EAS clearly shows that the open space ratio will decrease by more than two percent. EAS, Attachment C: Open Space, C-17. Furthermore, neither Attachment C, nor the Negative Declaration acknowledges that the quantitative analysis shows there may be a significant adverse impact regarding open space. It seems clear that HPD did not carefully review the EAS or conduct a thorough analysis with respect to open space, as required by SEQRA. *See* Clark Aff. ¶ 23-24; 6 NYCRR 617.7(b)(2)-(3).

According to the SEQRA regulations, a project should be evaluated to determine whether it will cause substantial changes to the use of open space and its capacity to support existing uses. 6 NYCRR 617.7(c)(viii). Such an evaluation necessarily requires a study of current uses of the open space at issue. Clark Aff. ¶ 29. However, the EAS never identifies or analyzes the current uses of Elizabeth Street Garden itself, merely citing general data indicating "a need for facilities geared towards the recreational needs of adults and senior citizens." EAS, Attachment C: Open Space, C-6. Needless to say, having failed to take even a cursory look at the current use of Elizabeth Street Garden, the EAS also fails to look at how the development will impact such use. Had the EAS taken a hard look at these issues it would have been apparent that the proposed development will have an adverse impact on the use of open space.

First, sunlight plays a critical role in the use and enjoyment of Elizabeth Street Garden. Visitors and neighbors alike relax in and soak-up the sunlight—all too scarce a resource in Manhattan—while enjoying the unique atmosphere created by the lush landscaping and many works of art displayed in the Garden. *See* Reiver Aff. ¶¶ 25-27; Reiver Aff., Ex. A, Fig. 1, 3.

The Garden is landscaped with many flowering plants and boasts several mature flowering trees, all of which need sun to thrive. Participation in the maintenance and upkeep of the plantings throughout the Garden is an important use of the Garden for volunteers, enabling them to spend time in the sun, in contact with nature and with other members of the community. *See* Reiver Aff., Ex. A, Fig. 11. The Garden's plant beds—located in sunny areas of the Garden—also contribute to the educational opportunities for young children and public school students. *See* Reiver Aff. ¶ 19; Reiver Aff., Ex. A, Fig. 8, 9.

The above-described enjoyment of the Garden will be all but eliminated by the proposed 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 as a result of the shadows that will be cast by the proposed building and by adjacent buildings from neighboring properties. *See* Clark Aff. ¶¶ 18-20; 32. The large amount of shade that will be cast over the limited open space will have an adverse impact on the open space, Clark Aff. ¶¶ 18-20; 32. The shadow will greatly impede current uses of Elizabeth Street Garden, making the remaining space unwelcoming, unable to sustain lush plantings, and possibly entirely unusable during the winter. Reiver Aff. ¶ 27.

Second, the vastly diminished size of the open space will be prohibitive of current uses. For example, any grassy area that remains, especially once federally-mandated paved paths are in place, *see* 2019 CB2 Resolution at 4, ¶ 14, will be far smaller than the current lawn and will likely be unable to accommodate the number of participants that currently enjoy yoga classes, Qi Gong classes and other workshops in Elizabeth Street Garden. Clark Aff. ¶ 34; *see* Reiver Aff. ¶ 22; Reiver Aff., Ex. A, Fig. 7.

Similarly, Elizabeth Street Garden is used by local community groups, such as the Chinatown YMCA, and City-wide organizations, such as the New York Public Library, to host large, well-attended events. With the Proposed Project, the limited amount of open space and the shape of the open space make it unlikely that such events will continue. The awkward L-shape of the remaining space is especially limiting for events such as concerts or outdoor movies, which require attendees to have an unblocked line of sight to the performance or screen. Clark Aff. ¶ 28; Reiver Aff., Ex. A, Fig. 10, 12.

Although the EAS repeatedly implies that other open spaces in the study area will compensate for the loss of the Garden, they will not. The Garden is a valuable resource that is used for a wide range of activities, active and passive, and as such is more valuable than a similar

open space that accommodates only one or the other type of activity. Clark Aff. ¶ 31. Many of the other open spaces in the study area are "walkways between lanes of traffic or are landscaped areas in front of commercial spaces," Clark Aff. ¶ 30; many are paved ball courts or playgrounds, not green spaces, Clark Aff. ¶ 34;*see also* Reiver Aff. ¶ 28. A number of the spaces are too small to be community gathering places. Clark Aff. ¶ 34. In contrast, the Garden is a green oasis that offers space for community events and contemplation alike. The Garden offers space to escape the noise and frenetic pace of the city or to engage in activities such as yoga or other types of conditioning. Elizabeth Street Garden is also a place for a 10-year-old to catch a firefly on movie night. See DONNA SCHAPER, *What is Margaret Chin thinking? Save the garden!*, Op-Ed, THE VILLAGER (Jan. 17, 2019), at https://www.thevillager.com/2019/01/what-is-margaret-chin-thinking-save-the-garden/.

An EIS is required because, as Attachment C to the EAS set forth, the open space ratio in the study area will decrease by more than one percent. Furthermore, the EAS and Negative Declaration failed to take a hard look at the use of the Garden and other open spaces in the study area in violation of SEQRA and CEQR. Had HPD taken a hard look, it would have concluded that, as shown above, the destruction and development of Elizabeth Street Garden may have an adverse impact on the environment with respect to open space and an EIS is required.

C. HPD Failed to Take A Hard Look At Historic and Cultural Resources

As an initial matter, it should be noted that, as discussed above, see *infra* Part I(A), the Negative Declaration, in imposing "measures" to ensure there will not be significant adverse impacts on historical resources, finds that such adverse impacts may occur. Under SEQRA, this finding is sufficient to require an EIS. 6 NYCRR 617.7(a)(1).

In addition, the EAS is deficient and fails to take a hard look at historical resources.[9] When assessing architectural historic resources, the initial step under the CEQR Technical is to identify all known historical resources within the study area—usually the area within a 400 foot radius of the project site. CEQR TECHNICAL MANUAL, Chapter 9: Historic & Cultural Resources, at 9-9. However, the EAS almost completely disregards the numerous buildings in the study area that have been identified as contributing to the Chinatown and Little Italy Historic District. It acknowledges three contributing buildings located at 209 Elizabeth Street and 228 and 230 Mott Street, EAS, Attachment D: Historic & Cultural Resources, D-7, but the National Register of Historic Places Registration Form for the Chinatown and Little Italy Historic District (the "Registration Form") identifies and lists 621 contributing historical buildings. Among them are several buildings within 90 linear feet of Elizabeth Street Garden: 204-206 Elizabeth Street and 208-210 Elizabeth Street, one-time New York Edison Sub Stations, and tenement buildings at 213, 215, 217, 219, 221, 223, 225, and 229 Mott Street. Clark Aff. ¶ 36; Registration Form, Section 7, at 28 & 40 (2009), at https://catalog.archives.gov/id/75319379. But there are numerous other buildings within the study area that are listed as contributing buildings on the State and/or National Register of Historic Places. *See generally*, Registration Form, Section 7; New York State, Cultural Resource Information System, Project Number 09PR06818.

The CEQR Technical Manual requires that "if any listed historic resources are located in the study area, then further analysis of the project's impact on these resources must be performed." CEQR TECHNICAL MANUAL, Ch.9, at 9-13. Clearly, no such analysis was done for the numerous contributing resources that are never acknowledged in the EAS. *Cf. Chatham Towers*, 6 Misc.3d at 823 (finding that the EAS failed to meet the hard look requirement of

[9] The EAS's discussion of architectural resources begins by distinguishing between direct and indirect impacts. This is not a distinction made by the CEQR Technical Manual, which does not prioritize one category of adverse impact over another.

SEQRA and CEQR and noting as a "gross oversight" that the EAS omitted to identify the existence and location of a hospital as required by the CEQR Technical Manual).

The omission of the above-identified contributing resources from the EAS's analysis takes on particular significance with respect to construction impacts in "adjacent historical resources," which, according to the Department of Buildings Technical Policy and Procedure Notice ("TPPN") No. 10/88, includes any building within 90 linear feet of the project site. Clark Aff. ¶ 36. The CEQR Technical Manual recognizes that construction-related impacts, including damages due to vibrations from blasting or pile-driving, "may occur to an architectural resource adjacent to a construction site if adequate precautions are not taken." CEQR TECHNICAL MANUAL, Ch.9, at 9-17. Consequently, "a construction protection plan ["CPP"] should be used to protect historic resources that may be affected by construction activities related to a proposed project." *Id.* at 9-20.

No such plan was set forth in the EAS. The EAS acknowledges that a CPP is necessary, EAS at D-13, and states that such a plan would take the CEQR Technical Manual into account, but deferring resolution of the need to protect historic resources is "improper because it shields the [CPP] from public scrutiny." *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board*, 253 A.D.2d 342, 349 (4th Dep't 1999); Clark Aff. ¶ 38. Even if the EAS had included an adequately developed CPP, the CPP would be inadequate without having first identified, let alone sufficiently assessed, the contributing historic resources that may be adversely impacted by the project. Furthermore, in acknowledging the need for a CPP to protect historic resources, the EAS and the Negative Declaration acknowledge that there may be significant adverse impacts on the environment in connection with Historic Resources. Consequently, an EIS should have been prepared. Clark Aff. ¶ 38.

D. HPD Failed to Take a Hard Look at Neighborhood Character

Under the CEQR Technical Manual, a neighborhood character assessment is "generally needed" if a project "has the potential to result in significant adverse impacts" in any of the following technical areas: Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Open Space; Historic and Cultural Resources; Urban Design and Visual Resources; Shadows; Transportation; or Noise. CEQR TECHNICAL MANUAL, Chapter 21: Neighborhood Character, at 21-1. A neighborhood character assessment is also generally needed "when the project may have moderate effects on several elements that define a neighborhood's character."[10] CEQR TECHNICAL MANUAL, Ch.21, at 21-1. As discussed above, the destruction and development of Elizabeth Street Garden may have significant adverse effects on the environment in terms of open space and historic and cultural resources. Consequently, by either standard, the EAS should have included a neighborhood character assessment. It did not. Therefore, the EAS was inadequate and violated the hard look requirement of SEQRA and CEQR.

Moreover, had a neighborhood character assessment prepared, the EAS would have concluded that the destruction and development of Elizabeth Street Garden "may have a significant impact on the environment," requiring an EIS. Clark Aff. ¶ 15.

A neighborhood character assessment "considers how elements of the environment combine to create the context and feeling of a neighborhood and how a project may affect that context and feeling." CEQR TECHNICAL MANUAL, Ch.21, at 21-1. The examination of a proposed action's impact on neighborhood character "focuses on whether a defining feature of

[10] However, the CEQR Technical Manual also states that "[o]nly under unusual circumstances would a combination of moderate effects to the neighborhood result in an impact to neighborhood character, in the absence of an impact in any of the relevant technical areas." CEQR TECHNICAL MANUAL, Ch. 21, at 21-1. Because the destruction and development of Elizabeth Street Garden will have an impact in multiple relevant technical areas, this limitation is not relevant here.

the neighborhood's character may be significantly affected." CEQR TECHNICAL MANUAL, Ch.21, at 21-1.

Elizabeth Street Garden is visible to passersby on Mott and Elizabeth Streets and is "a significant visual element in the neighborhood." Clark Aff. ¶ 12(d). The CEQR Technical Manual recognizes that parks may be "central to a neighborhood's character." CEQR TECHNICAL MANUAL, Ch.21, at 21-4. Elizabeth Street Garden is a key attraction to the neighborhood and serves a unique and critical role in the community, making it central to the neighborhood's character.

Elizabeth Street Garden is a well-known attraction. Clark Aff. ¶ 12(e). It draws visitors from other parts of the City, the country and the world, including Washington, Texas, Mexico and Portugal. Clark Aff. ¶ 12(e). The Garden is not only a destination for travelers, it is an oasis for local residents, and a veritable outdoor museum, boasting artworks of museum quality, such as a gazebo designed by the Olmstead Brothers and a balustrade designed by Jacques Henri Auguste Gréber. Clark Aff. ¶ 12(a). The small amount of open space that will remain after the destruction and development of Elizabeth Street Garden will hardly be an attraction to visitors from other parts of the City, let alone the world. What remains will be a cramped open space, frequently shrouded in shadow, visually-obscured by the breezeway, and bereft of historical sculptures.

The Garden is a gathering place for the community. Elizabeth Street Garden has hosted hundreds of free, public events for organizations around the City, Clark Aff. ¶ 12(b), (c), drawing people to the neighborhood. Among those organizations are the Chinatown YMCA, branches of the New York Public Library, the Fifth Precinct of New York City Police Department, the Lower East Side Ecology Center, and the Museum of Modern Art (MoMA). Clark Aff. ¶ 11(c).

Additionally local residents and businesses organize and sponsor events such as Tai Chi workshops, art show, movie screening, and the annual Harvest Festival. Clark Aff. ¶ 11(c).

The Garden is an outdoor classroom that enhances public school students' education and offers them a rare opportunity to interact hands-on with nature. Elizabeth Street Garden has partnered with Public School 1 and Public School 130. Clark Aff. ¶ 11(e). In 2018, Elizabeth Street Garden hosted educational workshops for 550 students throughout the school year. Clark Aff. ¶ 12(c).

As discussed above, *see* Part III(B), the destruction and development of Elizabeth Street Garden will have a significant adverse impact on these uses due to the diminished size of and sunlight on the small amount of open space that will remain available. For these reasons, an EIS is required with respect to neighborhood character, including an alternatives analysis, which the EAS has completely omitted. Clark Aff. ¶ 15.

E. HPD Failed to Take a Hard Look at Public Policy

Under CEQR, a proposed project's "compliance with, and effect on, the area's . . . applicable public policies" should be analyzed. CEQR TECHNICAL MANUAL, Chapter 4: Land Use, Zoning and Public Policy, at 4-1. The EAS failed to take a hard look at public policy, identifying only the City's Fresh program as a relevant policy. EAS, Attachment B: Supplemental Screening, B-3. However, a hard look at public policy would have identified and analyzed whether the destruction and development of Elizabeth Street Garden is compatible with City's policy and legal obligation to expand green infrastructure and to limit stormwater runoff and its policy, set forth in Executive Order No. 26, of delivering climate actions that support the goals of the Paris Agreement. Because the EAS and Negative Declaration fail to take a hard look

at public policy, they are in violation of SEQRA and CEQR and should be invalidated and annulled.

In 2010, Mayor Bloomberg announced the NYC Green Infrastructure Plan. SEE DEP'T ENVTL. PROTECTION, NYC GREEN INFRASTRUCTURE PLAN: 2011 UPDATE, 1 (2012), http://home2.nyc.gov/html/dep/pdf/green_infrastructure/gi_annual_report_2012.pdf. The Bloomberg Administration proposed to invest 1.5 billion dollars in green infrastructure over 20 years. *Id.* at i.

In 2012, New York City's commitment to green infrastructure became legally binding under an Order on Consent with the New York State Department of Environmental Conservation ("DEC"). *See In the Matter of the Violations of Article 17 of the Environmental Conservation Law and Part 750, et seq., of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by The City of New York and The New York City Department of Environmental Protection*, Order on Consent, DEC Case No, C02-20110512-25 (Dep't of Envtl. Conservation, Mar. 8, 2012) ("2012 Consent Order").

The 2012 Consent Order concerned ongoing violations of Article 17 of the Environmental Conservation Law relating to combined sewer overflows ("CSOs") and modified prior Orders on Consent between New York City and the DEC, the first of which was entered into in 1992.

CSOs are defined in the Order on Consent as "discharges of untreated domestic sewage from combined sewer systems, and industrial wastewaters, combined with stormwater. CSOs occur when wet weather flows are in excess of the capacity of combined sewer systems and/or the Water Pollution Control Plants they serve." 2012 Consent Order, at 1-2.

The Order on Consent requires the City to make best efforts to implement green infrastructure projects to reach certain benchmarks with respect to reduction of stormwater runoff so as to reduce CSOs. Affidavit of Adrian Benepe in Support of Verified Petition, sworn to March 5, 2019 ("Benepe Aff.") ¶ 12.

The City is legally obligated by the 2012 Consent Order to increase its use of green infrastructure to control CSOs. "Green spaces act as mini reservoirs that mitigate flooding during large storms . . . ." Benepe Aff. ¶ 14, and expanding green open space, parks or otherwise, is part of the City's effort to control CSO's by limiting stormwater runoff. Benepe Aff. ¶¶ 13-14.

The destruction of Elizabeth Street Garden and elimination of nearly all of the green, open space at that location is therefore contrary to the goals of the City's green infrastructure policy and the 2012 Consent Order.

Furthermore, on June 2, 2017 Mayor de Blasio committed New York City to the principals and goals of the Paris Agreement, which aims, *inter alia*, to hold the global average temperature increase below two degrees Celsius. Executive Order No. 26 (Jun. 2, 2017). Green spaces contribute to efforts to limit climate change: "The open green space of urban parks can produce an 'oasis effect,' cooling the immediate area by roughly 2.7 to 7.2 degrees Fahrenheit. This effect can extend beyond the park's boundary and into the surrounding neighborhood, cooling nearby blocks." Benepe Aff. ¶ 17. Furthermore,

> An urban tree canopy is effective at sequestering carbon dioxide and reducing local energy consumption, with some studies suggesting that a tree planted in a city is more effective at mitigating climate change than a tree planted in a rural setting. In addition to absorbing carbon dioxide, urban trees also trap and filter air pollution particulate matter. Trees also contribute to the general cooling effect of parks, helping make the surrounding neighborhood more climate resilient.

Benepe Aff. ¶ 18.

Destroying Elizabeth Street Garden is thus contrary to the City's policy directed at taking steps to limit the increase in global average temperature.

As the foregoing discussion makes clear, HPD did not take a hard look at public policy. Had it done so it would have found that the destruction and development of Elizabeth Street Garden may have significant adverse impacts and merits an EIS. Benepe Aff. ¶ 22. The court should vacate and annul the negative declaration and order that an EIS be prepared.

F. HPD Failed to Take a Hard Look at Cumulative Impacts

According to SEQRA regulations, a significant adverse impact on the environment is indicated by "changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in substantial adverse impact on the environment." 6 NYCRR 617.7(c)(1)(xi).

As set forth in the preceding sections, the destruction and development of Elizabeth Street Garden may have a significant adverse impact in several technical areas, including Land Use, Zoning and Public Policy; Open Space; Historic and Cultural Resources; and Neighborhood Character. Taken alone, the adverse impacts on the environment in any one of these technical areas is sufficiently significant to merit an EIS. But, under SEQRA, even if the adverse impact in no one area is found to be significant, the lead agency must assess whether, when considered together, there is a substantial adverse impact on the environment.

Here, the EAS failed to assess the cumulative impact of the destruction and development of Elizabeth Street Garden. Consequently, the EAS failed to satisfy the hard look requirement of SEQRA and CEQR. As the foregoing subsections indicate, had the EAS taken a hard look, it would have concluded that the project will have a significant adverse impact on the environment.

CONCLUSION

For the foregoing reasons, this Court should annul the Negative Declaration and EAS because they were affected by an error of law, failed to comply with lawful procedures, and was arbitrary, capricious and contrary to law. Moreover, had Respondents complied with the requirements of SEQRA and CEQR, they would have determined that an EIS was required due to significant adverse effects on the environment. Therefore, the Court should order an EIS to be prepared and enjoin Respondents from undertaking any action in furtherance of the destruction and development of Elizabeth Street Garden until they have complied with the requirements of SEQRA and CEQR and have prepared an EIS.

Dated: March 5, 2019
New York, New York

Respectfully submitted,

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