

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,  
ELIZABETH STREET, INC., ELIZABETH FIREHOUSE  
LLC and ALLAN REIVER,

Petitioners,

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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Index No. \_\_\_\_\_

**VERIFIED PETITION**

**ORAL ARGUMENT  
REQUESTED**

**PRELIMINARY STATEMENT**

1. This Article 78 proceeding is brought by Petitioners to enjoin Respondents from undertaking any additional action in furtherance of the destruction of Elizabeth Street Garden and the development of a seven-story mixed-use building in its place (the "Proposed Project") until Respondents have complied with their obligations under the State Environmental Quality Review Act ("SEQRA") and City Environmental Quality Review ("CEQR") and have prepared an Environmental Impact Statement ("EIS").

2. Petitioners also seek to annul the Environmental Assessment Statement prepared for and the Negative Declaration issued by Respondents on November 9, 2019 regarding the Proposed Project.

3. Petitioners bring this proceeding on the grounds that Respondents failed to comply with SEQRA and CEQR in multiple ways: (1) Respondents issued a negative declaration that was impermissibly conditioned; (2) Respondents' Negative Declaration was not published as required by SEQRA in the Environmental Notice Bulletin; (3) Respondents' EAS and Negative Declaration were affected by an error of law; and (4) respondents failed to take a hard look at relevant areas of environmental concern—specifically, Zoning, Open Space, Neighborhood Character, and Public Policy—with respect to the Proposed Project, and failed to recognize the adverse environmental impacts that may result from the Proposed Project, even when their own analysis revealed such impacts. If Respondents had fulfilled their legal obligations, they would have concluded that an EIS is required for the Proposed Project. Therefore, the EAS and Negative Declaration should be declared null and void and an EIS should be ordered.

#### **JURISDICTION**

4. The Court has jurisdiction over Petitioners' claims pursuant to C.P.L.R. § 7801.

#### **VENUE**

5. Venue is proper in New York City pursuant to C.P.L.R. § 506(b) and § 7804(b) because, inter alia, the relevant events took place and are taking place in New York County and because HPD's principal offices are located in New York County.

#### **PARTIES**

6. Petitioner ELIZABETH STREET GARDEN, INC. ("ESG") is a local, volunteer-based not-for-profit organization incorporated in the State of New York with its principal place of business in New York County. ESG's mission is to protect and preserve Elizabeth Street Garden (the "Garden" or "Elizabeth Street Garden") in its entirety as a public community green

space. ESG manages the operations and upkeep of the Garden, including providing free programs and events. ESG and its members will be negatively affected by the environmental impacts of the Proposed Project.

7. Petitioner RENEE GREEN is a resident of New York County. The entrance to her building is on Elizabeth Street, roughly 200 feet from Elizabeth Street Garden. She will be negatively affected by the environmental impacts of the Proposed Project. Ms. Green is the Chair of the Board of Directors of ESG.

8. Petitioner ELIZABETH STREET, INC. is a New York Corporation with its principal place of business in New York County. Elizabeth Street, Inc. leases the property where Elizabeth Street Garden is located, Block 493, Lot 30, from the City of New York on a month-to-month basis.

9. Petitioner ELIZABETH FIREHOUSE LLC is a New York limited liability company, owned by Little Italy LLC, a New York limited liability company of which Petitioner Allan Reiver is a member and manager, with its principal place of business in New York County. Elizabeth Firehouse LLC owns the historic firehouse property next to Elizabeth Street Garden.

10. Petitioner ALLAN REIVER is a resident of New York County. Mr. Reiver owns the historic firehouse next to Elizabeth Street Garden through Elizabeth Firehouse, LLC, where lives and operates an art gallery, the Elizabeth Street Gallery. He will be negatively affected by the environmental impacts of the Proposed Project. Through Elizabeth Street, Inc., Mr. Reiver has for more than 25 years leased and currently leases the property where the Garden is located from the City of New York (the "City") on a month-to-month basis. Mr. Reiver created Elizabeth Street Garden, dedicating substantial time and resources towards improving the lot and

eventually opening it as a public sculpture garden and green, open space that is used heavily by the local community.

11. Respondent the CITY OF NEW YORK is a municipal corporation.

12. Respondent DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT (“HPD”) is an agency of the City of New York. HPD is the lead agency for environmental review of the proposed destruction and development of Elizabeth Street Garden and is responsible for preparing an Environmental Assessment Statement and making a determination as to whether the action may include the potential for significant adverse impact on the environment.

13. Respondent MARIA TORRES-SPRINGER is the Commissioner of HPD. As Commissioner Ms. Torres-Springer oversees HPD activities, including the proposed destruction and development of Elizabeth Street Garden. Ms. Torres-Springer is sued in her official capacity.

#### **LEGAL FRAMEWORK & STATEMENT OF FACTS**

14. The destruction and development of Elizabeth Street Garden is an agency action subject to SEQRA and CEQR, which inject environmental considerations into governmental decision making.

15. Under SEQRA, HPD is required to take into account environmental as well as social and economic factors in reaching decisions on proposed activities.

16. HPD properly classified the destruction and development of Elizabeth Street Garden as a Type I Action because it will occur wholly within the Chinatown and Little Italy Historic District, which is listed on the National Register of Historic Places.

17. Because the destruction and development of Elizabeth Street Garden is a Type I Action, SEQRA required HPD to prepare a full Environmental Assessment Form (referred to

under CEQR and hereinafter as an “Environmental Assessment Statement” or “EAS”) to determine the environmental significance of the proposed action.

18. HPD is required by SEQRA to use the EAS to determine the significance of a Type I Action.

19. Pursuant to SEQRA, HPD must review the EAS and take a hard look at and thoroughly analyze relevant areas of environmental concern in order to determine if the destruction and development of Elizabeth Street Garden may include the potential for at least one significant adverse environmental impact. In doing so, HPD must study the same areas of environmental impact as would be contained in an EIS.

20. If HPD finds that the destruction and development of Elizabeth Street Garden may include the potential for at least one significant adverse environmental impact, then SEQRA requires that an EIS be prepared. SEQRA presumes that Type I Actions, such as the destruction and development of Elizabeth Street Garden, are likely to have a significant adverse environmental impacts may require an EIS.

21. If there will be no significant adverse effects, then a negative determination of significance, a negative declaration, may be issued.

22. When a negative declaration is issued for a Type I Action, notice of the negative declaration must be published in the Environmental Notice Bulletin (ENB) and the lead agency must provide notice to the ENB directly.

23. HPD’s determination of significance—whether positive, requiring an EIS, or negative—must be set forth in writing and provide a reasoned elaboration of the determination, including reference to any supporting documentation.

24. Here, HPD was required to prepare an EIS because the destruction and development of Elizabeth Street Garden may have a significant adverse impact on the environment.

25. CEQR is New York City's process for implementing SEQRA and cannot require less of an agency than SEQRA, that is, CEQR can be no less stringent than is SEQRA.

26. The CEQR Technical Manual provides guidance with respect to the procedures and substance of CEQR, as well as technical and methodological guidance for conducting environmental review.

### **Elizabeth Street Garden Today**

27. Elizabeth Street Garden is a beautifully landscaped, publicly-available green open space located in a part of Community District 2 that is sorely lacking in open space, let alone green open space. *See* Affidavit of Joseph Reiver in Support of Verified Petition, sworn to March 5, 2019 ("Reiver Aff."), Exhibit ("Ex.") A, Figure ("Fig.") 1.

28. The Garden is landscaped with a large lawn of lush green grass, seasonal flowers, including roses and daffodils, bushes, and numerous trees including two mature pear trees, one mature royal empress tree, and several young trees.

29. Also situated throughout Elizabeth Street Garden are a large number of statues and sculptures, some of significant historical value. For example, an iron gazebo designed by the Olmsted Brothers and a stone-and-granite balustrade designed by French landscape architect Jacques-Henri-Auguste Gréber figure prominently in the Garden and have been gifted by Mr. Reiver to the Elizabeth Street Garden in perpetuity. These unique works of art contribute to Elizabeth Street Garden's unique character as not only a garden but also a cultural destination. *See* Reiver Aff., Ex. A, Fig. 2.

30. Visitors to the Garden can meander along the paved walkways, rest on a bench or sit on the lawn and soak up the sun—even in winter. *See Reiver Aff., Ex. A., Fig. 2-4.*

31. The Garden is also used by local organizations and public schools to hold events and workshops. Over the past twelve to fifteen months at least 200 events were hosted at the Garden by various organizations including the YMCA, branches of the New York Public Library, and the Lower East Side Ecology Center. 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. *See Reiver Aff., Ex. A, Fig. 5-10, 12.*

#### **The History of Elizabeth Street Garden**

32. Elizabeth Street Garden has a long history as a site for public education and recreation.

33. Upon information and belief, the New York Public School Society of New York (the “Society”), privately incorporated in 1805 as the Free School Society, was a charitable organization that for many years was at the heart of the introduction and provision of public education in the City of New York.

34. Upon information and belief, from 1822 to 1853, when the Society transferred its properties to the City of New York, the Society established and operated its fifth public school on a portion of what is now the site of Elizabeth Street Garden.

35. Upon information and belief, an 1823 Memorial addressed to the Senate and Assembly of the State of New York and signed by the Vice-President of the Society on behalf of the Board of Trustees of the Society indicated that the five public schools theretofore established

by the Society “constitute[d] a real estate which will be held in perpetuity for the benefit of the lower classes of society.”

36. Furthermore, upon information and belief, in 1853 when the City ultimately acquired the Society’s properties for, upon information and belief, use in the public interest as public schools, the transfer was explicitly “subject to all the liens and encumbrances thereon” and “such portions of the property [] as have been granted to the Public School Society, subject to the trust that the same shall be devoted to the purposes of common schools, shall be held subject to such trust.”

37. The City of New York, upon information and belief, continued to operate the school at the Elizabeth Street Garden site as an educational and community resource until 1902.

38. Upon information and belief, in 1904, a larger school, P.S. 21, designed by master school builder C.B.J. Snyder, was opened at the Elizabeth Street Garden site.

39. Upon information and belief, P.S. No. 21 was designed with open space as a central feature of the property. Among the features of the new school property was a large playground and outdoor kindergarten—a raised flower garden terrace in which kindergarteners could play and attend class in the fresh air. Snyder maximized the amount of open space on the property building a below-street level auditorium. The resulting open space was publicly accessible and used as a community gathering place, as well as for school recess and recreation.

40. Upon information and belief, in 1927, the Board of Education acquired additional property to further expand the school and to enlarge the outdoor area available for school and public use. The recreational history of the property is still present today in the faded handball boundary lines on an adjacent building, which can be seen from the Garden.



41. Upon information and belief, P.S. 21 was demolished in the 1970s and the lot remained vacant until 1981 when the city built affordable housing on a portion of the site, reserving the remaining portion for recreational use in the Land Disposition Agreement. Specifically the Land Disposition Agreement gave the new owners permission to “enter and occupy” the northern portion of Lot 41—the 20,110 square feet that is now the Garden—and to maintain and use the space “exclusively” for “Recreational Use.”

42. However, the space intended for recreational use was not maintained and fell into disrepair until it was leased by Allan Reiver in 1991 under terms requiring that Mr. Reiver create an attractive viewing garden on the lot. Mr. Reiver cleaned the lot, planting trees, grass, and bushes and curating the arrangement of statuary and other works in the Garden.

43. In 2005, Mr. Reiver purchased 209 Elizabeth Street, a historic firehouse building, and made the garden publicly accessible through his ground-level gallery at 209 Elizabeth Street.

44. In 2013, Elizabeth Street Garden was opened to the public directly from Elizabeth Street and is now operated and maintained by ESG through its local volunteers.

45. Today Elizabeth Street Garden is publicly accessible seven days a week throughout the year, weather permitting, and offers educational, recreational and cultural programming to the community, in keeping with the property’s history.

### **Procedural History**

46. Upon information and belief, 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 3, negotiated a then non-public letter commitment from the Office of the Mayor of the City of New York for affordable housing to be built at the site of Elizabeth Street Garden.

47. From 2013 through 2016, Community Board 2 issued 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.

48. For example, Community Board 2 identified an alternative location within Community District 2 for the development of substantially more affordable housing for seniors than is possible on the site of Elizabeth Street Garden. Specifically, Community Board 2 proposed the development of 388 Hudson Street, a city-owned lot that, upon information and belief, had been designated as future parkland.

49. Although located in Community District 2, 388 Hudson Street is not located in City Council District 1, which is represented by Council Member Chin.

50. Upon information and belief, the City has refused to consider developing the 388 Hudson Street and preserving Elizabeth Street Garden.

51. On September 14, 2016, HPD 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.

52. 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.

53. In October 2018, 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.”

54. 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.

55. The Lead Agency Letter also described the size and location of the site for the Proposed Project and erroneously characterized the property—now occupied by a vibrant and flourishing garden and well-used community resource—as “vacant land.”

56. 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.

57. The Garden is an open, green space that contributes to the health and welfare of the community. As such, and according to the UDAA Act, it would be arbitrary and capricious and an abuse of discretion and contrary to law to designate the Garden as an UDAA.

58. The UDAA Act was passed to enable municipalities to better address and ameliorate municipally-owned areas that are:

slum or blighted, or which are becoming slum or blighted areas because of substandard, insanitary, deteriorated or deteriorating conditions, factors, and characteristics, with or without tangible physical blight, [the existence of which] constitutes a serious and growing menace, is injurious to the public safety, health, morals and welfare, contributes increasingly to the spread of crime, juvenile delinquency and disease, necessitates excessive and disproportionate expenditures of public funds for all forms of public service and maintenance and constitutes a negative influence on adjacent properties impairing their economic soundness and stability, thereby threatening the source of public revenues.

Gen. Mun. L. § 691. In keeping with these purposes, the UDAA Act requires,

In order to approve the proposal [of a project] for an urban development action area the governing body must by resolution first find that:

- (a) the present status of the area tends to impair or arrest the sound growth and development of the municipality;
- (b) the financial aid in the form of tax incentives, if any, to be provided by the municipality pursuant to section six hundred ninety-six of the article, is necessary to enable the project to be undertaken;
- (c) the area designation is consistent with the policy and purposes stated in section six hundred ninety-one of this article.

Gen. Mun. L. § 694(4) (emphasis added).

59. Subsequently, on November 13, 2018, HPD publicly released the full-form EAS, dated November 9, 2018, that was required under CEQR prepared because the proposed destruction of the Garden is a Type I action.

60. Also on November 13, 2018, HPD released the Negative Declaration, dated November 9, 2018, declaring, “HPD has completed its technical review of an Environmental Assessment Statement (EAS) dated September 24<sup>th</sup>, 2018 [sic] and has determined that the proposed actions will have no significant effect on the quality of the environment.”

61. On November 13, 2018 the City Planning Commission certified the Application for the Proposed Project as complete under the Uniform Land Use Review Procedure (“ULURP”).

62. On or about January 24, 2019, Community Board 2 adopted, by an overwhelming majority, the “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” (the “2019 CB2 Resolution”).

63. According to the 2019 CB2 Resolution,

The Proposed Development is flawed because it a) creates significant adverse environmental impacts, including the reduction of open space by more than 2% in an underserved neighborhood, b) relies on the designation of a beautiful, heavily-used and unique green open space as “blighted,” c) sells a city-owned educational asset for \$1 for non-permanent affordable housing and d) because a major portion of this site was dedicated by its owner, the Public School Society, in 1822 to use for educational purposes in perpetuity, and because the City took title to the property in 1853 subject to that restriction, the Garden should and must be preserved as educational parkland or be otherwise rededicated to permanent public use as an educational garden[.]

64. The 2019 CB2 Resolution specifically discussed the issue of open space, finding,

*inter alia:*

The Proposed Development provides 6,700 square feet of privately-owned publicly accessible open space that will be substantially covered in shadows for most of the day year-round due to a) its awkward L-shape, b) shadows from the 7-story Proposed Development and c) lack of southern sunlight blocked by the adjacent building and the mature trees in its courtyard (Shaded Open Space);

The Proposed Development fails to achieve the objectives of the RFP, which states “HPD recognizes that the space has become an important neighborhood amenity , as community members have come to value the lawns, trees and gardens as beautiful open space . . . [and so] . . . This public open space should, to the greatest extent possible, re-create current features such as lawns, trees, walks, and planting and seating areas with a variety of sun and shade conditions, and also to provide for continuation of current educational and recreational programs and events”;

The Proposed Development and presented renderings a) falsely attempt to classify the Breezeway as “open space,” even though it is not “unobstructed from the sky,” b) do not include required ADA circulation paths, which when added, will further significantly reduce any space for grassy lawn, nor c) provide access from both Mott and Elizabeth streets [sic.] . . . ;

...

The Proposed Development would destroy 100 % of the Elizabeth Street Garden and result in a loss of nearly 70% of the existing open space . . . , a substantial loss in a community and neighborhood so underserved by open

space that even a 1% decline in open space is significant and should at least result in substantial further analysis and completion of an EIS under City Environmental Quality Review (CEQR);

The EAS open space analysis is flawed because a) many of the open spaces in the ½-mile study area are not in excellent condition, none are gardens that are open year round and nearly all are 100%-paved, and b) it ignores the significant non-residential population that visits the neighborhood daily – more than 111,000 by subway alone – and should include an analysis of the impact of the combined residential and non-residential population on open space in a ¼-mile study area; and

Because the Garden is a green open space and the only majority pervious open space in the ½ and ¼ mile study area, removing this pervious land cover and replacing it with a building and impermeable surfaces will generate stormwater runoff and runs counter to the city’s own work as well as state and federal initiatives to reduce and mitigate stormwater runoff.

65. With respect to land use, the 2019 CB2 Resolution found, *inter alia*,

The Proposed Project does not meet the Urban Development Act [sic] requirements that the city-owned Garden site is a “slum or blighted” or “in deteriorated or deteriorating condition” and therefore should not be eligible to be designated as UDAA and UDDAP [sic] as defined under Article 16 of the State General Municipal Law[.]

66. The 2019 CB2 Resolution also raised concerns about the adverse impacts of the Proposed Project on quality of life—specifically, the importance of parks to health and well-being and the small size of the proposed studio units, which effectively “exclude[] applications from couples, partners, seniors with caregivers or children”—as well as on transportation.

67. On or about February 26, the Manhattan Borough President issued a Recommendation to the City Planning Commission with respect to the proposed destruction and development of Elizabeth Street Garden. The Manhattan Borough President recommended “approval with conditions . . . provided that the applicant:”

- (1) Make a more serious effort to design the building in order to generate at least 30% more open space than currently designed. This should be done in a way

that does not compromise the number of affordable units currently planned for the site and does not require breaking the height cap of the special district;

- (2) Requires permanent affordability of all housing units;
- (3) Requires all community facility space within the building provide services to the community in perpetuity;
- (4) Enters into an agreement with the New York City Parks Department so that the public open space is mapped as parkland and managed by the Parks Department; &
- (5) Continues community engagement and participatory design to ensure the open space will reflect the needs of the surrounding community.

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

#### FIRST CAUSE OF ACTION

#### THE NEGATIVE DECLARATION IS IMPERMISSIBLY CONDITIONED IN VIOLATION OF SEQRA'S LAWFUL PROCEDURES

69. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

70. According to the Negative Declaration the Proposed Project is a Type I action under SEQRA.

71. Conditioned negative declarations are not permitted for Type I actions under SEQRA.

72. The Negative Declaration imposes conditions on the Proposed Project with respect to Historic and Cultural Resources. Specifically, it states:

HPD on behalf of the project sponsor shall submit the final building design to LPC [Landmarks Preservation Commission] for review to ensure consistency with the design, massing, height, scale, fenestration pattern, materials and color of the new building and its historic context as referenced in the final EAS. This measure would require consultation with and review and acceptance by LPC, and

would also be required through the Land Disposition Agreement (LDA) between HPD and the project sponsor.

Additionally, in order to preclude construction-related impacts to buildings surrounding the site: 209 Elizabeth Street, 228 Mott Street, 230 Mott Street, and 232 Mott Street, a Construction Protection Plan (CPP) is required for these buildings, and shall be submitted to LPC for review and comment prior to construction. To avoid inadvertent demolition and/or construction-related damage to the surrounding resources from ground-borne construction-period vibrations, falling debris, collapse, etc., these buildings would be included in a CPP for historic structures that would be prepared in coordination with LPC and implemented in consultation with a licensed professional engineer.

The project sponsor would be responsible for implementing a CPP during all excavation and construction activities. The CPP would be developed in accordance with the requirements stipulated in the New York City Department of Buildings Technical Policy Procedure Notice #10/88 and LPC guidelines described in "Protection Programs for Landmarked Buildings." This measure would require consultation with and review and acceptance by LPC, and would also be required through the LDA between HPD and the project sponsor.

With implementation of the measures outlined above, no significant adverse impacts related to Historic Resources would be expected to occur during or following construction of the Proposed Project.

73. The Negative Declaration also imposes conditions with respect to Hazardous

Materials:

A Phase II Work Plan and Health and Safety Plan (HASP) will be submitted to HPD and the New York City Department of Environmental Protection (DEP) for review and approval prior to the start of any fieldwork. Based on the results of the Phase II Subsurface Investigation, a Remedial Action Plan (RAP) and construction Health and Safety Plan (CHASP) will be prepared and implemented during site redevelopment activities to address the removal and disposal of contaminated soils during the construction of the Proposed Project. No property disposition, funding, or construction will proceed without DEP's written approval of the RAP and CHASP. Upon completion of the construction activities, a Closure Report certified by a Professional Engineer of Architect will be submitted to HPD and DEP for review and approval. This report will demonstrate that all remediation activities have been implemented in accordance with the DEP-approved RAP and CHASP.

The Phase II investigation and remediation protocols outlined above will be required through provisions contained in the Land Disposition Agreement between HPD and the Project Sponsor. With implementation of these measures,



no significant adverse impacts related to hazardous materials would be expected to occur during or following construction of the Proposed Project.

74. The Supporting Statement for the Statement of No Significant Effect states:

The measures related to historic resources and hazardous materials described above would be implemented in connection with construction and/or the operation of the Proposed Development and would be required through provisions in the LDA between HPD and the project sponsor, as well as the applicable funding agreements between the project sponsor and HPD.

75. Because the Negative Declaration imposes certain conditions or “measures” as necessary to prevent adverse impacts on the environment, the Negative Declaration is properly classified as a conditional negative declaration and therefore violates SEQRA and CEQR.

76. Because the Negative Declaration violates SEQRA and CEQR, the Court should declare it null and void.

#### SECOND CAUSE OF ACTION

#### THE NEGATIVE DECLARATION WAS NOT PUBLISHED IN THE ENVIRONMENTAL NOTICE BULLETIN IN VIOLATION OF SEQRA’S LAWFUL PROCEDURES

77. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

78. Because the Negative Declaration violates SEQRA and CEQR, the Court should declare it null and void.

79. SEQRA requires that when a negative declaration is issued for a Type I Action, notice of the negative declaration must be published in the ENB. The lead agency is required to provide notice to the ENB directly.

80. The ENB is issued weekly on Wednesday.

81. As of March 5, 2019, the notice of the Negative Declaration had not been published in any issue of the ENB issued between November 9, 2018 and March 5, 2019.

82. Because notice of the Negative Declaration was not published in the ENB, the Negative Declaration did not comply with the lawful procedures required by SEQRA and should be annulled.

### THIRD CAUSE OF ACTION

#### THE NEGATIVE DECLARATION IS AFFECTED BY AN ERROR OF LAW

83. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

84. According to the EAS, Block 493, Lot 30, the site of Elizabeth Street Garden and the Proposed Project, is zoned C6-2 and is located in the Special Little Italy District (“SLID”). The SLID zoning regulations supersede the C6-2 zoning.

85. The EAS states that no action or approval, including a variance (bulk), is required by the Board of Standards and Appeals. This is an error of law because the Proposed Project does not comply with the SLID zoning regulations and would require a zoning variance, to the extent a variance is allowed under SLID regulations.

86. The EAS states that the maximum allowable floor area ratios (FARs) for the site are 6.02, 6.02 and 6.5 for residential, commercial and community facility development respectively. This is an error of law. The SLID regulations limit the FAR for through lots, such as the Elizabeth Street Garden site, to 4.1.

87. The EAS indicates that the Proposed Project would not result in “a change in zoning different from the surrounding zoning.” This is an error of law because the surrounding zoning is the SLID and the Proposed Project would not comply with such zoning and would require a zoning bulk zoning variance, to the extent one is available under the SLID zoning regulations.

88. The Negative Declaration acknowledges that the SLID regulations supersede the C6-2 zoning but, in conformity with the EAS, is silent as to the fact that the project does not comply with the SLID regulations.

89. SEQRA required HPD to use and review the EAS to determine the significance of the Proposed Project. The Negative Declaration was therefore affected by the errors of law contained in the EAS.

90. Because the Negative Declaration and the EAS were affected by an error of law they should be declared null and void.

#### FOURTH CAUSE OF ACTION

#### THE ENVIRONMENTAL ASSESSMENT STATEMENT VIOLATES SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT ZONING

91. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

92. HPD was required to take a “hard look” at the potential adverse impact that the Proposed Project would have on zoning.

93. The EAS arbitrarily, capriciously and contrary to law does not assess whether the Proposed Project will comply with the SLID zoning regulations, which are the controlling regulations applicable to the Elizabeth Street Garden site.

94. The SLID regulations impose a limit of 4.1 on the FAR of a through lot, such as the site of Elizabeth Street Garden. They also cap maximum lot coverage at 60 percent and require all buildings built after February 3, 1977 to have a rear yard of not less than 30 feet deep. Further, the SLID regulations require new buildings to be no more than seven stories or 75 feet high and make no exception for mechanical bulkheads.

95. The Proposed Project does not comply with the SLID regulations because it exceeds the maximum allowed FAR, exceeds the maximum allowed lot coverage, does not have a rear yard for the full length of the zoning lot, and exceeds the maximum allowed building height, given that the SLID regulations make no exception for mechanical bulkheads.

96. Because the EAS failed to assess and analyze the significant degree to which the Proposed Project does not comply with SLID regulations, HPD failed to take a hard look at zoning in violation of SEQRA and CEQR and the EAS and Negative Declaration should be declared null and void.

97. Because of the significant degree to which the Proposed Project does not comply with SLID regulations, the Proposed Project may have a significant adverse impact on the environment, mandating an EIS.

98. HPD failed to require an EIS in violation of SEQRA and CEQR. The Court should therefore order an EIS to be completed.

#### FIFTH CAUSE OF ACTION

#### THE ENVIRONMENTAL ASSESSMENT STATEMENT AND NEGATIVE DECLARATION VIOLATE SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT OPEN SPACE

99. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

100. HPD was required to take a “hard look” at the potential adverse impact that the Proposed Project would have on open space.

101. The Proposed Project will cause a net loss of publicly accessible open space in the relevant area.

102. According to the CEQR Technical Manual a net loss in publicly accessible open space indicated that a project may result in significant adverse open space impacts.

103. Elizabeth Street Garden is located in an area extremely underserved by open space, having an open space ratio (measured by acres of open space to one thousand residents) of .15 as compared with the citywide average of 1.5 and the citywide target of 2.5. The Proposed Project will further decrease this ratio by more than two percent.

104. According to the CEQR Technical Manual, in an area extremely underserved by open space a decrease in the open space ration of one percent may be considered significant, depending on the area of the City.

105. Because the Proposed Project results in a net loss of publicly accessible open space and will cause the open space ratio to decrease by more than two percent, the Proposed Project may result in adverse open space impacts. Therefore, an EIS was required.

106. HPD arbitrarily, capriciously and in violation of SEQRA and CEQR failed to take a hard look at open space. Had HPD taken a hard look at open space it would have concluded that the Proposed Project may result in adverse open space impacts and that an EIS was required.

107. SEQRA regulations and the CEQR Technical Manual recognize that a significant adverse impact on the environment “would occur if a project resulted in ‘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.’”

108. The Proposed Project will cause a substantial change in the use and intensity of use of open space and in the capacity to support existing uses. The Proposed Project will reduce that amount of open space at the site by nearly 70 percent, will replace a sunny oasis with a largely shaded area, and change an open, welcoming garden into an awkward, L-shaped space. These changes will impede the current uses of and activities that take place at the Garden.

109. The EAS and Negative Declaration arbitrarily, capriciously in violation of SEQRA and CEQR do not study the current use of Elizabeth Street Garden by the local and citywide communities or the change in use and capacity to support existing uses that will result from the Proposed Project.

110. HPD arbitrarily, capriciously and in violation of SEQRA and CEQR did not take a hard look at open space. Had HPD done so it would have concluded that the Proposed Project may have adverse open space impacts and that an EIS was required.

#### SIXTH CAUSE OF ACTION

##### THE NEGATIVE DECLARATION AND ENVIRONMENTAL ASSESSMENT STATEMENT VIOLATE SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT HISTORIC AND CULTURAL RESOURCES

111. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

112. HPD was required to take a “hard look” at the potential adverse impact that the Proposed Project would have with respect to architectural historic and cultural resources.

113. The Negative Declaration and EAS recognize the need for a Construction Protection Plan (“CPP”) to ensure that there are no adverse impacts on historical resources.

114. Because HPD recognized that the Proposed Project may result in adverse environmental impacts, an EIS was required under SEQRA.

115. HPD arbitrarily, capriciously and in violation of SEQRA and CEQR failed to find that an EIS was required.

116. The EAS and Negative Declaration arbitrarily, capriciously and contrary to law do not take a hard look at architectural historic resources because they do not adequately assess

the contributing historic resources in the study area, which is located within two historic districts listed on the National Register of Historic Places (“NRHP”).

117. The EAS identifies those buildings which are independently listed on the NRHP and/or by the Landmarks Preservation Commission while acknowledging only a handful of the numerous buildings that are recognized on the NRHP as contributing to the historical district.

118. The EAS and Negative Declaration arbitrarily, capriciously and contrary to law fail to comply with the requirements of the CEQR Technical Manual by failing to include a developed Construction Protection Plan (“CPP”) to address adverse construction-related impacts on nearby historical resources, such as those discussed above.

119. The EAS acknowledges that a CPP is necessary and states that it will take the CEQR Technical Manual into account, but because the CPP does not yet exist, HPD could not have taken a hard look at or thoroughly analyzed it.

120. Even if it the EAS had included a developed CPP to protect the historical resources acknowledged in the EAS, the EAS and the CPP would still fail to meet the hard look requirement because without having first sufficiently assessed the historical resources that may be adversely impacted by the Proposed Project, including by construction, the EAS cannot take a hard look at the adverse effects of the project on such resources nor can it adequately develop a plan to mitigate any such impacts.

121. The EAS violates the hard look requirement of SEQRA and CEQR with respect to architectural historic and cultural resources.

## SEVENTH CAUSE OF ACTION

### THE NEGATIVE DECLARATION AND ENVIRONMENTAL ASSESSMENT STATEMENT VIOLATES SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT NEIGHBORHOOD CHARACTER

122. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

123. SEQRA and CEQR obligate HPD to take a “hard look” at the potential adverse impact that the Proposed Project will have on neighborhood character.

124. Under the CEQR Technical Manual, the examination of a proposed action’s impact on neighborhood character “focuses on whether a defining feature of the neighborhood’s character may be significantly affected.”

125. The CEQR Technical Manual states that a neighborhood character assessment is “generally needed” if a project “has the potential to result in significant adverse impacts” with respect to: Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Open Space; Historic and Cultural Resources; Urban Design and Visual Resources; Shadows; Transportation; or Noise.

126. As alleged above, the Proposed Project may have significant adverse impacts on the environment in terms of zoning, open space, and historic and cultural resources, indicating that a neighborhood character assessment was needed.

127. The EAS arbitrarily, capriciously and contrary to law failed to take a hard look at neighborhood character.

128. Had HPD taken a hard look at neighborhood character it would have concluded that the Proposed Project may include the potential for adverse neighborhood character impacts and that an EIS was required.



129. The EAS violates the hard look requirement of SEQRA and CEQR with respect to neighborhood character.

#### EIGHTH CAUSE OF ACTION

##### THE NEGATIVE DECLARATION AND ENVIRONMENTAL ASSESSMENT STATEMENT VIOLATE SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT PUBLIC POLICY

130. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

131. HPD was required to take a “hard look” at the potential adverse impact of the Proposed Project on public policy.

132. In 2010, then Mayor Bloomberg announced the NYC Green Infrastructure Plan and committed 1.5 billion dollars over 20 years to its implementation.

133. Subsequently, in 2012, the City entered into an Order on Consent with the New York State Department of Environmental Conservation to address violations of law with respect to combined sewer overflows (CSOs).

134. CSOs are defined in the Order on Consent as “discharges of untreated domestic sewage from combined sewer systems, and industrial wastewaters, combined with storm water. 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.”

135. 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 storm water runoff so as to reduce CSOs.

136. Under Executive Order 26, issued in June 2017, the City is committed to supporting the goals and aims of the Paris Agreement, including the goal of limiting the global average temperature increase to less than two degrees Celsius.

137. HPD arbitrarily, capriciously and contrary to law does not acknowledge the Order on Consent, let alone take a hard look at, the compatibility of the Proposed Project, which will destroy open green space, an essential resource for combatting CSOs and climate change, with the City's obligation to take affirmative steps to reduce CSOs and to take steps to limit climate change.

138. HPD violated the hard look requirement of SEQRA and CEQR with respect to public policy. Had HPD taken a hard look at public policy it would have concluded that the Proposed Project may have adverse public policy impacts and that an EIS was required.

#### NINTH CAUSE OF ACTION

#### THE NEGATIVE DECLARATION AND ENVIRONMENTAL ASSESSMENT STATEMENT VIOLATE SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT CUMULATIVE IMPACTS

139. Petitioners repeat and re-allege each and every allegation set forth in the paragraphs above.

140. HPD was required to take a hard look at the potential cumulative environmental impacts of the Proposed Project.

141. SEQR regulations and the CEQR Technical Manual recognize that a significant adverse impact on the environment may occur when a project causes “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.”

142. The EAS arbitrarily, capriciously and contrary to law fails to consider, let alone take a hard look at, the cumulative impacts of the changes to the environment that may result from the Proposed Project.

143. The Proposed Project will have an impact in several technical areas, including Land Use, Zoning and Public Policy, Open Space, Shadows, Historical and Cultural Resources, Neighborhood Character and Construction.

144. Even if the Proposed Project will not have a significant adverse impact on the environment with respect to any single technical area, SEQRA regulations indicate that cumulative impacts should be evaluated. The EAS did not undertake such an evaluation.

145. HPD violated the hard look requirement of SEQRA and CEQR with respect to cumulative impacts. Had HPD taken a hard look at cumulative impacts HPD would have concluded that the Proposed Project may have significant cumulative adverse environmental impacts and that an EIS was required.

#### RELIEF REQUESTED

WHEREFORE Petitioner respectfully request that the Court:

- A. Annul the November 9, 2019 Environmental Assessment Statement and the November 9, 2019 Negative Declaration;
- B. Order Respondents to prepare an Environmental Impact Statement in compliance with SEQRA and CEQR;
- C. Enjoin Respondents from undertaking any action in furtherance of the Proposed Project until they have complied with the requirements of SEQRA and CEQR and have prepared an Environmental Impact Statement;
- D. Award attorneys' fees and costs in this action; and

E. Grant such other and further relief as the Court deems equitable and just.

Dated: March 5, 2019  
New York, New York

Respectfully submitted,

By: Norman Siegel  
Norman Siegel

By: Herbert Teitelbaum  
Herbert Teitelbaum *HS*

By: Kate Fletcher  
Kate Fletcher

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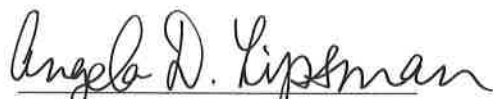
**VERIFICATION**

STATE OF NEW YORK    )  
  ) ss.:  
COUNTY OF NEW YORK )

RENEE GREEN, being duly sworn, deposes and says, that deponent is a Petitioner in the within action; that deponent has read the foregoing Petition and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to matter therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

  
RENEE GREEN

Sworn to me this 5<sup>th</sup> day of March 2019

  
Notary Public

ANGELA DANIELLE LIPSMAN  
Notary Public, State of New York  
Registration #02LI6287740  
Qualified In New York County  
Commission Expires Aug. 19, 2021