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

Respondents.

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Index No. 152341/2019

Hon. Debra A. James

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' AMENDED 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 starved for any kind of open space, let alone green space. Yet, while nearby sites owned by the City of New York (the "City") lay vacant and minimally used, Respondents have chosen to destroy Elizabeth Street Garden to build a seven-story mixed use building that fronts on Elizabeth Street and is set back from Mott Street, which will include 123 studio-size units of affordable senior housing, as well as office and retail space (the "Proposed Project").

The proposed destruction and development of Elizabeth Street Garden was subject to review under the State Environmental Quality Review Act ("SEQRA") and related regulations and the City's implementing procedures, City Environment Quality Review (CEQR), as well as the Uniform Land Use Review Procedure ("ULURP"). On November 9, 2018, Respondent Department of Housing Preservation and Development ("HPD") issued a Negative Declaration (the "Neg. Decl."), finding that the Proposed Project would have no significant adverse environmental impact.

However, it was affected by an error of zoning law because it relied on the November 9, 2018 Environmental Assessment Statement (the "EAS") which erroneously put forth that the Proposed Project complied with applicable zoning regulations. The Neg. Decl. is also arbitrary, capricious and in violation of law because HPD did not take a hard look at and thoroughly analyze the relevant areas of environmental concern—specifically, zoning, open space, historic and cultural resources, neighborhood character and public policy. Having failed to take a hard look, Respondents also failed to acknowledge the need for and to require an Environmental Impact Statement ("EIS"). [1] The Neg. Decl. is also improper under SEQRA because it was conditioned on measures specified in

[1] "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).

the Neg. Decl. itself and required in the Land Disposition Agreement and funding agreements. Respondents also did not fully comply with the procedures required by SEQRA, which are strictly enforced, insofar as the Neg. Decl. was not published in the Environmental Notice Bulletin until fifteen days after the original Verified Petition was filed in this proceeding.[2]

Further, because the ULURP application to submitted to the New York City Planning Commission ("CPC") and the New York City Council ("City Council") erroneously represented that the Proposed Project was pursuant to zoning and because the CPC and City Council relied on the Neg. Decl., which was affected by the error relating to zoning, the CPC's and City Council's decisions to approve and approve with modification, respectively, the ULURP application for the Proposed Project should be annulled.

STATEMENT OF FACTS[3]

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 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 tree, and several young trees. Reiver Aff. ¶¶ 8-9; Reiver Aff., Exhibit ("Ex.") A, Figure ("Fig.") 1-2. A large number of statues and sculptures, several of significant historical value, figure prominently in the Garden, contributing to its unique character and making it a cultural destination. Reiver Aff. ¶ 10; Reiver Aff., Ex. A, Fig. 3.

Local organizations, such as the YMCA, branches of the New York Public Library, and the

[2] The ENB is a weekly publication of the New York State Department of Environmental Conservation. 6 NYCRR § 617.2(o).
[3] For a detailed statement of the facts, the Court is respectfully referred to the Amended Verified Petition, and the Affidavit of Joseph Reiver in Support of Verified Petition, sworn to March 5, 2019, Doc. No. 14 ("Reiver Aff.").

Lower East Side Ecology Center, as well as public schools, host events and workshops in the Garden. Over the past two years, at least 200 events were hosted at the Garden, in addition to educational events for more than 750 public school students, including workshops organized with two public schools. Reiver Aff. ¶¶ 18-21; Amended Affidavit of Geoffrey K. Clark in Support of Amended Verified Petition, sworn to August 15, 2019 ("Amd. Clark Aff.") ¶ 12(c).

Elizabeth Street Garden has long been used as a site for public education and recreation. From 1822 until 1902 the Garden was the site of a public school, operated first by the Free School Society (the "Society"), later renamed the Public School Society, and then by the City. In 1903, the City reopened a larger school on the site, which remained in operation until the 1970s, approximately, when it was torn down. *See* Amended Verified Petition (the "Amd. Pet.") ¶¶ 54-62.

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* Amd. Pet. ¶¶ 62-63. Mr. Reiver transformed the property, eventually turning it into an attractive garden. In 2005, Mr. Reiver made the garden publicly accessible without fee through his gallery at 209 Elizabeth Street. 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* Id. ¶¶ 64-66.

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, including both children and adults. Reiver Aff. ¶¶ 16-21.

Procedural History

In or around the summer of 2013, Community Board 2 ("CB2") 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, CB2 issued four resolutions supporting the permanent preservation of the Garden in its entirety and urging Respondents to look to other sites in Community District 2 that to this day remain available to build affordable housing. .

Nevertheless, HPD, on September 14, 2016, issued a Request for Proposals for a "mixed-use affordable housing development for seniors" at the site of Elizabeth Street Garden. In December 2017, HPD announced that a development team had been chosen.

Approximately one year later, 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," Lead Agency Letter at 1. The letter also publicly revealed for the first time that HPD would seek to have the Garden designated an Urban Development Action Area ("UDAA") and the Proposed Project designated an Urban Development Action Area Project ("UDAAP") pursuant to the Urban Development Action Area Act ("UDAA Act"), Gen. Mun. L., Ch. 24, Art. 16, which was passed to enable municipalities to improve municipally-owned land that is slum or blighted or is becoming slum or blighted. *See* Gen. Mun. L. § 691.

On November 13, 2018, HPD released the EAS and Neg. Decl., both dated November 9, 2018.[4] Also on November 13, the CPC certified as complete the required ULURP application for the designation of the Garden as an UDAA and of the Proposed Project as an UDAA Project ("UDAAP"), as well as for the disposition of City-owned land.

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

On or about January 24, 2019, CB2 adopted, by an overwhelming majority, a resolution to deny the ULURP Application, citing, *inter alia*, concern over significant adverse environmental impacts, especially the loss of open space. *See* Manhattan CB2, *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 recommended "approval with conditions" of the ULURP Application. *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). A key condition required that a serious effort be made to increase the amount of open space by at least 30 percent. *See Id.* at 7.

The ULURP application for the Proposed Project, which was modified on March 5, 2019 to drop the request for UDAA and UDAAP designation but to retain the request for disposition of City-owned land (the "Revised ULURP Application"),[5] was ultimately approved by the CPC on April 10, 2019 (the "CPC Approval") and by the City Council, with modifications, on June 26, 2019 in City Council Resolution No. 985 ("Res. 985").

LEGAL FRAMEWORK

I. ENVIRONMENTAL REVIEW: SEQRA AND CEQR

The destruction and development of Elizabeth Street Garden is an agency action subject to SEQRA and CEQR. "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*

[5] The March 5, 2019 ULURP Application is appended hereto as Appendix C.

Colonie, 3 N.Y.3d 508, 515 (2004) (internal citations omitted). With 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 ("ECL") § 8-0103(7) (McKinney). Further, "[t]he Legislature adopted SEQRA with the express intent that . . . SEQRA's policies statutes and regulations should be implemented 'to the fullest extent possible,'" *N.Y. City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347 (2003) (quoting ECL § 8-0103(6)), creating "an elaborate procedural framework," *Id.* at 347, and requiring "strict compliance." *Town Bd. of Colonie*, 3 N.Y.3d at 515 (quoting *Matter of Merson v McNally*, 90 N.Y.2d 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 (1st Dep't 1996), *as modified* (Oct. 1, 1996) (internal citations omitted). SEQRA requires an EIS when an action "may include the potential for at least one significant adverse environmental impact." 6 NYCRR § 617.7(a)(1).[6] This is a "relatively low" threshold. *Chinese Staff & Workers Assn. v. City of N.Y.*, 68 N.Y.2d 359, 364 (1986). An EIS can be avoided only when 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." *Town Bd. of Colonie*, 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)). Actions that are "wholly or partially within . . . any historic building, structure, facility, site or district . . . that is listed

[6] In June 2018, the New York State Department of Environmental Conservation adopted amendments to 6 NYCRR Part 617, the regulations pertaining to State Environmental Quality Review. These amendments are applicable to "actions for which a determination of significance has not been made prior to January 1, 2019." 6 NYCRR § 617.19 (2018). The determination of significance for the Proposed Project was made on November 9, 2018; therefore the 2018 amendments are inapplicable. Because "[a]ctions for which a determination of significance has been made prior to January 1, 2019 must comply with this Part effective July 3, 2001," *id.*, all citations to 6 NYCRR Part 617 in this Memorandum are to the pre-2018 amendment regulations that went into effect in 2001.

on the National Register of Historic Places," 6 NYCRR § 617.4(b)(9), are Type I actions. Because Elizabeth Street Garden is located entirely within the nationally registered Chinatown and Little Italy Historic District, the Proposed Project is a Type I action.

In order to determine whether an action will require an EIS, an environmental assessment statement must be prepared.[7] For Type I Actions, a full EAS is required. 6 NYCRR § 617.2(2). The lead agency,[8]—here, HPD—must then "review" the EAS, the criteria for determining significance and "any other supporting information to identify relevant areas of environmental concern;" "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). In reviewing a lead agency's determination of significance, courts ask whether the lead agency took a "hard look" at "the relevant areas of environmental concern." *Chinese Staff & Workers Assn.*, 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." *Chinese Staff & Workers Assn.*, 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).

[7] 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.

[8] 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, 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 Environmental Notice Bulletin and to provide a minimum 30-day public comment period. 6 NYCRR § 617.7(d)(1)(iv).

In the City of New York, detailed technical guidance and methodologies for carrying out mandated environmental review is provided in the CEQR Technical Manual ("CEQR TM"), which "provides guidance . . . in the procedures and substance of the City's Environmental Quality Review (CEQR) process." CEQR TM, Intro. at Intro.-1 (Mar. 2014, revised Apr. 2016).[9]

II. LAND USE REVIEW: ULURP

The New York City Charter (the "City Charter") sets forth the requirements of ULRUP and City Council review in Sections 197-c and 197-d. Under the ULURP, applications for the disposition

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

of City-owned land, in addition to certain other actions, are subject to the process for public review. See City Charter §§ 197-c(a), 197-d(a),(b). Once an application—which includes information and documentation relating to environmental review—has been filed, it must be certified as complete by the CPC. *Id.* § 197-c(b)-(c). Upon being certified as complete, an application is sent to any affected community board. *Id.* § 197-c(e). An affected community board must notify the public of the application, hold a public hearing on the application, and submit a written recommendation to the CPC and affected borough president within 60 days of receipt of the application. *Id.* If authorized by the City Charter, the community board may waive the right to hold a hearing and submit a recommendation. *Id.*

As relevant here, the next step under the ULURP is for the borough president to submit a written recommendation or waiver thereof to the CPC within 30 days of receipt of the community board's recommendation. City Charter § 197-c(g). Within sixty days of the expiration of the time allowed for the filing of the borough president's recommendation or waiver, the CPC is required to approve, approve with modifications, or disapprove an application. *Id.* § 197-c(h). The CPC must provide notice of and hold a public hearing prior to taking any action on an application. *Id.* § 197-c(h), (k). Where the CPC's action modifies or disapproves a written recommendation by the community board, borough president or borough board, the CPC must provide a written explanation of the reason for such action. *Id.* § 197-c(h).

The CPC's decision and accompanying documents are then filed with the City Council. City Charter § 197-d(a). The City Council is required to review a subset of such CPC decisions. *Id.* § 197-d(b)(1)-(2). For all other such CPC decisions, City Council review is at the discretion of the City Council, which has 20 days to determine whether to review the CPC decision. *Id.* § 197-d(b)(3). If a decision is reviewed by the City Council, within 50 days of the CPC's filing its decision with the

City Council, the City Council must give notice of and hold a public hearing and take final action on the matter, by approving, approving with modifications, or disapproving the CPC's decision. *Id.* § 197-d(c). Before approving with modification a decision of the CPC, the City Council must file the text of such modification with the CPC. *Id.* § 197-d(d). The CPC is then required to file with the City Council a written statement indicating whether the modification will require additional environmental or public review. *Id.* If no additional review is required, the CPC may also file with the City Council, its recommendation on the modification and any proposed amendment to the modification. *Id.* Thereafter, the City Council may approve the modification, with or without the CPC's suggested amendments. *Id.*

ARGUMENT

A determination challenged pursuant to Article 78 of the New York Civil Procedure Law and Rules, may be reviewed for "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary, capricious or an abuse of discretion." C.P.L.R. 7803.

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." *N.Y. City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d at 348 (internal quotations 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 quotations and citations omitted.).

The Neg. Decl. should be annulled because (i) it was made in violation of lawful procedure because it was impermissibly conditioned and was not published in the Environmental Notice Bulletin, (ii) HPD's negative declaration was affected by an error of law because, contrary to the

EAS on which HPD relied, the Proposed Project violates the Special Little Italy District zoning regulations; and (iii) it 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; had HPD taken a hard look, it would have found an EIS was required.

Additionally, because the CPC and the City Council relied on the Neg. Decl., the CPC Approval and Res. 985 must also be annulled.

III. HPD'S NEGATIVE DECLARATION VIOLATED LAWFUL PROCEDURE

A. HPD's Negative Declaration Was Impermissibly Conditioned.

The Negative Declaration ("ND") issued by HPD impermissibly imposes conditions in order to prevent significant adverse impacts related to historic resources and hazardous materials. With respect to hazardous materials, the Neg. Decl. 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 must demonstrate that all remediation activity was conducted in accordance with the DEP-approved RAP and CHASP.

Neg. Decl. at 3-4. With respect to historical resources, the Neg. Decl. requires:

> (iv) The final building design must be submitted to and approved by the Landmarks Preservation Commission ("LPC") for review 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 would be required in the LDA.

Neg. Decl. 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." Neg. Decl. 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 at752 (referencing 6 NYCRR § 617.2(h)). As recognized by HPD in the ND, *see* Neg. Decl. 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 Neg. Decl. explicitly imposes conditions "in order to ensure that there are no significant adverse impacts associated with historic resources and hazardous materials." Neg. Decl. at 2. The Neg. Decl. 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. Amd. 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, as here, "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. The Neg. Decl. imposed conditions with respect to historical resources and hazardous materials expressly to ensure that there would be no significant adverse impacts, thereby recognizing that there may in fact be such adverse impacts. *See* Neg. Decl. at 2. As well, Elizabeth Street Garden is located in Chinatown and Little Italy Historic District and Special Little Italy District, environmentally sensitive areas.

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 Neg. Decl. issued by HPD falls afoul of the second prong's proscriptions. First, HPD issued the Neg. Decl. "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," Neg. Decl. at 2, and concluding that "with implementation of the [specified] measures, no significant adverse impacts . . . would be expected to occur," Neg. Decl. 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 Neg. Decl. 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. Neg. Decl. 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.

In *Citizens Against Retail Sprawl ex rel. Ciancio v. Giza*, 280 A.D.2d 234 (4th Dep't 2001), the Town Board issued a negative declaration and adopted a resolution based on the negative declaration to rezone the area at issue. 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." 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. Similarly, in *Miller v. City of Lockport*, 210 A.D.2d 955 (4th Dep't 1994), the court ruled that the lead agency's negative declaration was a conditioned negative declaration where, "[i]n support of the negative declaration, the [lead agency] stated that, to better ensure reduced environmental impacts, conditions were being imposed on the special use permit for the facility." *Id.* at 956-57.

In short, the Neg. Decl. issued by HPD was impermissibly conditioned in violation of SEQRA. It must be 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 Neg. Decl. recognized may result from the destruction and development of the Garden.

B. HPD Failed to Publish the Negative Declaration As Required By SEQRA.

The Neg. Decl. issued by HPD should be annulled because it was not published in the ENB until after Petitioners challenged this failure in these proceedings. 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 ENB. 6 NYCRR § 617.12(c)(1). The lead agency is required to provide notice to the ENB directly. *Id.* HPD issued the Neg. Decl. on November 9, 2018 and made it public on November 13, 2018. But, as of March 5, 2019, when the original Verified Petition was filed in these proceedings, notice of the Neg. Decl. was not contained in any issue of the ENB issued after November 9, 2018 up until and including, March 5, 2019. *See* Amended Affirmation of Kate Fletcher in Support of Amended Verified Petition, dated August 15, 2019 ("Amd. Fletcher Aff.")

Ex. A.

"SEQRA's policies, statutes, and regulations should be implemented 'to the fullest extent possible.'" *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347 (2003) (quoting ECL 8-0103(6)). The Court of Appeals has made clear the importance of literal adherence to SEQRA's procedures:

> SEQRA's policy . . . 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. . . . 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. at 348 (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.*

Although the court in *Dillon v. Town of Montour*, 18 Misc. 3d 1109(A) (unreported) (Sup. Ct. Schuyler Cnty. 2007) (attached as Ex. B to Amd. Fletcher Aff.), found failure to publish did not invalidate a negative declaration, it mistakenly relied on inapplicable cases. In *Village of Skaneateles v. Board of Educ.*, 180 Misc. 2d 591, 594 (Sup. Ct. Albany Cnty. 1999), the issue was not reached by the court. *Id.* at 594-598, and the other cases relied in *Dillon* concerned timing requirements, not the publication requirement.[10]

The Neg. Decl. was not published in the ENB until after litigation was filed challenging this

[10] *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 (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 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.).

failure. *See* Amd. Fletcher Aff. Ex. C. Therefore the Neg. Decl. should be annulled.

IV. HPD'S NEGATIVE DECLARATION WAS AFFECTED BY A MATERIAL ERROR OF LAW

The Proposed Project directly violates and is incompatible with the objectives of the Special Little Italy District ("SLID"), as defined and regulated in Article X, Ch. 9 of the Zoning Resolution, in which Elizabeth Street Garden is located. The EAS erroneously indicates that the Proposed Project would neither result in "a change in zoning different from the surrounding zoning," EAS Full Form at 6, nor "generate . . . structures that would be incompatible with the underlying zoning." EAS, Attachment B: Supplemental Screening, B-2.

The SLID zoning regulations were enacted in 1977. The CPC report accompanying the amendment of the Zoning Resolution ("ZR") to establish the SLID indicates that the objective of the special district was to "preserve the special character of the neighborhood" by, inter alia, "maintaining the street wall while providing open space and landscaping in the rear of buildings." CPC, Report N 760061 ZRM, at 2 (Jan. 3, 1977). Accordingly, the SLID zoning regulations applicable to the "Preservation Area," ZR 109-03, where Elizabeth Street Garden is located, *see* ZR 109-03, Appx. A, do not allow buildings to be set back from the front lot line. Affidavit of Howard Goldman in Support of Petitioners' Amended Verified Petition, sworn to Aug. 15, 2019 ("Goldman Aff."), ¶¶ 3-6. Specifically, the special front wall regulations for the Preservation Area provide:

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

ZR § 109-131. The Proposed Project does not comply with ZR § 109-131. Goldman Aff. ¶¶ 3-6.

The lot where Elizabeth Street Garden is located is in part a through lot, with a portion of the lot running from Elizabeth Street through to Mott Street. The Elizabeth Street Garden lot therefore has two "front lot lines," one on Elizabeth Street and one on Mott Street. *See* ZR § 12-10 (defining

"front lot line" as a "street line"); Goldman Aff. ¶ 6. Under ZR § 109-131, a front building wall—*i.e.* a street-facing wall—must be built along the front lot line. Id. ¶ 7. The Proposed Project, as described and pictured in the EAS, as well as in the ULURP Application, includes a single seven-story building that is set back from the front lot line at Mott Street. The setback is not *de minimis* and is starkly incompatible with the objectives of the SLID: the portion of the Mott Street front building wall where the covered passage is located is set back approximately 136.5 feet from the Mott Street lot line, while the rest of the Mott Street front building wall is set back approximately 60 feet from the Mott Street lot line. *See* EAS, Attachment B, Fig. B-4; Goldman Aff. ¶ 6.

The zoning discussion contained in the EAS, minimal though it was, was based on a misrepresentation and an error of law, indicating the Proposed Project would comply with applicable zoning regulations.[11] Goldman Aff. ¶ 2This Court should therefore annul the Neg. Decl. C.P.L.R. § 7803(3); *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"); *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"). If the Neg. Decl. is annulled, so too must be the CPC Approval and Res. 985, which relied on the Neg. Decl. Goldman Aff. ¶ 9.

Additionally, Under ZR § 109-514, in order to lawfully build the Proposed Project as depicted in the EAS and the ULURP Application, an authorization to modify ZR § 109-131 must be granted by the CPC. Such an authorization is itself a discretionary action subject to environmental

[11] The ULURP Application was similarly defective, including several architectural drawings and a basic zoning analysis that HPD and the development team incorrectly claimed complied with SLID zoning. The public hearings, as well as the reviews and decisions made by Manhattan Community Board 2, the Borough President, the CPC and the City Council were all premised on a substantial error of law.

review and public review. Goldman Aff. ¶ 8.

V. THE NEGATIVE DECLARATION WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW: HPD FAILED TO TAKE A HARD LOOK AT RELEVANT AREAS OF ENVIRONMENTAL CONCERN

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, Inc. v. Bloomberg*, 6 Misc. 3d 814, 823 (Sup. Ct. N.Y. Cnty. 2004), *aff'd as modified on other grounds,* 18 A.D.3d 395 (2005). The Neg. Decl. was based on an EAS that failed to adequately identify and address environmental issues in a number of technical areas identified by the CEQR TM. The potential for significant adverse impacts on the environment in any one area indicates that an EIS is required. But, even if the adverse impact with respect to any one technical area alone is not sufficient to be "significant," when considered cumulatively, the destruction and development of Elizabeth Street Garden is likely to have a significant adverse impact on the environment, requiring that the Neg. Decl., CPC Decision, and Res. 985 be annulled and that an EIS be prepared.

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 TM, Ch. 4, at 4-1. As discussed above, see *supra* Part II, the EAS erroneously indicated that the Proposed Project complied with applicable zoning. According to the CEQR TM, "a preliminary assessment, which includes a basic description of existing and future land uses and zoning, should be provided for all projects that would affect land or would change zoning on a site." CEQR TM, Ch. 4, at 4-9. Further, "for most projects, the project description includes a detailed description of the zoning changes." *Id.* at 4-12.

The EAS failed to adequately describe existing zoning, omitting any mention of the SLID special front wall regulations. *See* Part IV, *supra*. The EAS should have disclosed and assessed the

negative impact caused by the Proposed Project's violation of the SLID zoning regulations. HPD relied on the EAS to reach the determination that there would be no adverse environmental impacts with respect to zoning. Because the EAS was plainly inadequate with respect to zoning, HPD did not satisfy the hard look requirement and the EAS should be annulled.

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

The EAS's open space analysis is both flawed and substantively incomplete. Consequently, HPD failed to meet the hard look requirements of SEQRA and CEQR. A hard look at open space would have led HPD to the unavoidable conclusion 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 . . . open space or recreational resources, or in its capacity to support existing uses." 6 NYCRR § 617.7(c)(1)(viii); CEQR TM, Ch. 7, at 7-18.

The CEQR TM 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 TM, Open Space Appx., 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, C-17. Under the CEQR TM, "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 TM, 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, C-17; *see also* Amd. Clark Aff. ¶¶ 21, indicating that there may be

significant adverse open space impacts. Consequently, an EIS was required. Amd. Clark Aff. ¶ 23.[12]

Moreover, the EAS improperly argues that various "qualitative" "mitigating factors" can overcome the potential significant adverse impacts on open space. Amd. Clark Aff. ¶ 24; 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. Amd. Clark Aff. ¶ 25. 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. Amd. Clark Aff. ¶ 25. Moreover, even if Washington Square Park is considered, the study area is still "drastically underserved" by open space. Amd. Clark Aff. ¶ 25. 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. Amd. Clark Aff. ¶ 31.

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. Amd. Clark Aff. ¶ 27. 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.

[12] 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, C-17. Furthermore, neither Attachment C, nor the Neg. Decl. 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* Amd. Clark Aff. ¶ 22-22; 6 NYCRR § 617.7(b)(2)-(3).

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, Doc. No.15, 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 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—also contribute to the educational opportunities for young children and public school students. 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* Amd. Clark Aff. ¶¶ 16-18; 30. The large amount of shade that will be cast over the limited open space will have an adverse impact on the open space. *Id.* The shadow will greatly impede current uses of Elizabeth Street Garden, making the remaining space unable to sustain the same lush plantings, and possibly entirely unusable in 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* CB2 Resolution at 14, will be far smaller than the current lawn and will likely be unable to

accommodate the number of participants that currently enjoy yoga and Qi Gong classes and other workshops in the Garden. Amd. Clark Aff. ¶ 32; 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. Amd. Clark Aff. ¶ 26; 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. Amd. Clark Aff. ¶ 29. 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," Amd. Clark Aff. ¶ 28; many are paved ball courts or playgrounds, not green spaces. Amd. Clark Aff. ¶ 32; Reiver Aff. ¶ 28. A number of the spaces are too small to be community gathering places. Amd. Clark Aff. ¶ 32. 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. Amd. Clark Aff. ¶ 29.

An EIS is required because the open space ratio in the study area will decrease by more than one percent. Furthermore, HPD failed to take a hard look at the use of the Garden and other open spaces in the study area. Had HPD taken a hard look, it would have concluded that the destruction

and development of Elizabeth Street Garden may have a significant adverse impact on open space and an EIS is required.

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

As an initial matter, as discussed above, see *infra* Part I(A), the Neg. Decl., in imposing "measures" to ensure there will not be significant adverse impacts on historical resources, finds that such adverse impacts may occur. An EIS was therefore required. 6 NYCRR § 617.7(a)(1).

In addition, the EAS is deficient and fails to take a hard look at historical resources.[13] When assessing architectural historic resources, the initial step under the CEQR TM is to identify all known historical resources within the study area—usually the area within a 400 foot radius of the project site. CEQR TM, Ch. 9, 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. The EAS notes three contributing buildings located at 209 Elizabeth Street and 228 and 230 Mott Street, EAS, Attachment D, D-7. However, 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, several of which are 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. Amd. Clark Aff. ¶ 36; Registration Form, Section 7, at 28 & 40 (2009), at https://catalog.archives.gov/id/75319379. There are numerous other buildings within the study area that are listed as contributing buildings. *See generally*, Registration Form, Section 7; New York State, Cultural Resource Information System, Project No. 09PR06818.

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

The CEQR TM 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 TM, Ch.9, at 9-13. 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 the EAS failed to meet the hard look requirement and noting as a "gross oversight" that the EAS omitted to identify the existence and location of a hospital as required by the CEQR TM).

Omission of the above-identified contributing resources from the EAS's analysis is particularly significant with respect to construction impacts in "adjacent historical resources," which, according to the Department of Buildings Technical Policy and Procedure Notice No. 10/88, includes any building within 90 feet of the project site. Amd. Clark Aff. ¶ 34. The CEQR TM recognizes that construction-related impacts, including damage 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 TM, 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 TM 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); Amd. Clark Aff. ¶ 36. Even if the EAS included an adequate 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 Neg. Decl.

acknowledge that there may be significant adverse impacts on the environment in connection with Historic Resources. Consequently, an EIS should have been prepared. Amd. Clark Aff. ¶ 36.

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

Under the CEQR TM, 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 TM, Ch. 21, 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."[14] CEQR TM, Ch. 21, at 21-1. As discussed herein, *see* Parts V(B),(C), *supra,* and V(F), *infra*, the destruction and development of Elizabeth Street Garden may have significant adverse effects on the environment in terms of open space, historic and cultural resources, and public policy. By either standard, the EAS should have included a neighborhood character assessment. It did not. HPD thus failed to take a hard look at neighborhood character. Had it done so, it would have required an EIS. Amd. Clark Aff. ¶ 21.

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 TM, Ch.21, at 21-1. It "focuses on whether a defining feature of the neighborhood's character may be significantly affected." CEQR TM, 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." Amd. Clark Aff. ¶ 9(d). The CEQR TM recognizes that parks may be "central to a neighborhood's character." CEQR TM, Ch.21, at 21-4. Elizabeth

[14] However, the CEQR TM 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 TM, 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.

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. Amd. Clark Aff. ¶ 9(e). It draws visitors from other parts of the City, the country and the world, including Washington, Texas, Mexico and Portugal. Amd. Clark Aff. ¶ 9(e). The Garden is also 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. Amd. Clark Aff. ¶ 9(a). The small open space that will remain after the Garden is detroyed will hardly be an attraction to visitors.

The Garden is a community gathering place. It has hosted hundreds of free, public events for organizations around the City, Amd. Clark Aff. ¶ 9(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). Amd. Clark Aff. ¶ 8, 9(c). Local residents and businesses also organize and sponsor events such as Tai Chi workshops, an art show, a movie screening, and the annual Harvest Festival. Amd. Clark Aff. ¶ 9(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 Schools 1and 130, Amd. Clark Aff. ¶ 9(c), and in 2018 hosted educational workshops for 550 students throughout the school year. Amd. Clark Aff. ¶ 9(c).

As discussed above, see Part V(B), the Proposed Project will have a significant adverse impact on these uses. Therefore, an EIS is required with respect to neighborhood character, including an analysis of alternative sites for the Proposed Project. Amd. Clark Aff. ¶ 12.

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 TM, Ch. 4 at 4-1. HPD did not take a hard look at public policy. The EAS nowhere identified or analyzed whether the Proposed Project is compatible with City's policy, set forth in Executive Order No. 26, of delivering climate actions that support the goals of the Paris Agreement or the City's policy and legal obligations to expand green infrastructure. *See* City of New York, Office of the Mayor, Executive Order No. 26 (June 2, 2017).

On June 2, 2017 Mayor de Blasio committed New York City to the principles 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 help 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." Affidavit of Adrian Benepe in Support of Verified Petition, sworn to March 5, 2019, Doc. No. 16 ("Benepe Aff."), ¶ 17. Furthermore,

> [a]n 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. . . . Trees also contribute to the general cooling effect of parks, helping make the surrounding neighborhood more climate resilient.

Id. ¶ 18. Increasing the number of trees in New York City has been part of environmental policy at least since the Bloomberg administration, which implemented the MillionTreesNYC initiative. In making MillionTreesNYC part of its efforts to promote sustainability, *see* MillionTreesNYC, NYC Parks, at https://www.milliontreesnyc.org/html/about/getting_parks.shtml, the Bloomberg administration recognized the role trees play in slowing global climate change. *See* MillionTreesNYC, NYC's Urban Forest, at https://www.milliontreesnyc.org/html/about/forest.shtml. Destroying Elizabeth Street Garden with its many trees will detract from the urban forest and is

contrary to the City's policy of limiting the impact of climate change. Therefore, the Proposed Project may have a significant adverse impact with respect to public policy and an EIS is required.

In 2010, Mayor Bloomberg announced the NYC Green Infrastructure Plan, *see* DEP'T ENVTL. PROTECTION, NYC GREEN INFRASTRUCTURE PLAN: 2011 UPDATE, 1 (2012),[15] proposing to invest 1.5 billion dollars in green infrastructure over 20 years. *Id.* at i. In 2012, this 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 Envtl. Conservation L. and Part 750, et seq., of Title 6 of the Official Compilation of Codes, R. and Reg. of the State of N.Y. by The City of N.Y. and The N.Y. City Dep't of Envtl. Protection*, Order on Consent, DEC Case No, C02-20110512-25 (DEC, Mar. 8, 2012) ("2012 Consent Order").

The 2012 Consent Order concerned ongoing violations of the ECL relating to combined sewer overflows ("CSOs") and modified prior Orders on Consent between New York City and the DEC. CSOs are "discharges of untreated domestic sewage from combined sewer systems, and industrial wastewaters, combined with stormwater." 2012 Consent Order, at 1. The 2012 Consent Order obligates 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 control CSOs. Benepe Aff. ¶ 12. "Green spaces act as mini reservoirs that mitigate flooding during large storms . . . ." Benepe Aff. ¶ 14. Expanding green open space, parks or otherwise, is part of the City's effort to control CSO's. Benepe Aff. ¶¶ 13-14. HPD should have taken a hard look at the Proposed Project's impact on the City's legal obligations and policy relating to CSOs.[16]

[15] Available at http://home2.nyc.gov/html/dep/pdf/green_infrastructure/gi_annual_report_2012.pdf
[16] This is true even if the project will include permeable surfaces and a rooftop rainwater harvesting system, which are not discussed in the EAS, but were mentioned when the development team was designated. See HPD, Mott-Elizabeth Streets RFP (Dec. 8, 2017), https://www1.nyc.gov/site/hpd/developers/request-for-proposals/Mott-Elizabeth-Streets-RFP.page

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

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, Proposed Project may have a significant adverse impact in several technical areas. Even if, *arguendo*, the adverse impact in any one of these technical areas is not so significant as to merit an EIS, under SEQRA, the lead agency must assess if, when considered together, there may be substantial adverse environmental impact. The EAS failed to assess the cumulative impact of the destruction and development of Elizabeth Street Garden. Consequently, HPD failed to satisfy the hard look requirement. As the foregoing subsections indicate, had HPD taken a hard look, it would have found that the project will may have a significant adverse impact on the environment, requiring an EIS.

VI. THE ULURP APPROVALS WERE AFFECTED BY AN ERROR OF LAW.

The ULURP Application represented to the CPC and City Council that the Proposed Project was "pursuant to zoning." As discussed above, *see* Part IV, *supra*, the Proposed Project does not comply with SLID zoning regulations. Goldman Aff. ¶ 2. In particular, it violates ZR § 109-131. *Id.* ¶ 6. Consequently the CPC Approval and the Res. 985 were affected by an error of law. Furthermore, as stated above, see Part IV, *supra*, to lawfully construct the Proposed Project, authorization from the CPC to modify § 191-103 would be required and such authorization is itself subject to environmental and public review. Goldman Aff. ¶ 4-7. Therefore, the CPC Approval and Res. 985 should be annulled.

CONCLUSION

For the foregoing reasons, this Court should grant the Amended Verified Petition.

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New York, New York

Respectfully submitted,

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