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,

Index No. 152341/2019

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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MEMORANDUM OF LAW IN REPLY IN SUPPORT OF AMENDED VERIFIED PETITION

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PRELIMINARY STATEMENT

This case involves an attempt by the City of New York to destroy Elizabeth Street Garden—a cherished garden and community gathering space in an area of New York City that has an extreme paucity of open space—in a manner that violates zoning laws, fails to comply with the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR") regulations, and poses serious environmental risks.

But it is equally important to emphasize what this case is *not* about. Despite Respondents' attempts to confuse the issues, this is not a case about affordable housing for senior citizens. No one seriously disputes that the City is in the midst of an affordable housing crisis or that seniors are particularly vulnerable to rising rents. If the City wishes to address that problem—and by all means, it should—it must do so in accordance with applicable law. It did not do so here.

There are three, independent, fatal flaws with the proposed plan to destroy Elizabeth Street Garden in order to construct a mixed-use development with 123 residential units of affordable senior housing and office and retail space (the "Proposed Project"). First, the Proposed Project fails to comply with applicable zoning laws. The design that was considered at every stage of the review process was for a single mixed-use building rising seven stories.[1] Proponents of the design claimed that it complied with applicable zoning requirements, including the restrictive zoning regulations for the Special Little Italy District ("SLID"). It did not.

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[1] This design was evaluated by Department of Housing Preservation and Development ("HPD") for the purposes of assessing environmental impact. The design was also provided to the City Planning Commission ("CPC"), City Council and the public during the Uniform Land Use Review Procedure ("ULURP") process. In its April 10, 2019 Report and Resolution, the CPC concluded, "the proposed project complies with SLID Zoning Regulations." *See* Affirmation of Blythe Hawthorne-Loizeaux in Support of Verified Petition, dated Nov. 4, 2019 ("Hawthorne-Loizeaux Aff."), Ex. A ("CPC Report") at 3. On June 26, 2019, in Resolution No. 985, City Council declared there would be "no significant impact on the environment as set forth in the Negative Declaration." *See* Hawthorne-Loizeaux Aff., Ex. B ("City Council Res."). It is the design considered, evaluated and approved by both the CPC and City Council. However, this design does not comply with SLID zoning regulations.

SLID zoning regulations make clear that every "front building wall shall extend along the full length of its front lot line . . .." Zoning Resolution ("ZR") § 109-131. Under the Zoning Resolution, a "front lot line" is defined as a "street line." § 12-10. A through lot, such as the one at issue here, has "two street lines," *id.*, and therefore, for zoning purposes, two "front lot lines." That, in turn, means that both the Elizabeth Street and Mott Street sides of the proposed building must "extend along the full length of" the street. Yet the proposed design is substantially set back (at least 60 feet) from the Mott Street side of the lot. Because the front building wall facing Mott Street does not extend along the full length of the Mott Street lot line, the design considered by HPD, the City Council, the CPC and the public violates SLID zoning regulations.

Respondents, in their opposition, try two tactics: first, they try to ignore the issue, burying it in a few lines in the middle of their memo. Second, they try to confuse the issue. Because they have arbitrarily decided that the building's front entrance will be on Elizabeth Street, they claim SLID zoning regulations do not apply to the Mott Street side of the building. But the Zoning Resolution is explicit: a through lot such as this one has "*two* street lines." Therefore, for zoning purposes, the building has two "front building walls," and the current design is illegal. The environmental review and the CPC's and City Council's resolutions were all affected by a material error of zoning law and must be annulled.

Second, and independently, HPD was required to comply with the procedures set forth in the SEQRA and CEQR regulations. It failed to do so. It failed to take a "hard look," as New York courts uniformly require, at relevant areas of environmental concern, including zoning, open space, historic and cultural resources, neighborhood character, public policy and cumulative impacts. Moreover, because the Proposed Project may include the potential for at least one significant adverse impact on the environment, HPD was required to have an Environmental Impact Statement

("EIS") prepared. Again, it did not fulfill its obligations. The environmental review here was arbitrary, capricious and contrary to law in failing to comply with SEQRA procedures, failing to take a hard look at relevant areas of environmental concern and failing to determine that an EIS was mandated.

Finally, the Negative Declaration, which was issued by HPD and declared that there would be no significant adverse impacts of the Proposed Project, requires certain measures to be taken before the building is completed. These measures result, in effect, in a conditional negative declaration, which is impermissible for a Type I action such as this. Consequently, the Negative Declaration should be annulled, and an EIS should be required.

Conducting an EIS is not a mere formality. Such a study would include rigorous additional analysis of environmental impacts that was not part of the Environmental Assessment Statement ("EAS") process. For example, an EIS would require the City to identify, and rule out, alternative sites for the proposed development. If the City wants to destroy open green space, then in an EIS, it would have to explain why no alternative could provide affordable senior housing without destroying a unique, environmentally-beneficial community resource like Elizabeth Street Garden.

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Elizabeth Street Garden is unique. It offers children a rare opportunity to engage with nature and local senior citizens access to green space, which might otherwise be too far away. The lushly planted garden attracts visitors from other parts of the City as well as other states and even other countries. The Garden supports City public schools through collaborative workshops and hosts community events sponsored by various local organizations, including the New York Public Library and the New York City Police Department. Tragically, the City needlessly proposes to destroy this

iconic neighborhood feature. And to make matters worse, it proposes to do so in a way that violates applicable law for multiple, independent reasons.

Elizabeth Street Garden is located on a City-owned lot that was neglected by the City for more than 10 years until 1991 when it was leased to Elizabeth Street, Inc., a company owned by Petitioner Allan Reiver. *See* Affidavit of Allan Reiver in Support of Amended Verified Petition, dated Nov. 4, 2019 ("Reiver Aff.) ¶ 2. Mr. Reiver cleaned the dilapidated lot, planted trees, grass and bushes, and curated the arrangement of statuary/sculpture and architectural elements. *See* Reiver Aff. ¶ 3. In 2003, Mr. Reiver, through Elizabeth Firehouse LLC, purchased the historic firehouse adjacent to Elizabeth Street Garden, establishing an art gallery in the building. *See* Reiver Aff. ¶ 4. In 2005, upon completion of the firehouse's renovation and Garden's development, Mr. Reiver opened and welcomed the public to the Garden through the gallery and made it known by posting a prominent sign. *See* Reiver Aff. ¶ 5.

In 2013, Mr. Reiver and community members enlisted volunteers to staff the garden, enabling the public to enter the Garden directly from Elizabeth Street. *See* Reiver Aff. ¶ 6. Today, there are approximately 150 core volunteers, and through their dedication and generosity, Elizabeth Street Garden has grown, flourished and become an iconic feature of the neighborhood. *See* Second Supplemental Affidavit of Joseph Reiver Support of Amended Verified Petition, dated Nov. 4, 2019 ("Joseph Reiver Second Supp. Aff.") ¶¶ 3–6.

The only thing worse than allowing the destruction of this vital green space in the heart of SLID would be for that destruction to happen in a way that violates applicable law for multiple, independent reasons. But it is not too late to stop such an outcome. The Negative Declaration should be annulled, and an EIS should be required. The CPC Report and City Council Resolution should likewise be annulled.

ARGUMENT

I. THE NEGATIVE DECLARATION WAS AFFECTED BY A MATERIAL ERROR OF ZONING LAW.

The Proposed Project violates SLID zoning regulations that are applicable to the through lot property on which Elizabeth Street Garden is located. The Proposed Project includes a single building that would be constructed at the front lot line of the property that faces Elizabeth Street and would be set back significantly (at least 60 feet) from the front lot line of the property that faces Mott Street. The fact that the building wall facing Mott Street would be set back from the Mott Street front lot line violates SLID zoning regulations.

In pertinent part, SLID zoning regulations require:

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

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

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

Respondents know or should know the Proposed Project violates SLID zoning regulations. Respondents are aware of the Proposed Project is located in SLID. *See* Municipal Respondents'

Memorandum of Law in Opposition to the Amended Petition, dated Sept. 26, 2019 ("Resp. Mem.") at 12; Memorandum of Law in Support of Petitioners' Amended Verified Petition, dated Aug. 15, 2019 ("Pet. Mem."), App. A EAS Full Form at 1, 2, Fig. 3; Affidavit of Leila Bozorg, dated Sept. 26, 2019 ("Bozorg Aff.") ¶¶ 38–39; Affirmation of Susan E. Amron, dated Sept. 26, 2019 ¶ 23. Respondents are aware that the lot is a through lot. *See* EAS Full Form at 1. Thus, Respondents are aware, and have acknowledged, that the Garden property has two street lines and, therefore, two front lot lines. *See* EAS App. 4 at 7 (referencing "the Development Site's two frontages along Mott Street and along Elizabeth Street"). Moreover, the EAS emphasizes that the Proposed Project conforms to SLID with regard to the Elizabeth Street lot line. *See* EAS D-2 ("The proposed new building would be built-out to the lot line on Elizabeth Street without lower-level setbacks, continuing the continuous streetscape which is a defining element of the surrounding historic district."); *accord* EAS D-12. The EAS recognizes the neighborhood character: "most buildings in the district are brick and built out to the lot lines *without setbacks* or front yards, creating a cohesive streetscape." EAS D-7 (emphasis added). Therefore, it is striking that the EAS is silent on the Mott Street lot line.

Respondents attempt to escape the requirements of the § 109-131 by claiming that "the Project does not propose any building wall on the Mott Street side of the Site, much less a front building wall, and therefore this provision does not govern the Project on Mott Street. The front wall of the Project is on the Elizabeth Street side of the lot." Resp. Mem. at 13; *see also* Bozorg Aff. ¶ 40 ("when there is no front building wall, or building at all, this provision does not apply.") There is clearly a building with a wall that faces Mott Street. *See* EAS B-4. In the context of the Zoning Resolution, this argument is specious. *See* Affirmation of Howard Goldman, Esq. Supplementing

Affidavit of Howard Goldman in Support of Amended Verified Petition, dated Nov. 4, 2019 ("Goldman Supp. Aff.") ¶ 4.

At best, Respondents appear to confuse a front building wall, for zoning purposes, with a wall containing the front entrance to a building. *See Id.* at ¶ 15. But their confusion does not salvage the Proposed Project. If a building developer could arbitrarily assign its front and back with no reference to any fixed point, such as a street, they could undermine the zoning regulations, enabling construction that would otherwise be prevented without a specific authorization, permit or variance. *See Id.* at ¶ 16.

The EAS and Negative Declaration analyzed and assessed the environmental impacts of a project that cannot be built as proposed because it violates the Zoning Resolution. To develop Elizabeth Street Garden in accordance with SLID regulations, there must be a building wall along both Elizabeth and Mott Streets, continuing the cohesive streetscape. *See Id.* at ¶ 17. Respondents could have proposed a legally-compliant design, such as two buildings with open space between the two buildings, *see Id.* at ¶ 17,[2] or a change in zoning, but neither was analyzed by the EAS or Negative Declaration.

The Negative Declaration should be annulled since it is based on a material error or law.

II. THE CPC'S AND CITY COUNCIL'S ULURP DETERMINATIONS WERE AFFECTED BY A MATERIAL ERROR OF LAW.

The ULURP Application presented to the City Council and the CPC was incorrect and misrepresented the Proposed Project as conforming to applicable zoning laws. In fact, HPD had marked it "pursuant to zoning," Pet. Mem. App. C ("ULURP App.") at 4 (suggesting that zoning

[2] Note that under SLID, there are specific requirements with regard to height and width of rear yards between two buildings on through-lots. ZR § 109-122. Additionally, the ULURP application specifically did *not* indicate that a zoning change would be required.

changes were not required). As described above, the Proposed Project does not comply with zoning laws. Consequently, the determinations rendered by the CPC and the City Council were affected by an error of law and should be annulled.

Both the CPC's and City Council's determinations were based upon the ULURP application submitted by HPD for the Proposed Project. *See* CPC Report at 10 (approving "the application"); City Council Res. at 1, 2 (titled "Resolution approving with modifications the application submitted by [HPD]" and approving the CPC decision, which was itself based on the ULURP Application). However, the ULURP Application misrepresented the Proposed Project that the disposition of land is meant to facilitate.

The ULURP Application indicated that the Proposed Project was "pursuant to zoning" and that a Zoning Authorization—which Respondents admit would require a zoning analysis, *see* Resp. Mem. 34–35("ULURP Applications to *approve changes to zoning* such as zoning authorizations . . . require the project sponsor and CPC to conduct an in-depth zoning analysis.")—was not required. *See* ULURP App. at 1. The ULURP Application correctly noted that the Proposed Project is within SLID. *See Id.* at 8. Similar to the EAS, the ULURP Application included depictions of the Proposed Project as a single building built to the front lot line on Elizabeth Street and set back significantly from the front lot line on Mott Street, allowing for some empty space along the Mott Street front lot line. *See Id.* at 16–17, 22. As discussed in Part I, such a building cannot legally be developed under applicable zoning laws. *See also* Goldman Supp. Aff. ¶ 2. Therefore, a zoning authorization should have been sought and a zoning analysis should have been included in the ULURP Application. *See* ZR § 109-514. Since HPD did not apply for a zoning change, *see* ULURP App. at 3 (showing HPD did not request an action related to zoning), it is implied the land use will be zoning compliant—which it is not.

To argue that the CPC and City Council determinations are simply for the disposition of land is to ignore that the disposition of land was for this particular Proposed Project presented to the CPC and the City Council. The CPC Report and City Council Resolution all describe development of a single building, and the CPC Report specifically indicates that the Proposed Project complies with SLID zoning laws. *See* CPC Report at 2–3, 9; City Council Res. at 1. As Respondents stated, "CPC and Council made a discretionary decision that the City should advance *the proposed Project* . . .." Resp. Mem. at 35 (emphasis added). Since the ULURP Application is for the Proposed Project, it is more than a disposition of land.

Additionally, the ULURP Application is inextricably intertwined with the EAS and Negative Declaration. As discussed in Petitioners' Memorandum, the EAS and Negative Declaration were both affected by the same error of zoning law presented in the ULURP Application. The CPC and City Council determinations in turn relied on the EAS's and Negative Declaration's faulty conclusion that the Proposed Project will have no significant adverse impacts on the environment, discussed *infra*. *See* CPC Report at 5, 10; City Council Res. at 1. In relying on the EAS and Negative Declaration, the CPC and City Council determinations were affected by an error of law twice.

III. THE NEGATIVE DECLARATION DID NOT COMPLY WITH SEQRA'S PROCEDURAL REQUIREMENTS.

At the outset, the Court should bear in mind that SEQRA's requirements are strictly enforced. *See, e.g., New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 (2003) ("Strict compliance with SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review.") (internal quotations and citations removed). Furthermore, *post hoc* compliance with SEQRA procedures once litigation

has commenced would undermine the purposes of SEQRA. *Id.* at 348 ("Anything less than strict compliance . . . offers incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.").

A. The Negative Declaration Was Impermissibly Conditioned, in Violation of SEQRA Regulations.

Under SEQRA, for a Type I action such as this, Respondents cannot avoid the need for an EIS by imposing conditions in the Negative Declaration. The Negative Declaration sets forth various "measures" related to historic and cultural resources and hazardous materials that will be required in the Land Disposition Agreement ("LDA") and funding agreements between HPD and the project sponsor, Penrose, LLC, including: review and approval of final building designs by the Landmarks Preservation Commission ("LPC") to ensure consistency with the Chinatown and Little Italy National Historic District; implementation of a Construction Protection Plan ("CPP") that will be developed in consultation with and subject to review and approval by the LPC; a Phase II Subsurface Investigation relating to hazardous materials; and a Remedial Action Plan and Construction Health and Safety Plan that are subject to review and approval by the Department of Environmental Protection ("DEP"). *See* Pet. Mem. App. B. Negative Declaration ("Neg. Dec.") at 3, 4.

The purpose of imposing these measures is "to ensure that there are no significant adverse impacts associated with historic resources and hazardous materials." *Id.* at 2. The Negative Declaration thus recognizes that without such measures, the Proposed Project may have adverse environmental impacts with respect to historic and cultural resources and hazardous materials. Consequently, a negative declaration is inappropriate and an EIS should have been prepared.[3] *See*

[3] In regards to Respondents' reliance on *Matter of Merson v McNally*, 90 N.Y.2d 742 (1997), *see* Pet. Mem. 11–15.

Pet. Mem. at 11–15. *See also S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 564–565 (2d Dep't 2002) (finding a Type I action required an EIS because "[i]n identifying various mitigation measures which would be undertaken to minimize the adverse effects to the environment posed by the project, the [lead agency] implicitly acknowledged that the effects were significant").

Respondents argue that the Negative Declaration is not impermissibly conditioned because the measures imposed in the Negative Declaration were "otherwise required by law, irrespective of SEQRA." Resp. Mem. at 30. They are wrong. For example, as the Third Department held in *Cathedral of St. John the Divine v. Dormitory Authority*, 224 A.D.2d 95 (3d Dep't 1996), the Department of Buildings' Technical Policy and Procedure Notice # 10/88 ("DOB Policy"), was in effect, just as it is here, and the Court still found a conditional negative declaration. Moreover, one of the other measures identified in the Negative Declaration, 15 RCNY § 24-06, is not, in fact, required by law.

Perplexingly, Respondents rely on *Cathedral* as their principal authority, but that case supports Petitioners' position. In *Cathedral*, in a Type I action under SEQRA review, a negative declaration included various measures to preserve a monumental Gatehouse during a nursing home expansion. *Id.* The Court found these conditions to be "part and parcel of the project plans" and therefore, the negative declaration was not a conditional negative declaration. *Cathedral* 224 A.D.2d at 102–103.

However, the reason the measures were "part and parcel" was that they were conditions imposed by the antecedent CEQR process when CPC and DEP "issued a *conditional* negative declaration finding that the project would have no significant environmental impact provided certain conditions were met." *Id.* at 98 (emphasis added). The project developer agreed to the conditions before the City approved the project. It was after the City approval that the project developer

undertook the SEQRA process. In reviewing the SEQRA process only, the Court clarified that the conditions were "part and parcel of the project plans being reviewed by respondent—plans which had been revised and modified to address problems raised throughout the City's CEQR review." Here, as in the CEQR review in *Cathedral*, the measures HPD imposes on the Proposed Project to prevent significant environmental impact create a conditional negative declaration. Respondents cannot view *Cathedral's* SEQRA process in isolation and ignore the conditional negative declaration that was found during the CEQR process.

Additionally, even if *arguendo* some or all of the conditions imposed by the Negative Declaration were otherwise required by law, which they are not, that fact would not make such conditions "part and parcel" of the project. For example, the fact that the DOB Policy imposes requirements on construction with which the developers of the Proposed Project will have to comply does not negate that the Negative Declaration was conditioned on implementation of a CPP. *Cf.* Resp. Mem. at 32. In *Cathedral*, under the CEQR process, the agencies issued a conditional negative declaration even though the DOB Policy was in effect and mandated a CPP. *See* Hawthorne-Loizeaux Aff., Ex. C, DOB Policy.

Furthermore, Respondents are incorrect in stating that "the Phase II protocols are dictated by law, namely 15 RCNY § 24-06." Resp. Mem. at 32. The law does not mandate a Phase II Investigation for the Proposed Project. Under § 24-06, a Phase II Environmental Site Assessment is only required in order to receive a building permit for development on a tax lot that is "subject to an (E) Designation or an Environmental Restrictive Declaration." § 24-06(a). Moreover, even for such sites, a Remedial Action Plan and Construction Health and Safety Plan are not required in all instances. § 24-06(j). The Elizabeth Street Garden property is subject to neither an (E) Designation nor an Environmental Restrictive Declaration. *See* ZR App. C, Table 1, Table 2; *accord* EAS Full

Form at 8–10. Thus, the imposition of the Phase II Investigation, Remedial Action Plan and Construction Health and Safety Plan in the Negative Declaration was not a mere reiteration of requirements already imposed by law but the imposition of non-mandated conditions.

Finally, Respondents' cannot gloss over the condition imposed in the Negative Declaration—which will be also be required in the LDA and funding agreements—that the final building design be reviewed and approved by LPC. Respondents argue that this condition is part and parcel of the Proposed Project because LPC has already reviewed the preliminary building plans. *See* Resp. Mem. at 24, 30. If LPC's review of the preliminary plans were sufficient to protect historic resources, there would be no need to require subsequent review and approval in the Negative Declaration, let alone to impose it as a binding condition precedent to transfer of the Elizabeth Street Garden property and funding agreements. In fact, due to the age and condition of the adjacent historic firehouse, one of the few expressly recognized "Buildings of Special Significance" contributing to the Little Italy Historic District, extraordinary measures must be taken to protect it in the event of construction on the site, and therefore, more detailed plans were required.

B. Notice of the Negative Declaration Was Published in the Environmental Notice Bulletin in Response to Litigation.

When a negative declaration is issued for a Type I action, notice of the negative declaration is required to be published in the Environmental Notice Bulletin ("ENB") pursuant to 6 NYCRR § 617.12(c)(1). On March 5, 2019, approximately four months after HPD issued the Negative Declaration for the Proposed Project on November 9, 2018, Petitioners filed an Article 78 Petition challenging the Negative Declaration and HPD's failure to comply with SEQRA procedures, including that notice of the Negative Declaration was not published in the ENB. Approximately two

weeks after the Article 78 Petition was filed, notice of the Negative Declaration was published in the ENB.

The timing of the ENB publication strongly suggests that but for Petitioners' litigation, notice of the Negative Declaration would not have been published. Indeed, Respondents have not suggested otherwise or provided the Court with any evidence that there was a pre-litigation intent to comply with the publication requirement set forth in § 617.12(c)(1).

Having failed to comply with SEQRA, Respondents should not be able to escape the consequences of their inaction by complying in response to litigation. The Negative Declaration should be annulled.

IV. THE ASSESSMENT OF THE POTENTIAL FOR ADVERSE ENVIRONMENTAL IMPACTS WAS INADEQUATE AND DID NOT CONSTITUTE A HARD LOOK.

A. An EIS was required.

Respondent HPD's assessment of the EAS, which concluded with a Negative Declaration, did not constitute a "hard look." The purpose of an EAS is to set forth the impacts that may reasonably be expected to occur: "a properly completed [EAS] must contain enough information to describe the proposed action [...] and its potential impacts on the environment." 6 NYCRR § 617.2(m). A hard look would have revealed that the EAS for the Proposed Project lacked sufficient information to evaluate the potential adverse impacts on the environment—in the areas of zoning, open space, historic and cultural resources, neighborhood character and public policy—and therefore, necessitated an EIS.

"The heart of SEQRA is the [EIS] process." *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415 (1986). The EIS is "an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return." *Town of Henrietta v. Dep't of Envtl. Conservation of New York*, 76 A.D.2d 215, 220 (4th

Dep't 1980). SEQRA requires that an EIS be prepared for any Type I action, as here, that "may include the potential for at least one significant adverse environmental impact." § 617.7(a)(1). This is a "relatively low" threshold. *Chinese Staff & Workers Assn. v. City of N.Y.*, 68 N.Y.2d 359, 364 (1986). Type I actions, such as this, "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." § 617.4(a)(1). Since Respondents did not do a hard look at the EAS, the Court should annul the Negative Declaration and require an EIS.

B. Environmental Review Failed to Take a Hard Look at Zoning.

As discussed above, *see* Part I, the Proposed Project fails to comply with SLID zoning regulations because the proposed building will be set back significantly from the Mott Street front lot line. Therefore, the Proposed Project would require a change in zoning.

Respondents argue that it was sufficient for the EAS to "identif[y] both the SLID and C6-2 as the existing zoning districts . . . and correctly note[] that the project does not involve a change in zoning to one or more sites." Resp. Mem. at 12. But, as previously discussed, it was an error to state that the Proposed Project does not require a change in zoning. *See supra* Part I; Pet. Mem. at 17–19; Goldman Supp. Aff. ¶ 2.

Because a change in zoning is required, under the CEQR Technical Manual, a preliminary assessment of zoning should have been performed. *See* CEQR Technical Manual ("CEQR TM") 4-9 ("A preliminary assessment . . . should be provided for all projects that would . . . change the zoning on a site, regardless of the project's anticipated effects."). Here, had there been a hard look, the environmental review would have found, at a minimum, that the Proposed Project would have an adverse impact on the coherent streetscape of the historic neighborhood. Indeed, SLID zoning regulations were passed to preserve the look and feel of the neighborhood by requiring development to be compatible with the neighborhood: "maintaining the street wall while providing open space

and landscaping in the rear." *See* Hawthorne-Loizeaux Aff., Ex. D, 1977 CPC Resolution at 2 (establishing the SLID).

C. Environmental Review Failed to Take a Hard Look at Open Space.

As extensively discussed in Petitioners' Memorandum and the Amended Affidavit of Geoffrey K. Clark, Respondents failed to take a hard look at open space. *See* Pet. Mem. 20–24; Amended Affidavit of Geoffrey K. Clark in Support of Amended Verified Petition, dated Aug. 15, 2019 ("Clark Amd. Aff."). Further, also as discussed in depth, the Proposed Project may result in the potential for adverse environmental impacts with respect to open space, and an EIS should have been prepared. Respondents' arguments to the contrary do not hold up.

One of the criteria of significance recognized under SEQRA and set forth in the CEQR TM is "a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses." § 617.7(c)(1)(viii); *accord* CEQR TM 1-8; *see also* 43 RCNY § 6-06(a)(8) ("An action may have a significant effect on the environment if it can reasonably be expected to lead to one of the following consequences: . . . a substantial change in the use or intensity of use of land."). Therefore, where, as here, such a substantial change may be caused by the proposed action, an EIS is required. The Proposed Project may have multiple direct effects on open space, including "a loss of public open space," a change in "the use of an open space so it no longer serves the same user population" and the imposition of shadows. *See* CEQR TM 7-3 (defining direct effects).

The Proposed Project would significantly reduce the open space in the half-mile study area around Elizabeth Street Garden. According to the CEQR TM, "[i]n areas that are extremely lacking in open space, a reduction as small as 1 percent may be considered significant, depending on the area of the City." CEQR TM 7-16. The Proposed Project would be located in an area that is extremely lacking in open space. With an open space ratio of 0.6 acres per 1,000 residents,

Community Board 2 ("CB2") has one of the lowest open space ratios in the City. *See* Hawthorne-Loizeaux Aff., Ex. E, Community Board 2, Jan. 25 2019 Resolution at ¶ 16. Little Italy and SoHo have an open space ratio of only 0.07 acres per 1,000 residents. *Id.* Specifically, for the study area, the predicted open space ratio for the study area with no-action on the Proposed Project in 2021 is 0.15. *See* EAS Table C-4 at C-16. According to the EAS's quantitative open space analysis, in 2021 the Proposed Project would cause a reduction of 2.24% in the open space ratio. *See* EAS Table C-5 at C-17. Consequently, an EIS should have been prepared.[4]

Respondents try to minimize the significant adverse impact of the reduction in open space in the study area by suggesting that the EAS's quantitative open space analysis, which determined that there would be a reduction in the open space ratio of more than two percent, was particularly generous in counting Elizabeth Street Garden as open space. *See* Resp. Mem. at 14, 20 n. 9. They base this suggestion on the EAS's problematic and, in light of their repetitive characterization of the Garden as a vacant and undeveloped lot, disingenuous description of Elizabeth Street Garden as "a commercial sculpture garden with some public access" and the EAS's claim that it "conservatively considered" Elizabeth Street Garden in the open space analysis. Resp. Mem. at 14 n. 6, 20.

In fact, there was nothing "conservative" about including Elizabeth Street Garden in the quantitative analysis. Under the CEQR TM, the quantitative analysis should include all "[o]pen space that is accessible to the public on a constant and regular basis." CEQR TM 7-1. Public open space includes privately owned gardens that are accessible to the public. *Id.* Elizabeth Street Garden, though privately operated, is open to the public as much as virtually all publicly owned

[4] Respondents argue that the City's open space ratio goals do not constitute an impact threshold. *See* Resp. Mem. at 19. But Petitioners never suggested that they were. Petitioners' point is that the CEQR TM identifies a decrease in the open space ratio of one percent as potentially significant in areas such as CB 2, Little Italy, and SoHo that are extremely lacking in open space. *See* Clark Aff. ¶ 19.

gardens, and meets this definition and is required to be included, as indicated by the New York City Department of Parks and Recreation's ("DPR") comments on the Proposed Project. *See* Hawthorne-Loizeaux Aff., Ex. F, Email between DPR and HPD, dated July 3, 2018 ("Elizabeth Street Garden should be considered quantitatively, as a publically accessible open space today. It is open 7 days a week for at least 5 hours a day, which makes it accessible to the public on a constant and regular basis as per CEQR Tech [sic] Manual Guidelines.").

Additionally, it is more than a little misleading to characterize Elizabeth Street Garden as a commercial sculpture garden. None of the sculptures in Elizabeth Street Garden are for sale, it is not operated on a for-profit basis, and tickets are not required to enter the Garden.

Besides their argument regarding the quantitative factors, Respondents argue that they properly took into account qualitative factors in determining that, despite significant reduction in the open space ratio, no EIS was required. Not so. First, nothing in the CEQR TM indicates that a qualitative assessment can override a finding of a significant adverse quantitative impact on open space. *See* CEQR TM 7-15–7-17. Nevertheless, Respondents argue that proximity to Washington Square Park was properly considered to ameliorate the impact of the loss in open space because the CEQR TM "clearly contemplates the consideration of '[o]ther factors' including, for instance, 'the availability of any major regional park.'" Resp. Mem. at 19. However, Washington Square Park is not a "major regional park," and is outside the study area. *See* Supplemental Affidavit of Adrian Benepe in Support of Amended Verified Petition, dated Nov. 4, 2019 ("Benepe Supp. Aff.") ¶ 7.

Furthermore, as discussed in Petitioners' Memorandum at 21, in relying on Washington Square Park to mitigate the reduction in open space, the EAS gave no consideration to whether Washington Square Park was already heavily used (such that it would not be an appropriate mitigant), or to the fact that as a study area is expanded, a larger open space ratio is required to

support the larger population. *See* Clark Amd. Aff. ¶ 25. Indeed, according to the former Commissioner of the Department of Parks and Recreation, Washington Square Park, a largely paved open space, is "always very crowded." Benepe Supp. Aff. ¶ 6. It is also a roughly fifteen-minute walk from Elizabeth Street Garden to Washington Square Park. This is prohibitive for seniors, such as Petitioner Renée Green, who have health and mobility issues and rely on Elizabeth Street Garden. *See* Affidavit of Renée Green in Support of Verified Petition, dated Feb. 22, 2019 ¶ 5.

As discussed extensively in Petitioners' Memorandum, the Proposed Project may have a significant adverse impact on the capacity of the proposed open space to support existing uses of the Garden for which other open spaces in the study area cannot compensate. *See* Pet. Mem. at 21–23; Clark Amd. Aff. ¶ 26.

Indeed, among other impacts, the EAS fails to adequately consider the adverse impact of the Proposed Project from the increased shadow on the remaining open space, which the CEQR TM recognizes may be a significant adverse impact. *See* CEQR TM 7-17; *see generally* CEQR TM Chapter 8. The remaining open space will predominantly be in shade preventing existing uses, like gardening, from being feasible. *See* Clark Amd. Aff. ¶¶ 16–18, 30. Furthermore, if the project was a zoning-compliant project with two buildings, as discussed *supra*, even more additional shadows would be the case in the remaining rear yard space. *See* Clark Amd. Aff. ¶ 15.

Therefore, where, as here, such a "substantial change" may be caused by the proposed action an EIS is required. *See Farrington Close Condominium Bd. of Managers v. Inc. Vill. of Southampton*, 205 A.D.2d 623, 625 (2d Dep't 1994) (finding that "a substantial change in recreational resources and open space . . . suggested that an EIS should have been prepared.").

Respondents make an unsuccessful attempt to gloss over HPD's failure to adequately assess current uses of Elizabeth Street Garden by pointing to the EAS's description of Elizabeth Street Garden "a commercial sculpture garden with some public access, free programming, and events." Resp. Mem. at 14 n. 6, 20. This scant description of all that Elizabeth Street Garden offers to the community is hardly a study of the current uses of the Garden. *See generally* Affidavit of Joseph Reiver in Support of Verified Petition, dated Mar. 5, 2019; *see* Clark Amd. Aff. ¶ 9, Ex. B; Pet. Mem. at 2–3. Nor is the perfunctory acknowledgement that Elizabeth Street is in "good condition" and has "high utilization." EAS Table C-2, Resp. Mem. at 20.

To avoid the obvious conclusion that an EIS should have been prepared, Respondents argue, "not every 'substantial change in the use . . . of land' automatically qualifies as a significant adverse impact." Resp. Mem. at 18. In support of this assertion, Respondents cite *Vill of Poquott v. Cahill*, 11 A.D.3d 536 (2d Dep't 2004), *Soho Alliance v. N.Y. City Bd. of Stds. & Appeals*, 264 A.D.2d 59 (1st Dep't 2000) and *Cathedral Church of St. John the Divine v. Dormitory Auth.*, 224 A.D.2d 95 (3d Dep't 1996), none of which include any relevant discussion of the proper interpretation and meaning of 6 NYCRR § 617.7(c).

Respondent HPD failed to take a hard look at open space. Furthermore, because the Proposed Project may have a significant adverse impact on open space, an EIS is legally required.

D. Environmental Review Failed to Take a Hard Look at Historic and Cultural Resources.

Regardless of Respondents' arguments to the contrary, the Negative Declaration clearly recognizes that the Proposed Project may have the potential to result in significant adverse environmental impacts on historical resources. It explicitly imposes conditions "in order to ensure that there are no significant adverse impacts associated with historic resources[.]" Neg. Dec. at 2. It also explicitly supports its finding of no significant adverse impact with the imposition of these

conditions, in particular with the fact that the conditions will be required in the LDA and funding agreements. *See Id.* at 4. In other words, the Negative Declaration itself is evidence that an EIS should have been prepared.

Furthermore, the analysis of the historic resources set forth in the EAS was inadequate. As discussed in Petitioners' Memorandum, both the inventory of historic resources and the discussion of the CPP were inadequate. Respondents argue that the inventory constituted a hard look because it "acknowledge[d] that [the Chinatown and Little Italy historic district] contains 625 contributing resources, and indeed includes photographs of many of the resources that Petitioners claim were overlooked." Resp. Mem. at 23. However, a bare statement of the number of contributing historic resources in the district—with no attempt to identify them individually—does not constitute an inventory of the contributing historic resources in the study area, which is what is required by the CEQR TM. *See* CEQR TM at 9-13; Clark Amd. Aff. ¶ 34. Nor does the caption to a photograph—*see* caption of photo 1 EAS Figure D-2a—which is the only time 219, 221 and 223 Mott Street are mentioned, constitute an inventory in any meaningful sense.

Respondents also claim that the potential effects of the Proposed Project were adequately discussed. But as stated in Petitioners' Memorandum, it is impossible to adequately discuss the effects of the Proposed Project on historic resources without first preparing a proper inventory of such resources. *See* Pet. Mem. 24–25. Indeed, the EAS mentions that there are contributing resources within 90 linear feet of the proposed project, but nowhere lists or identifies these resources. *See* Pet. Mem. at 24; Clark Amd. Aff. ¶ 34. An adequate CPP cannot be prepared unless and until vulnerable resources are identified. For example, the DOB Policy contemplates specific "movement criteria" and monitoring requirements for each building that may be affected. *See* DOB Policy ¶¶ 5.0, 8.1, 8.5.1., 8.5.2.

Lastly, Respondents claim it was sufficient to state that the CPP will comply with DOB Policy and LPC guidelines because a CPP could not have been prepared yet. To the contrary, environmental review is project specific. It is intended to analyze and mitigate, if appropriate, the impacts of a specific action. Consequently, without more, statements of compliance general guidelines are inadequate. The EAS should have included an analysis and discussion of the specific ways in which this particular Proposed Project would impact the particular vulnerable historic resources and, at a minimum, some consideration of how a CPP would address such impacts. This analysis is explicitly contemplated by the CEQR TM which indicates, for example, that a CPP may include "*existing* foundation and structural condition information and documentation for the historic property" and "formulation of maximum vibration tolerances based on impact, duration and other considerations using accepted standards for old buildings." CEQR TM at 9-20. This type of information and analysis should have been included in the EAS.

E. Environmental Review Failed to Take a Hard Look at Neighborhood Character.

Respondents defend the EAS's lack of a neighborhood character analysis with the refrain, "neighborhood character impacts are rare." Resp. Mem. 24–25. Yet, the CEQR TM recognizes the need to assess a proposed projects' impact on neighborhood character under certain circumstances. *See generally* CEQR TM Chapter 21. In particular, a preliminary assessment of neighborhood character impacts may be appropriate where, as here, the project has "the potential to result in any significant adverse impacts" with respect to open space, historic and cultural resources and public policy. *See supra* Subsections IV.C and IV.D; *infra* Subsection IV.F; Pet. Mem. 20–26, 27–29. Nevertheless, no such assessment was included in the EAS.

According to the CEQR TM, a neighborhood character assessment "focuses on whether a defining feature of the neighborhood's character may be significantly affected." CEQR TM 21-1. For example, significant adverse impacts on "a defining neighborhood feature" may result from a

project that creates adverse shadows on a park that is central to a neighborhood's character and such effects should be analyzed. CEQR TM 21-4. This is neither, as Respondents argue, "Petitioners' personal view," nor does it suggest, as Respondents claim, that "a neighborhood character assessment be conducted merely because a project ends one use of a property and begins another." Resp. Mem. at 25. Rather, it indicates that, Elizabeth Street Garden is just such a "neighborhood feature." An analysis of the Proposed Project's impacts on neighborhood character should have been conducted. As discussed in Petitioners' Memorandum, had such an analysis been performed, an EIS would have been required. *See* Pet. Mem. at 26–27; Clark Amd. Aff. ¶ 12.

Elizabeth Street Garden draws visitors from throughout the City, nation and the world. *See* Clark Amd. Aff. ¶ 9(e). It hosts educational opportunities for public school students and events for many organizations like, for example, the New York Public Library and New York Police Department. *See Id.* at ¶ 9(c). It is supported by local businesses and provides a space for cultural performances. *See* Supplemental Affidavit of Joseph Reiver in Support of Amended Verified Petition, dated Aug. 15, 2019 ¶¶ 13–15, Ex. E–G (videos); Joseph Reiver Second Supp. Aff. ¶ 7; Clark Amd. Aff. ¶ 9(c). It provides space for recreation, such as Qi Gong and Yoga workshops. *See* Clark Amd. Aff. ¶ 9(c); Joseph Reiver Second Supp. Aff. ¶ 6. And, of course, it is a unique site-specific integrated work of art and garden, offering city residents much-needed access to nature and sun-filled space for relaxation and contemplation. *Id.* at ¶¶ 8, 29.

The 6,700 square feet of ground-level open space that will remain if Elizabeth Street Garden is destroyed and the land developed will be cast in shadow, *see* Clark Amd. Aff. ¶¶ 16–18, 30, and will not have the capacity to support existing uses and/or at their current scales, *see* Clark Amd. Aff. ¶ 26. The reduction in open space would prevent it from playing a vital role in the community, as does Elizabeth Street Garden.

In other words, the Proposed Project "may include the potential" for significant adverse impacts on neighborhood character and an EIS should have been prepared.

F. Environmental Review Failed to Take a Hard Look at Public Policy.

Respondents failed to take a hard look at the possible impact on public policy. *See* Pet. Mem. at 27–29. But, according to Respondents, the EAS took an adequate look at public policy by acknowledging that Elizabeth Street Garden is in a part of the City covered by the FRESH program, which provides incentives to create grocery stores. *See* Resp. Mem. at 26–27 (referencing EAS B-3).

However, as Petitioners' Memorandum argues, the EAS should have considered the Proposed Project's compatibility with New York City's binding legal obligation, under a consent decree, to reduce combined sewer overflow ("CSO") and its commitment, under the Paris Agreement, to green infrastructure and to fighting climate change.[5] *See* Pet. Mem. at 28–29; Affidavit of Adrian Benepe in Support of Verified Petition, dated Mar. 5, 2019 ("Benepe Aff.") ¶¶ 7–14; Benepe Supp. Aff. ¶¶ 14–19. These are "officially adopted and promulgated public policies," and thus, should be considered. CEQR TM 4-5. Respondents argue that the EAS was not required to assess the impact of the destruction of Elizabeth Street Garden on New York City's policies relating to climate change and green infrastructure and its obligations to reduce CSO. *See* Resp. Mem. at 27. According to Respondents, "an assessment of public policy impacts is appropriate when a project 'would be located within areas governed by public policies controlling land use.'"

[5] For example, 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 ttps://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. 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. *See* Pet. Mem. at 28–29.

Resp. Mem. at 27 (quoting CEQR TM 4-9, 10). Respondents ignore an elementary fact: all city-wide land use policies would be relevant to this matter.

City-wide policies requiring land to be developed with green infrastructure are land use policies. Policies of promoting the planting of trees are land use policies. Policies requiring that the City take steps that combat climate change are land use policies. It is hard to see how a program like the FRESH program, about grocery stores, is more of a land use policy than one aimed at creating more green spaces and green infrastructure. Yet, according to Respondents, the EAS's assessment of the Proposed Project's impacts on the FRESH program satisfied the CEQR TM's requirements, while assessment of impacts on policies concerning climate change as well as green infrastructure and CSO was not required.

Furthermore, as the CEQR TM recognizes, a public policy analysis focuses on the proposed action's impact on policies. In the context of climate change policy as in the City's obligation to reduce CSO, "every square foot of green space and every tree is critical." Benepe Aff. ¶ 20; *see* Benepe Supp. ¶ 20. Indeed, policies are undermined one action at a time. The proposed destruction of Elizabeth Street Garden is one such decision and will have a significant adverse impact on City policies, creating a precedent of the destruction of open green space in the future. Therefore, an EIS should have been prepared.

According to Respondents, for climate change-related concerns, Petitioners should have relied on CEQR TM guidance contained in CEQR TM Chapter 18: Greenhouse Gas ("GHG") Emissions and Climate Change. Respondents speculate that "Petitioners ignored this chapter likely because it sets thresholds for analysis" that the Proposed Project does not trigger. Resp. Mem. at 27. However, Petitioners have raised no arguments relating to GHG emissions, which are the subject of all the thresholds cited by Respondents, and GHG is not the only climate change-related concern.

In response to Petitioners' concerns relating to the City's green infrastructure obligations arising from CSO violations, Respondents invoke the standards set forth in CEQR TM Chapter 13, Water and Sewer Infrastructure. *See* Resp. Mem. at 28. But this misses Petitioners' point. Petitioners have not argued that the Proposed Project would significantly affect water and sewer infrastructure.

Respondents also argue that Petitioners did not consider various sustainability measures that are intended to be part of the Proposed Project, for example, complying with Passive House standards and the use of permeable surfaces and a rooftop rainwater harvesting system. *See* Resp. Mem. at 28. Yet, this argument exposes the inadequacy of the EAS. If the EAS were adequate, Respondents would have cited to it. They do not, because it never mentions these sustainability measures. Instead, they cite the Bozorg Affidavit, which references the ULURP Application. *See* Bozorg Aff., ¶ 28. And even then, they get it wrong: the Bozorg Affidavit misstates the ULURP application, as the ULURP Application, in fact, does not include any reference to permeable surfaces and a rainwater harvesting system. *Compare* Bozorg Aff. ¶ 28 *with* ULURP App. at 10 (only mentioning "two green roofs").

It is not Petitioners' legal responsibility to analyze the Proposed Project and assess its impact on the environment. But even if they wanted to, they could not have done so, because no information relating to the alleged permeable surfaces and rainwater harvesting system has been released to the public. Moreover, it is likely that "whatever rooftop infrastructure is added will . . . only briefly detain, and not eliminate, the stormwater runoff that will go directly into the city's combined sewer system, exacerbating the CSO problem." Benepe Supp. Aff. ¶ 16(a). Additionally, even if the remaining open space is permeable, it will be roughly one third the size of Elizabeth Street Garden and therefore, less able to manage stormwater. *See Id.* ¶ 16(b).

Additionally, Respondents do not consider the impact of rising urban heat, a grave climate change concern, *see* Benepe Aff. ¶ 17; Benepe Supp. Aff. ¶ 8. Elizabeth Street Garden measurably reduces urban heat. The Trust for Public Land[6] analyzed every 30 by 30-meter unit containing thermal measurements to map "Urban Heat Islands"—meaning an area that is hotter than other parts of a city and much hotter than suburban or rural areas—and discovered that Nolita, SoHo and NoHo are in an Urban Heat Island. *See* Benepe Supp. Aff. ¶ 11; And yet, Elizabeth Street Garden helps to create a "cool island" within the surrounding Urban Heat Island whose benefits extend well beyond the boundaries of the Garden. *See* Benepe Supp. Aff. ¶12, Ex. A. If the Garden is destroyed, this cool island may cease to exist because, even though the Proposed Project purports to have green space, the existing mature trees, which significantly reduce urban heat, will be gone. *See* Benepe Supp. Aff. ¶ 13. Additionally, there would not be a garden where people could take refuge. *Id.*

In short, Respondents' had a legal duty to take a hard look at the Proposed Project and assess its impact on public policy. They did not do so. An EIS should have been prepared to evaluate the significant impacts of the destruction of an open green space.

G. Environmental Review Failed to Take a Hard Look at Cumulative Impacts.

SEQRA and the CEQR clearly require that the lead agency consider whether adverse environmental impacts that are not in and of themselves significant are nevertheless significant when considered cumulatively. 6 NYCRR § 617.7(c)(xii); 43 RCNY § 6-06(a)(10). This requirement is included in the CEQR TM Chapter One, Procedures and Documentation, and addresses criteria for significance, stating:

> SEQR regulations state that a project may have a significant effect on the environment if it may reasonably be expected to have any of the

[6] The Trust for Public Land is a nonprofit organization with a mission to "create parks and protect land for people, ensuring healthy, livable communities for generations to come." https://www.tpl.org/about

> following consequences: . . . 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.

CEQR TM 1-8. Respondents are, therefore, in error when they argue otherwise. *See* Resp. Mem. at 29.

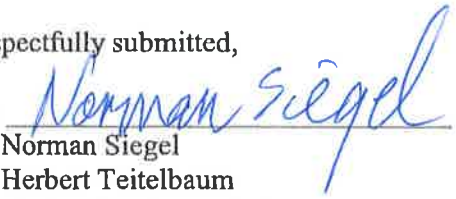
Although they deny a requirement to assess cumulative effects, Respondents nevertheless contend that an adequate hard look at cumulative impacts was taken because HPD checked the box on the EAS Full Form for no cumulative effects. *See* Resp. Mem. at 29. This is not a hard look. In fact, the EAS nowhere considers cumulative effects across multiple technical areas. Admittedly, its entirely inadequate neighborhood character assessment acknowledges a requirement to consider whether a combination of moderate effects to several elements may cumulatively affect neighborhood character. *See* EAS B-11. That is the sum total of any kind of cumulative impact analysis and obviously does not constitute a hard look with respect to the overall impact of the Proposed Project as a whole.

CONCLUSION

For the reasons set forth herein; in the Amended Verified Petition and accompanying affidavits, affirmations and exhibits; and in Petitioners' Memorandum of Law in Support of Amended Verified Petition, the Amended Verified Petition should be granted.

Dated: November 5, 2019
New York, New York

Respectfully submitted,

By: 

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