

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

Hon. Debra A. James

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules

**AMENDED VERIFIED
PETITION**

-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

**ORAL ARGUMENT
REQUESTED**

Respondents.

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PRELIMINARY STATEMENT

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

2. Petitioners also seek to annul the following decisions relating to the Proposed Project: the Negative Declaration, CEQR No. 18HPD105M, issued by Respondent Department of Housing

Preservation and Development (“HPD”) on November 9, 2018 (the “Negative Declaration”); the New York City Planning Commission’s April 10, 2019 approval of ULURP Application No. C 190184 HAM (revised Mar. 5, 2019) (the “Revised ULURP Application”); and New York City Council Resolution No. 985, dated June 26, 2019, approving the Revised ULURP Application with modifications.

3. Petitioners bring this proceeding on the grounds that (i) the Negative Declaration was impermissibly conditioned; (ii) the Negative Declaration was not published as required by SEQRA in the Environmental Notice Bulletin until approximately two weeks after this failure was challenged in Petitioners’ original Verified Petition, filed March 5, 2019; (iii) the Negative Declaration was affected by an error of law; (iv) HPD failed to take a hard look at the impact of the Proposed Project on relevant areas of environmental concern, specifically, zoning, open space, neighborhood character, and public policy, and failed to prepare an EIS; and (v) the CPC’s approval and the City Council’s approval with modifications of the Revised ULURP Application were affected by an error of law. The Negative Declaration should be annulled and an EIS should be ordered.

JURISDICTION

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

VENUE

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

PARTIES

6. Petitioner ELIZABETH STREET GARDEN, INC. (“ESG”) is a local, volunteer-based not-for-profit organization incorporated in the State of New York with its principal place of business in New York County. ESG’s mission is to protect and preserve Elizabeth Street Garden (the “Garden” or “Elizabeth Street Garden”) in its entirety as a public community green space. ESG manages the operations and upkeep of the Garden, including providing free programs and events. ESG and its members will be negatively affected by the adverse environmental impacts of the Proposed Project.

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

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

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

10. Petitioner ALLAN REIVER is a resident of New York County. Mr. Reiver owns the historic firehouse next to Elizabeth Street Garden through Elizabeth Firehouse, LLC, where he lives and operates an art gallery, the Elizabeth Street Gallery. He will be negatively affected by the adverse environmental impacts of the Proposed Project. Through Elizabeth Street, Inc., Mr. Reiver has for

more than 25 years leased the property where the Garden is located from the City of New York (the “City”) on a month-to-month basis. Mr. Reiver created Elizabeth Street Garden, dedicating substantial time and resources towards improving the lot and eventually opening it as a public sculpture garden and green, open space that is used heavily by the local community.

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

12. Respondent DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT (“HPD”) is an agency of the City of New York. HPD is the lead agency for environmental review of the proposed destruction and development of Elizabeth Street Garden and is responsible for, *inter alia*, making a determination as to whether the destruction and development of Elizabeth Street Garden may include the potential for significant adverse environmental impacts.

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

14. Respondent NEW YORK CITY PLANNING COMMISSION (“CPC”) is required under the Uniform Land Use Review Procedure (“ULURP”), City Charter § 197-c, to certify when applications for actions requiring ULURP review, such as the disposition of City-owned land, are complete and to review and approve, approve with modifications, or disapprove such applications. The CPC approved the Revised ULURP Application on April 10, 2019.

15. Respondent NEW YORK CITY COUNCIL (the “City Council”) is authorized under City Charter § 197-d to review and act upon any decision by the CPC to approve or approve with modifications any action subject to ULURP review. The City Council by Resolution No. 985 approved with modifications the Revised ULURP Application on June 26, 2019.

LEGAL FRAMEWORK & STATEMENT OF FACTS

Environmental Review

16. The destruction and development of Elizabeth Street Garden is an agency action subject to SEQRA.
17. SEQRA injects environmental considerations into governmental decision making.
18. CEQR is New York City's process for implementing SEQRA.
19. CEQR cannot require less of an agency than does SEQRA.
20. HPD properly classified the destruction and development of Elizabeth Street Garden as a Type I Action because it will occur wholly within the Chinatown and Little Italy Historic District, which is listed on the National Register of Historic Places.
21. Because the destruction and development of Elizabeth Street Garden is a Type I Action, SEQRA required a full environmental assessment form (referred to under CEQR and hereinafter as an environmental assessment statement) to be prepared to determine the environmental significance of the Proposed Project.
22. The CEQR Technical Manual provides guidance with respect to the procedures and substance of CEQR, as well as technical and methodological guidance for conducting environmental review.
23. HPD was required by SEQRA to review the environmental assessment statement for the Proposed Project to identify relevant areas of environmental concern.
24. Pursuant to SEQRA, HPD was obligated to take a hard look at and thoroughly analyze relevant areas of environmental concern in order to determine if the destruction and development of Elizabeth Street Garden may include the potential for at least one significant adverse

environmental impact. In doing so, HPD was required to study the same areas of environmental impact as would be contained in an EIS.

25. If the destruction and development of Elizabeth Street Garden may include the potential for at least one significant adverse environmental impact, then SEQRA requires an EIS to be prepared.

26. SEQRA presumes that Type I Actions, such as the destruction and development of Elizabeth Street Garden, are likely to have significant adverse environmental impacts and may require an EIS.

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

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

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

30. Here, HPD was required to prepare an EIS because the destruction and development of Elizabeth Street Garden may include the potential for at least one significant adverse environmental impact.

Land Use Review

31. The ULURP is set forth in Sections 197-c and 197-d of the New York City Charter (the “City Charter”) and provides a process for public review of land use decisions.

32. Under the ULURP, applications for the disposition of City-owned land, in addition to certain other actions, is subject to public review by the affected community board(s), the affected borough president, the CPC, and in certain circumstances the City Council.

33. All ULURP applications must be certified by the CPC as complete prior to the commencement of the review process.

34. Once an application is complete it is submitted to any affected community board.

35. 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, or, if authorized by the City Charter, the community board may waive the right to hold a hearing and submit a recommendation.

36. In certain circumstances a copy of the recommendation or waiver of a community board must also be submitted to the borough board, which may hold a public hearing on the application and any community board recommendations and submit a recommendation or waiver thereof to the CPC.

37. The borough president must then submit a written recommendation or waiver thereof to the CPC within 30 days of receipt of the community board's recommendation.

38. 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.

39. The CPC must hold a public hearing prior to taking any action on an application.

40. Where the CPC's action modifies or disapproves a written recommendation by the community board, borough president or borough board, the CPC's must provide a written explanation of the reason for such action.

41. A decision by the CPC to approve or approve with modification an application must then be filed with the City Council.

42. The City Council is required to review a subset of such CPC decisions, as set forth in Section 197-d of the City Charter. 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.

43. 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.

44. Before approving with modification a decision of the CPC, the City Council must file the text of such modification with the CPC.

45. 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.

46. 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.

47. Thereafter, the City Council may approve the modification, with or without the CPC's suggested amendments.

Elizabeth Street Garden Today

48. Elizabeth Street Garden is a beautifully landscaped, publicly-available green open space located in a part of Community District 2 that sorely lacks open space, let alone green open space. *See* Affidavit of Joseph Reiver in Support of Verified Petition, sworn to March 5, 2019, Doc. No. 14 ("Reiver Aff."), Exhibit ("Ex.") A, Doc. No. 15, Figure ("Fig.") 1.

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

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

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

52. The Garden is also used by local organizations and public schools to hold events and workshops. Over the past two years at least 200 events were hosted at the Garden by various organizations including the YMCA, branches of the New York Public Library, and the Lower East Side Ecology Center. Over the past two years, the Garden has collaborated with Public School 1 and Public School 130 for educational events and has hosted workshops in fall, winter and spring for more than 750 public school students. *See* Reiver Aff., Ex. A, Fig. 5-10, 12.

The History of Elizabeth Street Garden

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

54. Upon information and belief, the New York Public School Society of New York (the "Society"), privately incorporated in 1805 as the Free School Society, was a charitable organization

that for many years was at the heart of the introduction and provision of public education in the City of New York.

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

56. Upon information and belief, an 1823 Memorial addressed to the Senate and Assembly of the State of New York and signed by the Vice-President of the Society on behalf of the Board of Trustees of the Society indicated that the five public schools theretofore established by the Society “constitute[d] a real estate which will be held in perpetuity for the benefit of the lower classes of society.”

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

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

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

60. Upon information and belief, P.S. No. 21 was designed with open space as a central feature of the property. Among the features of the new school property was a large playground and outdoor kindergarten—a raised flower garden terrace in which kindergarteners could play and attend class in the fresh air. Snyder maximized the amount of open space on the property by building a

below-street level auditorium. The resulting open space was publicly accessible and used as a community gathering place, as well as for school recess and recreation.

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

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

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

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

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

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

Procedural History

67. Upon information and belief, in or around the summer of 2013, Community Board 2 discovered that City Council Member Margaret Chin had, in conjunction with the 2012 Seward Park Mixed Use Development Project (now Essex Crossing) in Community District 3, negotiated a then non-public letter commitment, dated on or about September 27, 2012, from the Office of the Mayor of the City of New York for affordable housing to be built at the site of Elizabeth Street Garden, located on a portion of Block 493, Lot 41.

68. In October 2012, Lot 41 was subdivided into two lots: Lot 41, containing the Little Italy Restoration Association ("LIRA") apartment building at 21 Spring Street, and Lot 30, containing Elizabeth Street Garden.

69. From 2013 through 2016, Community Board 2 issued four resolutions expressing support for the permanent preservation of Elizabeth Street Garden in its entirety and urging the City and HPD to consider alternate development sites within Community District 2 for the creation of affordable housing.

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

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

72. Upon information and belief, the City has refused to develop 388 Hudson Street and while preserving Elizabeth Street Garden in its entirety.

73. On September 14, 2016, HPD issued a Request for Proposals (“RFP”) for a “mixed-use affordable housing development for seniors” at Block 493, Lot 30 in Manhattan, the site of Elizabeth Street Garden.

74. HPD announced on December 8, 2017 that the site would be developed by Penrose Properties, LLC, Habitat for Humanity New York City (Habitat NYC), and RiseBoro Community Partnerships, Inc.

75. In October 2018, HPD issued a “Notice of Lead Agency Determination and Review,” by letter to Hilary Semel of the Mayor’s Office of Sustainability, dated October 12, 2018 (“Lead Agency Letter”). The Lead Agency Letter stated that HPD proposed “to assume lead agency status for the CEQR review.”

76. The Lead Agency Letter provided a short description of the Proposed Project. The Proposed Project, according to the Lead Agency Letter, would include conveying city-owned property to private developers, destroying Elizabeth Street Garden, and constructing a mixed-used building that would include 123 units of affordable housing, 4,454 gross square feet (“gsf”) of retail space, and 12,885 gsf of office space for Habitat for Humanity, one of the developers. A small amount of open space—6,700 square feet—would also be included.

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

78. The Lead Agency Letter also publicly revealed for the first time that HPD planned to have the Garden designated as an Urban Development Action Area (“UDAA”) and the proposed project designated as an Urban Development Action Area Project (“UDAAP”) pursuant to the Urban Development Action Area Act (“UDAA Act”), General Municipal Law Chapter 24, Article 16.

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

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

Gen. Mun. L. § 691.

80. Subsequently, on November 13, 2018, HPD publicly released the full-form environmental assessment statement, CEQR No. 18HPD105M, dated November 9, 2018 (the “EAS”), which was required to be prepared because the proposed destruction of the Garden is a Type I action.

81. The EAS was prepared for Pennrose, LLC by Philip Habib & Associates.

82. Pennrose, LLC is part of a joint venture with RiseBoro Community Partnership and Habitat for Humanity NYC that has been selected by HPD to tear down and develop Elizabeth Street Garden.

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

84. The Negative Declaration was based upon information and analysis contained in the November 9, 2018 EAS.

85. On November 13, 2018 the City Planning Commission certified as complete the ULURP application, ULURP No. C 190184 HAM, for the designation of Elizabeth Street Garden as a UDAA and of the Proposed Project as a UDAAP and for the disposition of city-owned land to facilitate the Proposed Project.

86. On or about January 24, 2019, Community Board 2 adopted, by an overwhelming majority, the “Resolution to Deny the City’s Application for the Disposition of City-Owned Land and UDAAP Designation for the Proposed Haven Green Development on the Elizabeth Street Garden site and in Support of Permanently Saving the Garden and Building Substantially More Senior Housing at an Alternative Site, Only if the Garden is Saved in Its Entirety” (the “2019 CB2 Resolution”).

87. The 2019 CB2 Resolution specified that the Proposed Project is flawed for several reasons including its adverse environmental impacts. The Resolution states:

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

88. More specifically, with respect to open space the 2019 CB2 Resolution states, *inter alia* :

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

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

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

...

The Proposed Development would destroy 100 % of the Elizabeth Street Garden and result in a loss of nearly 70% of the existing open space . . . , a substantial loss in a community and neighborhood so underserved by open space that even a 1% decline in open space is significant and should at least result in substantial further analysis and completion of an EIS under City Environmental Quality Review (CEQR);

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

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

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

90. On or about February 26, 2019, the Manhattan Borough President issued a Recommendation to the City Planning Commission with respect to the ULURP application for the Proposed Project. The Manhattan Borough President recommended “approval with conditions”, including “a more serious effort to design the building in order to generate at least 30% more open space than currently designed.”

91. On March 5, 2019, the ULURP application for the Proposed Project was revised to eliminate the request to designate Elizabeth Street Garden as an UDAA and the Proposed Project as an UDAAP, while retaining the request for disposition of City-owned land.

92. On April 10, 2019 the City Planning Commission, relying in part on the Negative Declaration, approved the Revised ULURP Application.

93. On June 11, 2019, the City Council filed a proposed modification with the CPC.

94. On June 26, 2019, the CPC filed with the City Council a written statement indicating the proposed modification did not raise land use or environmental issues requiring further review.

95. On June 26, 2019 the City Council, relying in part on the Negative Declaration, passed Resolution No. 985 approving with modifications the Revised ULURP Application.

FIRST CAUSE OF ACTION

VIOLATION OF SEQRA—THE NEGATIVE DECLARATION IS IMPERMISSIBLY CONDITIONED

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

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

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

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

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

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

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

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

100. The Negative Declaration also imposes conditions with respect to Hazardous Materials:

A Phase II Work Plan and Health and Safety Plan (HASP) will be submitted to HPD and the New York City Department of Environmental Protection (DEP) for review and approval prior to the start of any fieldwork. Based on the results of the Phase II Subsurface Investigation, a Remedial Action Plan (RAP) and construction Health and Safety Plan (CHASP) will be prepared and implemented during site redevelopment activities to address the removal and disposal of contaminated soils during the construction of the Proposed Project. No property disposition, funding, or construction will proceed without DEP's written approval of the RAP and CHASP.

Upon completion of the construction activities, a Closure Report certified by a Professional Engineer of Architect will be submitted to HPD and DEP for review and approval. This report will demonstrate that all remediation activities have been implemented in accordance with the DEP-approved RAP and CHASP.

The Phase II investigation and remediation protocols outlined above will be required through provisions contained in the Land Disposition Agreement between HPD and the Project Sponsor. With implementation of these measures, no significant adverse impacts related to hazardous materials would be expected to occur during or following construction of the Proposed Project.

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

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

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

103. Because the Negative Declaration violates SEQRA, it should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the disposition of the Elizabeth Street Garden site.

SECOND CAUSE OF ACTION

VIOLATION OF SEQRA—FAILURE TO PUBLISH THE NEGATIVE DECLARATION IN THE ENVIRONMENTAL NOTICE BULLETIN

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

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

106. The ENB is issued weekly on Wednesday.

107. As of March 5, 2019, when the original Verified Petition was filed in this proceeding and nearly four months after the Negative Declaration was issued, the notice of the Negative Declaration had not been published in any issue of the ENB issued between November 9, 2018 and March 5, 2019.

108. After the original Verified Petition challenged the failure to publish the Negative Declaration in the ENB, the Negative Declaration was published in the March 20, 2019 ENB.

109. Because notice of the Negative Declaration was not published in the ENB prior to the March 5, 2015 filing of the original Verified Petition, the Negative Declaration did not comply with the lawful procedures required by SEQRA.

110. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application.

THIRD CAUSE OF ACTION

THE NEGATIVE DECLARATION IS AFFECTED BY AN ERROR OF LAW

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

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

113. SLID zoning regulations supersede the C6-2 zoning where so provided.

114. According to the EAS, the Proposed Project would not result in “a change in zoning different from the surrounding zoning” or “structures that would be incompatible with the underlying zoning[.]”

115. This is an error of law because the Proposed Project is neither in compliance nor compatible with applicable zoning regulations.

116. According to the January 3, 1977 City Planning Commission (“CPC”) report the SLID “seeks to preserve the special character of the neighborhood by . . . maintaining the street wall while providing open space and landscaping in the rear of buildings[.]” CPC, *Amendment of the Zoning Resolution Pursuant to Section 200 of the New York City Charter Relating to Article X, Chapter 8 Concerning the Establishment of the Special Little Italy District*, N 760061 ZRM, at 2 (Jan. 3, 1977).

117. Section 109-131 of the Zoning Resolution, part of the SLID zoning, requires that “the front building wall of any building [] extend along the full length of its front lot line . . .and [] shall rise without setback up to a height of six stories or 65 feet, or the height of the building, whichever is less.”

118. The portion of Block 493, Lot 30 that is a through lot has two front lot lines: one on Elizabeth Street and one on Mott Street.

119. The front building wall of the Proposed Project that fronts on Mott Street does not extend along the full length of the front lot line without setback. To the contrary, it is impermissibly set back from the front lot line, either by approximately 60 feet (or by approximately or 136.5 feet where the covered passage is located). Therefore, the Proposed Project violates the Zoning Resolution.

120. The Negative Declaration indicates that Respondents reviewed and relied on the EAS in concluding that the Proposed Project would have no significant impacts on the environment.

121. The Negative Declaration was affected by the error of law in the EAS.

122. Because the Negative Declaration was affected by an error of law it should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application.

FOURTH CAUSE OF ACTION

VIOLATION OF SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT ZONING

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

124. HPD failed to take a hard look at relevant areas of environmental concern including but not limited to the underlying zoning.

125. The Negative Declaration indicates that HPD relied on the EAS in making the determination of no significant adverse impact on the environment.

126. The CEQR Technical Manual indicates that a preliminary assessment of land use and zoning is required for a project that would change the zoning on a site.

127. Among the basic elements of a preliminary assessment of land use and zoning is a detailed description of the zoning changes associated with a project.

128. The EAS erroneously claims that the Proposed Project complies with SLID zoning. The EAS fails to acknowledge or discuss that the Proposed Project violates applicable zoning requirements, let alone provide a description of zoning changes that would be required for the project to proceed as proposed in the EAS.

129. Because the Negative Declaration relied on the EAS and the EAS failed to conduct even an adequate preliminary assessment of zoning, HPD arbitrarily, capriciously and contrary to law failed to take a hard look at zoning in violation of SEQRA and CEQR.

130. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application.

FIFTH CAUSE OF ACTION

VIOLATION OF SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT OPEN SPACE

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

132. Under SEQRA and CEQR, HPD was required to take a “hard look” at the impact of the Proposed Project on open space.

133. HPD arbitrarily, capriciously and in violation of SEQRA and CEQR failed to take a hard look at open space.

134. Had HPD taken a hard look at open space it would have concluded that the Proposed Project may result in significant adverse open space impacts and that an EIS was required.

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

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

137. Elizabeth Street Garden is located in an area extremely underserved by open space, having an open space ratio (measured by acres of open space to one thousand residents) of .15 as compared with the citywide average of 1.5 and the citywide target of 2.5.

138. According to the EAS, the Proposed Project will decrease the open space ratio by more than two percent.

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

140. Because the Proposed Project results in a net loss of publicly accessible open space and will cause the open space ratio to decrease by more than two percent, the Proposed Project may result in significant adverse open space impacts.

141. HPD arbitrarily, capriciously and in violation of SEQRA failed to issue a Positive Declaration, finding that there may be a significant adverse environmental impact on open space and that an EIS was required to be prepared.

142. SEQRA regulations and the CEQR Technical Manual recognize that a significant adverse impact on the environment “would occur if a project resulted in ‘a substantial change in the use, or intensity of use, of land including . . . open space or recreational resources, or in its capacity to support existing uses.’”

143. The Proposed Project will cause a substantial change in the use and intensity of use of open space and in the capacity of the open space to support existing uses.

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

145. The EAS fails to comply with the CEQR Technical Manual because it does not study, let alone take the required hard look at, the current use of Elizabeth Street Garden by the local and citywide communities or the change in use and capacity to support existing uses that will result from the Proposed Project.

146. The Negative Declaration indicates that HPD relied on the EAS in making the determination of no significant adverse impact on the environment.

147. HPD arbitrarily, capriciously and in violation of SEQRA and CEQR did not take a hard look at the adverse impact of the Proposed Project on the use, or intensity of use, of open space, or in its capacity to support existing uses.

148. Had HPD done so it would have concluded that the Proposed Project may have significant adverse impacts on the environment with respect to open space that an EIS was required.

149. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application, and the Court should order an EIS to be prepared for the Proposed Project.

SIXTH CAUSE OF ACTION

VIOLATION OF SEQRA AND CEQR – FAILURE TO TAKE A HARD
LOOK AT HISTORIC AND CULTURAL RESOURCES

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

151. The Negative Declaration and EAS recognize the need for a Construction Protection Plan (“CPP”) to ensure that there are no significant adverse impacts on historical resources, thereby acknowledging that the Proposed Project may result in significant adverse impacts on the environment.

152. Because HPD recognized that the Proposed Project may result in significant adverse environmental impacts, under SEQRA and CEQR, HPD was required to have an EIS prepared.

153. HPD arbitrarily, capriciously and in violation of SEQRA and CEQR failed to issue a positive declaration, finding that the Proposed Project may have a significant adverse impact on the environment and that an EIS was required.

154. Under SEQRA and CEQR HPD was required to take a “hard look” at the potential adverse impact on the environment that the Proposed Project would have with respect to historic and cultural resources.

155. HPD arbitrarily, capriciously and contrary to law did not take a hard look at historic resources because the EAS’s assessment of historic and cultural resources, on which HPD relied in issuing the Negative Declaration, was not adequate under the CEQR Technical Manual.

156. First, the EAS does not adequately assess the contributing historic resources in the study area, which is located within two historic districts listed on the National Register of Historic Places (“NRHP”).

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

158. The EAS is also inadequate because it merely acknowledges that a CPP is necessary and states that the CPP will take the CEQR Technical Manual into account.

159. Without an actual, fully-developed CPP in place, the EAS does not, and could not, meaningfully assess whether the Proposed Project may have significant adverse construction-related impacts on nearby historical resources, including nearby buildings that contribute to the China Town and Little Italy Historic District.

160. Even if it the EAS had included a developed CPP to protect the historical resources acknowledged in the EAS, HPD would still have failed to meet the hard look requirement because

without having first sufficiently assessed the historical resources that may be adversely impacted by the Proposed Project, including by construction, HPD cannot take a hard look at the adverse effects of the Proposed Project on such resources nor can it adequately develop a plan to mitigate any such impacts.

161. HPD violated the hard look requirement of SEQRA and CEQR with respect to architectural historic and cultural resources.

162. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application.

SEVENTH CAUSE OF ACTION

VIOLATION OF SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT NEIGHBORHOOD CHARACTER

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

164. Under SEQRA and CEQR HPD was required to take a “hard look” at the potential adverse impact on the environment that the Proposed Project will have with respect to neighborhood character.

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

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

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

168. The Negative Declaration indicates that HPD relied on the EAS in making the determination of no significant adverse impact on the environment.

169. The EAS did not include a neighborhood character assessment.

170. HPD arbitrarily, capriciously and contrary to law, failed to take a hard look at neighborhood character.

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

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

173. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revise ULURP Application, and the Court should order an EIS to be prepared for the Proposed Project.

EIGHTH CAUSE OF ACTION

VIOLATION OF SEQRA AND CEQR – FAILURE TO TAKE A HARD LOOK AT PUBLIC POLICY

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

175. Under SEQRA and CEQR HPD was required to take a “hard look” at the potential adverse impact on the environment caused by the Proposed Project with respect to public policy.

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

177. Open green spaces planted with trees are critical to environmental sustainability and health in urban areas and help to minimize that impact of climate change, including by mitigating rising temperatures associated with climate change and exacerbated by dense urban terrain.

178. Increasing the number of trees has been part of New York City's environmental policy since former Mayor Bloomberg undertook the MillionTreesNYC initiative as part of the administration's efforts under PlaNYC to make New York City greener and more sustainable by the year 2030.

179. Destroying open green space planted with trees, like Elizabeth Street Garden, is contrary to the City's public policy of combatting climate change.

180. The Negative Declaration indicates that HPD relied on the EAS in making the determination of no significant adverse impact on the environment.

181. The EAS included no discussion of the compatibility of the Proposed Project with the City's public policy relating to sustainability and climate change.

182. Consequently, HPD arbitrarily, capriciously and contrary to law failed to fulfill its obligation under SEQRA and CEQR to take a hard look at possible adverse impacts of the Proposed Project with respect to Public Policy.

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

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

185. CSOs are defined in the Order on Consent as “discharges of untreated domestic sewage from combined sewer systems, and industrial wastewaters, combined with storm water. CSOs occur when wet weather flows are in excess of the capacity of combined sewer systems and/or the Water Pollution Control Plants they serve.”

186. The Order on Consent requires the City to make best efforts to implement green infrastructure projects to reach certain benchmarks with respect to reduction of storm water runoff so as to reduce CSOs.

187. The EAS includes no discussion of the compatibility of the Proposed Project with the City’s obligation to take affirmative steps to reduce CSOs.

188. Consequently, HPD arbitrarily, capriciously and contrary to law failed to fulfill its obligation under SEQRA and CEQR to take a hard look at possible adverse impacts of the Proposed Project with respect to Public Policy.

189. Had HPD taken a hard look at public policy it would have concluded that the Proposed Project may have significant adverse public policy impacts and that an EIS was required.

190. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application, and the Court should order an EIS to be prepared for the Proposed Project.

NINTH CAUSE OF ACTION

VIOLATION OF SEQRA AND CEQR – FAILURE
TO TAKE A HARD LOOK AT CUMULATIVE IMPACTS

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

192. Under SEQRA and CEQR HPD was required to take a hard look at the potential cumulative environmental impacts of the Proposed Project.

193. SEQRA regulations recognize that a significant adverse impact on the environment may occur when a project causes “changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in substantial adverse impact on the environment.”

194. Similarly, under CEQR, “[a]n action may have a significant effect on the environment if it can reasonably be believed to lead to . . . changes in two or more elements of the environment, no one of which is substantial, but taken together result in a material change to the environment.”

195. The Negative Declaration indicates that HPD relied on the EAS in making the determination of no significant adverse impact on the environment.

196. The EAS fails to consider, let alone take a hard look at, the cumulative impacts of the changes to the environment that may result from the Proposed Project.

197. The Proposed Project will have a significant adverse environmental impact in several technical areas, including Land Use, Zoning and Public Policy, Open Space, Historical and Cultural Resources, and Neighborhood Character.

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

199. HPD arbitrarily, capriciously, and contrary to law violated the hard look requirement of SEQRA and CEQR with respect to cumulative impacts.

200. Had HPD taken a hard look at cumulative impacts HPD would have concluded that the Proposed Project may have significant cumulative adverse environmental impacts and that an EIS was required.

201. The Negative Declaration should be annulled, as should be the April 10, 2019 CPC decision and City Council Resolution No. 985, which approved, based in part on the Negative Declaration, the Revised ULURP Application, and the Court should order an EIS to be prepared for the Proposed Project.

TENTH CAUSE OF ACTION

THE CPC'S AND CITY COUNCIL'S DECISIONS PURSUANT TO THE ULURP WERE AFFECTED BY AN ERROR OF LAW

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

203. The ULURP Application represented to the CPC and City Council that the Proposed Project was "pursuant to zoning."

204. As set forth in ¶¶ 112 through 120, *supra*, the Proposed Project does not comply with applicable SLID zoning regulations, specifically, ZR § 109-131.

205. The April 10, 2019 CPC approval of the Revised ULURP Application and City Council Resolution No. 985, which approved with modifications the Revised ULURP Application, should be annulled.

RELIEF REQUESTED

WHEREFORE Petitioner respectfully request that the Court:

- A. Annul the November 9, 2019 Negative Declaration, the April 10, 2019 CPC approval of the Revised ULURP Application and City Council Resolution No. 985 approving with modifications the Revised ULURP Application;
- B. Order Respondent HPD to prepare or cause to be prepared an Environmental Impact Statement in compliance with SEQRA and CEQR;
- C. Enjoin Respondents from undertaking any action in furtherance of the Proposed Project until they have complied with the requirements of SEQRA, CEQR, ULURP and the Zoning Resolution;
- D. Award attorneys' fees and costs in this proceeding; and
- E. Grant such other and further relief as the Court deems equitable and just.

Dated: August 15, 2019
New York, New York

Respectfully submitted,

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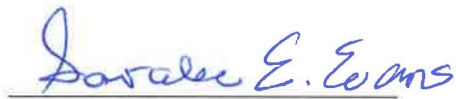
VERIFICATION

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

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


RENEE GREEN

Sworn to me this 15 day of August 2019


Notary Public

SARALEE E. EVANS
Notary Public, State of New York
No. 02EV6263298
Qualified in New York County
Commission Expires June 11, 2020