To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2022-05170

In the Matter of the Application of

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

Petitioners-Respondents-Appellants,

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, NEW YORK CITY COUNCIL, and NEW YORK CITY PLANNING COMMISSION,

Respondents-Appellants-Respondents.

BRIEF FOR PETITIONERS-RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

Respondents-Appellants-Respondents (hereinafter the "City") seeks to destroy a 20,000 square foot, beautifully landscaped, publicly accessible, loved, community garden which has serviced the local community for years. Rather than continuing to provide the community with this unique open space in which educational programs are held for school children and adults alike, among other community-based events, the City plans to put this lot into the hands of a development team to demolish the Garden and develop 123 units of affordable housing for seniors, office space, and retail space.

Petitioners-Appellants-Respondents Elizabeth Street Garden (hereinafter "ESG") filed an Article 78 Petition because the City's proposed project was unlawful on multiple grounds. The Supreme Court, New York County (James, J.) agreed as to the Fifth Cause of Action (Violation of SEQRA and CEQR – Failure to take a Hard Look at Open Space) and to that extent, the decision, order, and judgment below should be affirmed. The Court below denied or declined to reach others of ESG's Causes of Action, and to that extent, they should be reversed or, in the alternative, vacated and remanded.

ESG's petition charges that, in approving the project to move forward, the City violated the State Environmental Quality Review Act ("SEQRA"), the City Environmental Quality Review ("CEQR"), and the Uniform Land Use Review

Procedure ("ULURP"), by among its other infractions, failing to prepare an Environmental Impact Statement ("EIS"), as legally mandated, that would consider environmental impacts that would befall the community were the Garden eradicated. The City issued a "Negative Declaration," finding that the proposed project would not have a significant environmental impact and concluded that an EIS was not required.

The court below granted ESG's petition and, vacated and annulled the City's Negative Declaration for the project, finding that the City's determination that the project would have no significant adverse impact upon open space "is not rationally based and that therefore the negative declaration based upon such determination must be voided and the matter remanded to respondents [the City] to conduct a full EIS of the project's impacts." (R.27a)[1] The Supreme Court denied ESG's petition to vacate and annul the Negative Declaration on the other grounds asserted in the petition, including that because of "binding precedent" the court was compelled to not address ESG's argument that the proposed project violated the zoning laws applicable to the Special Little Italy District.

The City has appealed the decision, order, and judgment below. ESG has cross-appealed, seeking a reversal of the Supreme Court's rejection of the

[1] The prefix R.___ denotes references to the page or pages of Joint Record on Appeal in this proceeding.

following alternate grounds for annulling and vacating the Negative Declaration, namely, (a) the City's failure to take a hard look as to how the project would impact the neighborhood character, public policy, and its cumulative impact; (b) the proposed project's violation of special zoning regulations, and (c) that the ULURP approval of the project was flawed. The brief is submitted in opposition to the City's appeal and in support of the ESG's cross-appeal.

The decision and judgment of the Supreme Court should be affirmed insofar as it annulled and vacated the City's Negative Declaration and required the preparation of a full EIS. In addition, ESG asks this Court to reverse so much of the Supreme Court's decision declining to annul and vacate the City's Negative Declaration on the other grounds asserted in the petition. Alternatively, as to ESG's zoning argument, the Supreme Court's decision should be vacated and remanded with instructions to decide the issue on the merits.

QUESTIONS PRESENTED

QUESTION 1: Did the Supreme Court correctly hold that the environmental review process, and the approvals based there, were invalid, because the City's Negative Declaration's conclusion, that the Project would have no significant adverse upon the neighborhood's open space, had no rational basis?

ANSWER 1: Yes.

QUESTION 2: Did the Supreme Court err in declining to address the merits of the zoning issues raised in the petition?

ANSWER 2: Yes.

QUESTION 3: Did the Supreme Court err in rejecting ESG's claim that the Negative Declaration should be annulled and vacated on one or more of alternate grounds, namely, (a) the City's failure to take a hard look as to how the project would impact the neighborhood character, public policy, and its cumulative impact; (b) the proposed project's violation of special zoning regulations, and (c) that the ULURP approval of the project was flawed, including being affected by an error of law?

ANSWER 3: Yes.

STATEMENT OF FACTS

A. Elizabeth Street Garden

Elizabeth Street Garden (also the "Garden") is a beautifully landscaped, publicly accessible green open space located in a part of Community District 2 that is sorely lacking in open space, let alone green open space. The Garden is a sunny space landscaped with a large lawn of lush green grass, seasonal flowers, bushes, and numerous trees, including two mature pear trees, fifteen mature cypress trees, one mature royal empress tree, one mature fig tree, one mature plum tree, two mature cherry trees, one mature serviceberry tree, one mature redbud tree, and several young trees (R.29b). A large number of statues and sculptures, several of significant historical value, figure prominently in the Garden, contributing to its unique character and making it a cultural destination (R.29c). Local organizations, such as the YMCA, branches of the New York Public Library, and the Lower East Side Ecology Center, as well as public schools, host events and workshops in the Garden. During the period of 2018-2019, at least 200 events were hosted at the Garden, in addition to educational events for more than 750 public school students, including workshops organized with two public schools (R.105). These events continue.

Elizabeth Street Garden has long been used as a site for public education and recreation. From 1822 until 1902 the Garden was the site of a public school,

operated first by the Free School Society, later renamed the Public School Society, and then by the City. In 1903, the City reopened a larger school on the site, which remained in operation until the 1970s, approximately, when it was torn down (R.49-51).

The lot lay vacant until 1981 when affordable housing was built on a portion of the site, with the remaining portion reserved exclusively for recreational use. The City neglected this lot for 10 years. Then, in 1991, Elizabeth Street, Inc., a company owned by Petitioner Allan Reiver[2] leased the lot to improve it (R.2334). Mr. Reiver cleaned the dilapidated lot, planted trees, grass and bushes, and curated the arrangement of statuary/sculpture and architectural elements. In 2003, Mr. Reiver, through Elizabeth Firehouse LLC, purchased the historic firehouse adjacent to Elizabeth Street Garden, establishing Elizabeth Street Gallery in the building (R.2334-2335). Mr. Reiver, a senior citizen, managed the art gallery. 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. Contrary to the City's suggestion, access was not selective or discretionary; in fact, Mr. Reiver posted a prominent sign to that effect welcoming the public. (R.2335, 2338).

[2] Mr. Reiver passed away in May of 2021. His son, Joseph Reiver, is the executor of his estate and is a board member and officer of Elizabeth Street Garden, Inc., the managing non-profit.

In 2013, Mr. Reiver and community members enlisted volunteers to staff the garden, enabling the public to enter the Garden directly from Elizabeth Street (R.2336). Today, there are approximately 280 core volunteers, and through their dedication and generosity, Elizabeth Street Garden has grown, flourished, and become an iconic feature of the neighborhood (R.2340). The Garden is accessible seven days a week throughout the year, weather permitting, and offers hundreds of free public events for the community, including wellness programs like Tai Chi and Yoga, live music & poetry with the local bookstore, movie screenings and educational events for the local public school and universities, as well as for children and adults. (R.29d-f).

B. The Project

In or around the summer of 2013, Community Board 2 ("CB2") discovered that former City Council Member Margaret Chin had, in conjunction with the 2012 Seward Park Mixed Use Development Project (now Essex Crossing) in Community District 2, negotiated a non-public letter agreement with the City of New York to develop the site of Elizabeth Street Garden (R.1030, 1031). If built, the Project would destroy the Garden. From 2013 through 2016, CB2 issued four resolutions supporting the permanent preservation of the Garden in its entirety and urging the City to look to other sites in Community District 2 to build affordable apartments (R.1030).

Nevertheless, the City's Department of Housing Preservation & Development (HPD), on September 14, 2016, issued a Request for Proposals for a "mixed-use affordable housing development for seniors" at the site of Elizabeth Street Garden (R.466, 471). In December 2017, HPD announced that a development team had been chosen.

Approximately one year later, HPD issued a "Notice of Lead Agency Determination and Review," by letter to Hilary Semel of the Mayor's Office of Sustainability, dated October 12, 2018 ("Lead Agency Letter") (R.812-814). The Lead Agency Letter stated that HPD proposed "to assume lead agency status for the CEQR review," Lead Agency Letter at 1. The letter also publicly revealed for the first time that HPD would seek to have the Garden designated an Urban Development Action Area ("UDAA") and the Proposed Project designated an Urban Development Action Area Project ("UDAAP") pursuant to the Urban Development Action Area Act ("UDAA Act"), Gen. Mun. L., Ch. 24, Art. 16, which was passed to enable municipalities to improve municipally owned land that is slum or blighted or is becoming slum or blighted. *See* Gen. Mun. L. § 691. None of these remotely describes the Garden.

On November 13, 2018, HPD released an Environmental Assessment Statement (EAS) (R.844-997) and Negative Declaration (R.999-1002), both dated November 9, 2018. This documentation confirmed that the City relied entirely on

the analysis, as set forth in the EAS, to reach its conclusion that the project would not have an adverse impact on the neighborhood. Also on November 13, the New York City Planning Commission ("CPC") certified as complete the required ULURP application for the designation of the Garden as an UDAA and of the Proposed Project as an UDAA Project, as well as for the disposition of City-owned land (R.1004).

On or about January 24, 2019, CB2 adopted, by an overwhelming majority, a resolution to deny the ULURP Application, citing, *inter alia*, concern over significant adverse environmental impacts, especially the loss of open space (R1029).

On or about February 26, the Manhattan Borough President recommended "approval with conditions" of the ULURP Application. (R.1047).

The ULURP application for the Proposed Project was modified on March 5, 2019. The modification dropped the request for UDAA and UDAAP designation but retained the request for disposition of City-owned land (the "Revised ULURP Application"). The Revised ULURP Application was approved by the CPC on April 10, 2019 (the "CPC Approval") and by the City Council, with modifications, in City Council Resolution No. 985 ("Res. 985"), on June 26, 2019. (R1904-1905). Although the City Council approved the project on condition that the open space provided be increased from 6,700 to 8,400 square feet, the additional 1,700 square

feet of so-called open space hardly is comparable to the open space provided by the Garden, as it "may be enclosed with building walls on no more than two sides and shall function as an entrance to the portion of open space that is open to the sky." (R.1905). In other words, the additional so-called open space is a tunnel.

Throughout this proceeding, in a transparent attempt to justify the Garden's destruction, the City has sought to belittle the Garden's importance to the neighborhood. It bears repeating, even though the Garden is a beautiful, landscaped property, HPD sought to have the Garden designated an Urban Development Action Area, in effect contending that the property is a slum or blighted (R.813). Thereafter, in the EAS, the City continued this sleight of hand by describing the Garden as an "unimproved lot operating as a commercial sculpture garden" (R.865, 908).

Equally troubling is the City's insinuation, in its present filing, that petitioner Allan Reiver only opened access to the Garden to the public in 2013, "to thwart the City's development plans". City Brief, p. 6. Not only is this a false statement, as explained above, the public has been welcomed to the Garden since 2005 (R.2335, 2338), it suggests that the Garden is a mere tool used to deprive the community of affordable senior housing and a ploy for SEQRA litigation purposes.

The City's attempt to detract from the real issue in this case, to wit, its failure to comply with applicable zoning regulations and the procedures set forth in

the SEQRA and CEQR regulations and ULURP, including the preparation of an EIS, comes across loud and clear in points A and B of its Brief. Rather than acknowledging the real issue, the City attempts to frame it as one of the Garden stifling the City's need for affordable senior housing.

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. As correctly found by the Supreme Court, it did not do so here. Simply put, preserving the Garden and developing affordable housing is not a zero-sum game. Both goals are achievable if the City would only select any available alternative site.

C. Procedural History

When it became apparent that the City was dead set on moving forward with the project, a move that would result in the destruction of the Garden, ESG on March 5, 2019, filed a petition, pursuant to CPLR Article 78, seeking to enjoin the City from moving forward with the project. Briefly summarized, the Petition challenged the EAS and Negative Declaration under SEQRA, CEQR, and ULURP. Specifically, the Petition alleged that the Negative Declaration is, in fact, an impermissible conditional negative declaration and was not timely published in the Environmental Notice Bulletin issued weekly by the New York State Department

of Environmental Conservation; that the EAS and Negative Declaration were affected by an error of law; that the EAS failed to take a hard look at the environmental impact of the proposed project in the technical areas of zoning, open space, historic and cultural resources, neighborhood character, and public policy, or to take a hard look at the cumulative environmental impacts of the Proposed Project, and that the ULURP was flawed and that the City should have prepared an Environmental Impact Statement.

On March 6, 2019, ESG moved to stay the proceeding, pending further action by the City Council, as well as leave to amend the Petition. The City agreed to the Motion to Stay by stipulation, and was so ordered by the Supreme Court. After the City Council approved the project by Resolution on June 26, 2019, ESG filed the amended Petition on August 16, 2019 (R.40-78). The Amended Petition updates and substantially realleges the prior grounds for enjoining the City from proceeding with the project.

D. The Supreme Court Decision

By Decision, Order and Judgment entered November 9, 2022 (R.10-27d), the Supreme Court granted the Petition, on the ground that the City's "determination that the project would have no significant adverse impact upon open space is not rationally based", vacated and annulled the project approvals

given by the City Planning Commission and City Council, and remanded the matter to the City "to conduct a full EIS of the project's impacts." (R27a).

The Supreme Court otherwise denied ESG's claims.

ARGUMENT

POINT ONE – IN RESPONSE AND OPPOSITION TO CITY'S APPEAL

I. THE SUPREME COURT CORRECTLY HELD THAT THE CITY'S DETERMINATION THAT THE PROJECT WOULD HAVE NO SIGNIFICANT ADVERSE IMPACT ON THE OPEN SPACE IN THE NEIGHBORHOOD IS NOT RATIONALLY BASED

A. SEQRA

SEQRA was adopted in 1975, with the goal of protecting the environment to the fullest possible consistent with other key areas of policy. To that end, it requires that Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process. ECL, § 8-0109(1)
As the Court of Appeals described the import of the statute in *City Council of Watervliet v. Town Board of Colonie*, 3 N.Y.3d 508 (2004), "SEQRA's primary purpose 'is to inject environmental considerations directly into governmental decision making."

The principal mechanism for ensuring that environmental factors are seriously considered in the decision-making process is the EIS. SEQRA requires an EIS to be prepared when government agencies propose to undertake an action or give discretionary approvals for actions by others, as was the case with the project, whenever the action or actions "may have a significant effect on the environment." ECL, § 8-0109(2). In such cases, the EIS must include, among other things:

(a) a description of the proposed action and its environmental setting;

(b) the environmental impact of the proposed action including short-term and long-term effects;

(c) any adverse environmental effects which cannot be avoided should the proposal be implemented; [and]

(d) alternatives to the proposed action.

The courts echo SEQRA. ("The heart of SEQRA is the [EIS] process." *Matter of 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 1 action, as here, that "may include the potential for at least one significant adverse environmental impact. 6 NYCRR § 617.7 (a) (1). "The threshold at which the requirement that an EIS be prepared is triggered is relatively low.". *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y. 2d

359, 364 (1986). Type I actions, such as this, "carries with it the presumptions that it is likely to have a significant adverse impact on the environment may require an EIS. 6 NYCRR § 617.4 (a) (1).

In cases where an EIS must be prepared, SEQRA further requires that a draft EIS be circulated to other interested agencies and the public for their critique and that any comments received, plus answers to them, be included in the final EIS. ECL, §§ 8-0109(2), 8-0109(4). This last requirement is intended to ensure that the public is fully informed about, and has a chance to offer its critique of, the proposed action and, also, to make sure that the agency proposing the action does not sweep difficult problems under the rug. *See, e.g., Matter of Shawangunk Mountain Environmental Ass'n v. Planning Board of the Town of Gardiner*, 157 A.D.2d 273, 276 (3d Dept 1990); *Matter of Merson v. McNally*, 90 N.Y.2d 742, 755 (1997).

Not all governmental actions or approvals require the preparation of an EIS. *See, e.g., City Council of Watervliet v. Town Board of Colonie, supra*, 3 N.Y.3d at 347. The key language is this regard is that an EIS is required for any action that may have a significant effect on the environment, but if this not the case, the governmental authority need not prepare one; nor is it obligated to include other agencies or the public in the evaluation process, as is the case when an EIS is mandated. It is up to the agency responsible for compliance with SEQRA - without

input from other agencies or the public - to make this determination of significance. 6 NYCRR § 617.6. If the responsible agency concludes that the proposed action will not have a significant adverse impact on the environment, it terminates the environmental review process by issuing a Negative Declaration. 6 NYCRR §§617.2, 617.7. In such instances, the public and other interested agencies have no opportunity to participate in the environmental review.

B. THE EAS IS DEFICIENT AND INCOMPLETE

Although the City conducted an environmental assessment, culminating in the preparation of an EAS, the EAS is replete with errors and omissions. Thus, the City's conclusion that the project would not have a significant adverse impact on the environment cannot stand.

According to the SEQRA regulations, a project should be evaluated to determine whether it will cause substantial changes to the use of open space and its capacity to support existing uses. 6 NYCRR § 617.7(c)(viii). Such an evaluation necessarily requires a study of current uses of the open space at issue (R.111). However, the EAS never identifies or analyzes the current uses of Elizabeth Street Garden itself, merely citing general data indicating "a need for facilities geared towards the recreational needs of adults and senior citizens." (R.898). Having failed to take even a cursory look at the current use of Elizabeth Street Garden, the EAS also fails to look at how the development will impact such use.

Additionally, the EAS Full Form and Attachment C to the EAS, which addresses open space, are inconsistent. The Full Form indicates that the open space ratio will not decrease by more than one percent, Full Form 4(g) (R.858). At the same time, the quantitative analysis performed in Attachment C to the EAS clearly shows that the open space ratio will decrease by more double that amount. EAS, Attachment C, C-17 (R.910). Furthermore, neither Attachment C, nor the Negative Declaration acknowledges that the quantitative analysis shows there may be a significant adverse impact regarding open space. It seems clear that HPD did not carefully review the EAS or conduct a thorough analysis with respect to open space, as required by SEQRA. (R.109-110); 6 NYCRR § 617.7(b)(2)-(3).

Had the EAS taken a hard look at these issues it would have been apparent that the proposed development will have an adverse impact on the use of open space. First, sunlight plays a critical role in the use and enjoyment of Elizabeth Street Garden. Visitors and neighbors alike relax in and soak-up the sunlight—all too scarce a resource in Manhattan—while enjoying the unique atmosphere created by the lush landscaping and many works of art displayed in the Garden. (R.29f-29g; R.30b-30d).

The Garden is landscaped with many flowering plants and boasts several mature flowering trees, all of which need sun to thrive. Participation in the maintenance and upkeep of the plantings is an important use of the Garden for

volunteers, enabling them to spend time in the sun, in contact with nature and with other members of the community. (R.29b-29d; R.30j). The Garden's plant beds—located in sunny areas—also contribute to the educational opportunities for young children and public-school students. (R.29d; R.30g-30h).

The above-described enjoyment of the Garden will be all but eliminated by the proposed building, which will occupy most parts of the Garden that receive significant amounts of sunlight. The remaining open space will be surrounded by buildings and, therefore, in shadow for much of the day during most of the year (R.107-109, R.113). The large amount of shade that will be cast over the limited open space will have an adverse impact on the open space. *Id*. The shadow will greatly impede current uses of Elizabeth Street Garden, making the remaining space unable to sustain the same lush plantings, and possibly entirely unusable in winter. (R.29g).

Second, the vastly diminished size of the open space will be prohibitive of current uses. For example, any grassy area that remains, especially once federally mandated paved paths are in place, *see* CB2 Resolution, at 14 (R.1032), will be far smaller than the current lawn and will likely be unable to accommodate the number of participants that currently enjoy yoga and Qi Gong classes and other workshops in the Garden. (R.29f, R.30g, R.113).

Similarly, Elizabeth Street Garden is used by local community groups, such as the Chinatown YMCA, and City-wide organizations, such as the New York Public Library, to host large, well-attended events. (In 2019, there were over 2000 attendees throughout the day at the Garden's Annual Fall Harvest event (R.29g-h).) With the Proposed Project, the limited amount of open space and the shape of the open space make it unlikely that such events will continue. The awkward L-shape of the remaining space is especially limiting for events such as concerts or outdoor movies, which require attendees to have an unblocked line of sight to the performance or screen. (R30i-j, R.111).

Although the EAS repeatedly implies that other open spaces in the study area will compensate for the loss of the Garden, they will not. The Garden is a valuable resource that is used for a wide range of activities, active and passive, and as such is more valuable than a similar open space that accommodates only one or the other type of activity. (R.112).

Because of these errors and omissions, the finding of no adverse impact, and resulting Negative Declaration, must be vacated and annulled. Rather, an EIS is mandated.

C. STANDARD OF JUDICIAL REVIEW

While agencies are invested with considerable discretion in making decisions under SEQRA - including decisions on whether to prepare an EIS or

proceed by way of a negative declaration - that discretion is not unlimited and is subject to judicial review. The basic standard of review is that set forth in CPLR §7803(3) - whether the agency's determination "was made in violation of lawful procedures, was affected by an error of law or was arbitrary, capricious or an abuse of discretion..."

A SEQRA determination, such as the issuance of a Negative Declaration, cannot stand if the court concludes that it "'was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" *Chinese Staff & Workers Assn. v. City of New York*, 68 NY2d 359, 363, quoting CPLR 7803 [3]. The issue for the court's review is whether the agency identified "'the relevant areas of environmental concern," took a "'hard look" at them and made a "reasoned elaboration of the basis for its determination" (*Matter of Merson v. McNally*, 90 NY2d 742, 751-752 [*citations omitted*]; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 416).

Thus, although courts may not substitute their view of the merits of a proposed action for that of the agency, they are obligated to hold the agency to its legal duties under the statute. *Matter of Fisher v. Giuliani*, 280 A.D.2d 13 (1st Dept 2001)

In SEQRA cases, the Court of Appeals has long held that requirements of the statute must be "strictly" complied with." *See, e.g., Matter of Tri-County Tax-*

payers Association v. Town Board of Queensbury, 55 N.Y.2d 41 (1982). In later cases, the Court of Appeals refined this test, eventually setting out, in *Matter of Jackson v. New York State Urban Development Corporation*, 67 N.Y.2d 400, 417 (1986), the basic standard that agencies are required to meet under SEQRA and that courts are to apply in reviewing agency determinations under the statute. Agencies proposing an action or asked to approve one must (i) "identify" the relevant areas of environmental concern, (ii) take a "hard look" at them and (iii) make a "reasoned elaboration" of the basis for their decision.

Jackson involved a case where the responsible agency had prepared a full EIS. But the same standard of review was extended to negative declarations in *Chinese Staff and Workers Ass 'n v. City of New York*, 68 N.Y.2d 359, 363 (1986), where the failure of the City to identify and take a hard look at potential secondary impacts of a housing development in Chinatown was found to violate SEQRA. The Court of Appeals has continued to apply this standard in cases challenging negative declarations, most recently in *Friends of P.S. 163 Inc. v. Jewish Home Lifecare*, 30 N.Y.3d 415 (2017). And meaningful judicial review is all the more important where negative declarations are relied on because, as was the case here, they end the environmental review process without any opportunity for outside comment and on the say-so of a single agency.

D. THE SUPREME COURT ADHERED TO THE STANDARD OF REVIEW IN ANNULLING THE CITY'S NEGATIVE DECLARATION

The Supreme Court carefully and comprehensively reviewed the case, including the agency determination (R.10-16), case law precedent setting forth the parameters for the court's consideration of the SEQRA/CEQR claims (R.16-20), and the role of the court in reviewing the agency's determination (R.23-24).

After denying ESG's first four claims (R.20-23), the court considered ESG's claim that HPD failed to take the required "hard look" at whether the proposed project would implicate a significant effect on the environment triggering the statutory requirement for an EIS to be prepared. Here, the court carefully and comprehensively reviewed controlling case law, including cases that speak to the limited scope of a judicial review of a lead agency's SEQRA determination, ("limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" *citing, Matter of Chinese Staff v. Burden*, 19 NY3d 922, 923-24 (2012) (R.23-24). The court confirmed that with respect to environmental reviews, "the City was entitled to rely on the accepted methodology set forth in the CEQR Technical Manual." *citing, N.*

Manhattan Is Not for Sale v. City of New York, 185 AD3d 515, 519 (2020) (R.24). (The CEQR Technical Manual is hereinafter referred to as the "CEQR TM ".)[3]

The CEQR TM provides detailed guidance as to the analysis that must be conducted to determine whether a proposed project would have a direct impact resulting from the elimination or alteration of open space and/or indirect impact resulting from overtaxing available open space. (CEQR TM, Ch.7 at 7-1) Briefly, the analysis compares the open space as it exists in the study area with No-Action with the open space that will exist With-Action. The determination of significance is based upon the context of a project, including its location, the quality and quantity of the open space in the future With-Action, the types of open space provided, and any new open space provided by the project. CEQR TM, Ch. 7 at 7-15.

The initial analysis is a preliminary assessment. If a preliminary assessment determines that the quantitative open space ratio would increase or remain substantially the same in the With-Action condition compared to the No-Action condition, no further analysis of open space is needed. Decreases in the open space

[3] As noted by the court, at fn. 1 of the decision, the version of the CEQR TM used in the preparation of the EAS is the March 2014 Edition. While now out of date, the difference in the wording in the current Manual "is not germane to the issues considered here" (R___). The 2014 edition of the CEQR TM remains accessible at https://www.nyc.gov/assets/oec/technical-manual/2014/Documents/07_Open_Space_2014.pdf.

ratio would generally warrant a more detailed analysis, under the following conditions:

The decrease in the open space ratio approaches or exceeds 5 percent, it is generally considered to be a substantial change warranting more detailed analysis.

If the study area exhibits a low open space ratio (e.g., below the citywide average of 1.5 acres per 1,000 residents or 0.15 acres of passive space per 1,000 nonresidential users) [as is the case here], indicating a shortfall of open space, even a small decrease (less than 5%) in that ratio as a result of the project may require detailed analysis. (CEQR TM, Ch. 7 at 7-7 to 7-8.)

For the detailed analysis, the CEQR TM, Ch. 7 at 7-16, identifies the circumstances under which a proposed project may result in a significant adverse open space impact.

> There would be a direct displacement/alteration of existing open space within the study area that has a significant adverse effect on existing users, unless the proposed project would provide a comparable replacement (size, usability, and quality) within the study area (*i.e.*, there is a net loss of publicly available open space).
>
> The project would reduce the open space ratio by more than 5 percent in areas that are currently below the City's median community district open space ratio of 1.5 acres per 1,000 residents. (The area at issue in this action is such an underserved area.) In areas that are extremely lacking in open space (such as the area at issue) a reduction as small as 1 percent may be considered significant depending on the area of the City. These

> reductions may result in overburdening existing facilities or further exacerbating deficiency in open space (*emphasis supplied*).

The analysis contemplates a two-step approach. Initially the adequacy of open space in the study area is assessed quantitatively using a ratio of usable open space acreage to the study area population, referred to in the open space ratio, This quantitative measure is then used to assess the changes in the adequacy of open space resources in the future, both without and with the proposed actions, In addition, qualitative factors are considered in making an assessment of the proposed actions' effects on open space resources. The EAS applies this methodology (R.893).

Applying the controlling standard, the court scrutinized the EAS, the basis of HPD's Negative Declaration, as it pertains to the proposed project's impact on the open space of the neighborhood, to ascertain whether it comports with the requirements of the CEQR TM. Based on its review, the court concludes, correctly, that the Negative Declaration lacks a rational basis.

Referencing the relevant EAS analysis, found at R892 and R910, the court states that "based on the quantitative analysis of the effect of the Project on open space as analyzed within the EAS sets forth that, under the guidelines of the CEQR TM, the reduction in open space is sufficient to indicate the presence of a significant adverse impact." (R.26) (*emphasis supplied*). Here, as acknowledged in

the EAS, with the proposed action, the total open space is expected to decrease by 2.24% (as compared to the No-action condition); the With-Action passive open space ratio would decrease by 11.41%; and the With-Action active open space ratio would decrease by 0.13%. (R.26).[4]

The City's Brief argues that the court's conclusion that "the reduction in open space is sufficient to indicate the presence of a significant adverse impact" is a misreading of the CEQR TM (Brief at p. 26). This argument is incorrect. While the CEQR TM uses the permissive "may" in considering whether a proposed project results in a significant quantitative adverse open space impact, and while the benchmarks identified in the CEQR TM "do not constitute an absolute impact threshold" (CEQR TM, Ch. 7 at 7-16), a reduction approaching or greater than 5% reduction is significant ("if the decrease in open space ratio approaches or exceeds 5 percent, it is generally considered to be a substantial change" CEQR, Ch. 7 at 7-7) while even "an open space ration change of less than 1 percent may result in potential significant open space impacts" if, as here, "the study area exhibits a low open space ratio." (CEQR, Ch. 7 at 7-7 – 7-8). Therefore, the court correctly concludes that a 2.24% reduction of open space is sufficient to indicate the

[4] The City's attempt to minimize this loss of open space in fn. 8 of its Brief fails, as its calculations are off by a decimal point. Thus, the correct calculation does not yield the City's result ("on a per-resident basis, this works out to the loss of approximately 2 square inches per person") but rather yields a loss of approximately 22 square inches per person.

presence of a significant adverse quantitative impact because it is more than double the "even less than 1%" decrease in the open space ratio. Moreover, the decrease is simply an acknowledgment that this percentage falls approximately in the middle of the benchmarks identified in the CEQR TM, thereby requiring further analysis of qualitative factors.

The court further echoes the two-step analysis. As explained by the court, the CEQR TM provides that "when there is a significant adverse impact on open space on a quantitative basis as is the case in this EAS" then "the adequacy of the open space in the study area should be considered in order to determine whether the[ ] change in the open space conditions and/or utilization results in a significant adverse effect to open space." (Quoting the CEQR TM, Ch. 7 at 7-16) (R.27). Relevant factors identified in the CEQR TM are "the type of open space (active or passive) in the neighborhood, its capacity and conditions, the distribution of open space, whether the areas is considered "well-served" or "underserved" by open space, the distance to regional parks, the connectivity of open space, and any additional open space provided by the project, including rooftop gardens, greenhouses, and new active or passive space." *Id.*

Although the EAS attempts to make this qualitative analysis and based thereon concludes that these factors compensate for the reduction of the

quantitative space, the deficiency of the City's conclusion is laid bare by the court's analysis.

After first identifying the relevant section in the CEQR TM (R.27), referenced above, the court's well-reasoned conclusion, states as follows:

> The infirmity in the EAS' Qualitative Assessment of open space impacts is that it fails to provide any context that would support respondents' conclusion that the reduction in the quantitative open space is compensated for by any of the aforementioned factors set out in the CEQRTM. That is, rather than following the CEQRTM and using the qualitative assessment in relation to the quantitative assessment's finding of a significant decline in the open space ratios, the respondents instead fail to explain how the qualitative assessment reduces the significance of the quantitative reduction in open space caused by the project. Even if, assuming arguendo, the qualitative assessment identified factors that would mitigate the impact of the significant decline in the open space ratio caused by the project, there is no evidence in the current record that such mitigations are sufficient to overcome such significance. *Citing, Matter of Merson v. McNally, 90 NY2d 742, 754 (1997)* ("mitigating measures will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action.") (R.27-28).

The court here does not substitute its view of the merits for that of the agency, it simply holds the agency to its legal duties under the statute. The court's finding that the agency failed to follow the procedures set forth in the CEQR TM are within the limited review power of the court. (*Matter of Merson v. McNally,* 90

NY2d 742, 751-752 [citations omitted]; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 416)

In its Brief, at p. 27, the City attempts to rehabilitate the EAS, albeit without success. Initially, its contention that a 2.24% reduction in open space is "probably insignificant" is directly contradicted by the percentage range identified as guidelines in the CEQR TM. As noted *supra*, in an underserved study area, such as the present one, a reduction in open space of even less than 1%, may be significant.

Similarly, the assertion that the reduction in the amount of open space is balanced by the alleged substantial increase in public access, simply has no merit. The Garden currently is accessible to the public for most of the daylight hours throughout the week (R.29d). The Garden intends to increase the hours of access even further, once the Garden is saved. *Id*. Thus, the minimal projected increase in public access will have little impact, if any, on the reduction in open space resulting from the proposed project.

The City's reliance on the existence of other open spaces to mitigate the decrease in open space misses the point. As shown in the record (R.113, R.145-168), while these open spaces may be well-landscaped, they essentially are walkways between lanes of traffic or are landscaped areas in front of commercial spaces. (R.112). Such open spaces do not compare to what the Garden provides.

The repeated references to Washington Square Park and Tompkins Square Park are a red herring. First, both are outside the study area and, as a result beyond the walking distance of seniors that are enjoying the Garden (R.28b). Moreover, while the City identifies Washington Square Park and Tompkins Square Park as a "destination park" this is not a category recognized by the CEQR TM. Rather, it refers to "regional parks" (CEQR TM, Ch.7 at 7-16). Neither Washington Square Park nor Tomkins Square Park are a regional park. (R.2411-2412). Furthermore, neither the EAS nor the City's Brief considers that Washington Square Park may be currently utilized to capacity. (R.110).

The City also relies on the contention that the proposed project will include open space. As discussed in the Clark Declaration (R.109-115), the space created in the project is nowhere near the quality of the open space provided by the Garden. Thus, this cannot be said to mitigate the loss of open space.

In fn. 5 of its Brief, the City asks the Court to take judicial notice of the alleged fact that the project developer has leased the courtyard of a building adjoining the Garden location, as stated in a Memorandum, dated November 16, 2021, approximately one year before the court below rendered its decision. Regardless, it appears, this was never brought to the attention of the court. As the City had ample opportunity to do so, it should not now be permitted to include it in the Record for this Court's consideration. Even assuming, arguendo, that this

information is considered, it should not impact on the Court's determination. As stated in the Memorandum, the space at issue is a paved courtyard, almost entirely in shade from the surrounding building, thus hardly comparable to the Garden. Moreover, any assessment on how the courtyard impacts the open space analysis cannot be simply based on speculation. Rather, at minimum, it should be reviewed and analyzed in the context of a full EIS, or alternatively remanded to the Supreme Court for review and evaluation.

POINT II – IN SUPPORT OF ESG'S CROSS-APPEAL

I. THE SUPREME COURT ERRED IN DECLINING TO ADDRESS THE MERITS OF THE ZONING ISSUES THAT ESG RAISED

A. THE SUPREME COURT IS EMPOWERED TO ADDRESS THE MERITS OF ESG'S ZONING CLAIMS

The Supreme Court declined to consider the merits of ESG's claims with respect to zoning, as set forth in the third and fourth cause of action, "because binding precedent compels that '*except where the proposed action is a zoning amendment*, SEQRA review may not serve as a vehicle for adjudicating legal issues concerning compliance with local government zoning. *Matter of WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd*, 79 NY2d 273, 382 (1992) (*emphasis supplied*). Thus, to the extent that petitioners seek to challenge the project's zoning and compliance therewith, this proceeding is not the litigation to

do so and the court has no power to determine whether or not such claims have any merit." (R.22-23).

ESG claims with respect to zoning are set forth in the third, fourth, tenth, and (to some extent) seventh causes of action. Of these, only the fourth and seventh causes of action allege a violation of SEQRA.

The tenth cause of action alleges that the City failed to comply with applicable zoning regulations, however, in the context of the approval of the Revised ULURP Application for the Proposed Project, rather than within the context of SEQRA. Although referencing the tenth cause of action at p. 6 of the Decision (R.15) ("The tenth cause of action challenges the ULURP approval on zoning grounds."), the Decision does not otherwise address this cause of action. As the court below entirely fails to rule on the tenth cause of action, either on the merit or on jurisdictional grounds, this issue must be reversed. At a minimum and in the alternative, this issue should be remanded to the Supreme Court for review and determination.

The third cause of action alleges that the EAS conclusion that 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" is "neither in compliance with nor compatible with applicable zoning regulations" (EAS at R.876; Complaint, ¶114, R.61), "is an error of law because the Proposed

Project is neither in compliance nor compatible with zoning regulations." (Complaint, ¶115, R.62). Specifically, the third cause of action alleges that the EAS conclusion is incorrect because the Proposed Project is impermissible set back from the Mott Street front lot line and, therefore, violates the applicable Zoning Resolution (Complaint ¶¶116-119, R.62).

ESG submits that the Supreme Court has misread the third cause of action, as it is not a SEQRA claim. Therefore, *Matter of WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd* does not control and the court is not foreclosed from exercising jurisdiction over this claim.

The fourth cause of action alleges that HPD failed to take a hard look at zoning, to wit, "conduct a preliminary assessment of land use and zoning is required for a project that would change the zoning on a site" (*emphasis supplied*), (Complaint ¶126, R.62), and failed to "provide a description of zoning changes that would be required for the project to proceed as proposed by the EAS" (*emphasis supplied*), (Complaint ¶128, R.62).

As for the fourth cause of action, the gravamen of the allegations is that the Proposed Project requires a change in the zoning, to wit, a zoning amendment. Therefore, the challenge to the project falls within the exception set forth in *Matter of WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd.* Accordingly, the

Supreme Court also erred in declining to exercise jurisdiction over this cause of action and the matter should be remanded for a decision on the merits.

Finally, the seventh cause of action alleges a violation of SEQRA and CEQR because HPD failed to take a "hard look" at the potential adverse impact on the environment that the Proposed Project will have with respect to neighborhood character (Complaint ¶164, R.67). Zoning is one of the impacts that must be considered when assessing the effect, a project has on Neighborhood Character. (CEQR TM, Ch. 21 at 21-2; R.27c). Thus, zoning issues are implicated in this cause of action.

Here too, this claim may be considered on the merits, as the court does (R. 27c-27d), albeit in a cursory manner. *See, infra*. Consideration of the zoning issue, in the context of assessing the Proposed Project's impact on the Neighborhood Character is not inconsistent with *Matter of WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd.* As stated there, "[t]hat is not to say that local zoning laws are irrelevant to determinations made pursuant to SEQRA. They are indeed relevant. For example, the permitted use is in harmony with the general zoning plan and will not adversely affect the local community." *Id*, at 382. Thus, an assessment of the impact of an impermissible set back from the front lot line on Neighborhood Character is within the jurisdiction of the court.

In short, the court had jurisdiction over all of ESG's zoning claims, and this matter should be remanded to permit a determination thereof on the merits. A full discussion of the merits of the zoning issues follows, *infra*.

B. THE EAS, NEGATIVE DECLARATION, AND ULURP APPROVAL SHOULD BE ANNULLED AND VACATED AS THEY FAIL TO RECOGNIZE THE PROJECT'S VIOLATION OF APPLICABLE ZONING REGULATIONS

The Proposed Project is not compatible with applicable zoning regulations. Block 493, Lot 30, the site of Elizabeth Street Garden and the Proposed Project, is zoned C6-2 and located in the Special Little Italy District ("SLID"). SLID zoning regulations supersede the C6-2 zoning where so provided. Therefore, the proposed development on its site must comply with and be compatible with applicable SLID zoning regulations. It does not. Rather, to proceed as proposed, the Proposed Project requires a zoning change.[5]

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:

[5] Alternatively, the Project, as proposed, could only be developed if an authorization to modify Section 109-131 was granted by the City Planning Commission under ZR Section 109-514. (R.169c)

> 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. (Italics in original.)

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.

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.") (R.337); *accord*, EAS D-12 (R.350). 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 (R.342) (*emphasis added*). ESG does not disagree with the analysis as to the Elizabeth Street side of the proposed project. But it is striking that the EAS is silent on the Mott Street lot line.

At best, the City appears to confuse a front building wall, for zoning purposes, with a wall containing the front entrance to a building. *See, Goldman Supp. Aff.* at ¶ 15, (R.2345-6). 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. *Id.* at ¶ 16 (R.2346).

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. *Id*. at ¶ 17, (R.2346) Exh. A (R.2348). Respondents could have proposed a legally compliant design, such as two buildings with open space between the two buildings, see *Id.* at ¶ 17, (R.2346)[6] or a

[6] The ULURP application specifically did *not* indicate that a zoning change would be required (R.817) The box "Pursuant to Zoning" was marked with an "x" (R.818).

change in zoning, but neither was analyzed by the EAS or Negative Declaration. *See, Goldman Aff'd* at ¶ 7, (R. 169 c). (R.2347).

Because the Project, as proposed, requires a zoning change, a proper analysis requires a preliminary assessment of land use and zoning. (CEQR TM, Ch. 4, at 4-9). 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. Rather than conducting this analysis, the EAS erroneously claims that the Proposed Project complies with SLID zoning, stating that 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[.]" (R.298).

The Negative Declaration (R.355-358) indicates that HPD reviewed and relied on the EAS in concluding that the proposed Project would have no significant impacts on the environment. (*Id*., at R.358.)

As neither the EAS nor the Negative Declaration include a detailed description and assessment of the zoning changes associated with a project, had the Supreme Court reviewed ESG's third and fourth causes of action on the merits, it should have annulled and remanded the Negative Declaration on the grounds alleged therein. A remand to the Supreme Court will afford it that opportunity.

Separately and independently from the environmental review mandated by SEQRA and CEQR, an application for the disposition of City-owned land, such as

the Elizabeth Street Garden property, is subject to public review, under the Uniform Land Use and Review Procedure ("ULURP"), by the affected community board(s), the affected borough president, the City Planning Commission ("CPC"), and in certain circumstances the City Council. 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.

The review process requires CPC certification of the application for a project as complete, a public hearing before the affected community board, a recommendation or waiver by the community board, a recommendation or waiver by the borough president, CPC approval, approval with modifications, or disapproval of an application, after a public hearing. Next, 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. After further review by the CPC, including review of any City Council modifications, the application is returned to the City Council which may approve the application, approve the application with modifications, or disapprove the application.

Here, the petition alleges, in the tenth cause of action, that the ULURP Application represented to the CPC and City Council that the Proposed Project was "pursuant to zoning" when, in fact, it was not. (R.72) Based in part on the

Negative Declaration, the CPC's decision dated April 10, 2019, and City Council Resolution No. 985, approved the Revised ULURP Application. The CPC approval and City Council Resolution No. 985 should be annulled and vacated since it is based on a material error of law.

As noted *supra*, the Decision does not address this cause of action, either on the merit or on jurisdictional grounds. Thus, at a minimum, this cause of action must be remanded to the Supreme Court for review and determination.

II. THE SUPREME COURT ERRED IN DECLINING TO ANNUL THE NEGATIVE DECLARATION ON THE GROUNDS THAT THE CITY FAILED TO TAKE A HARD LOOK AT NEIGHBORHOOD CHARACTER, PUBLIC POLICY, AND CUMULATIVE IMPACT

A. THE SUPREME COURT DECISION

While the Supreme Court reviewed and analyzed the "open space" issue carefully and comprehensibly, its analysis of the proposed project's impact on the neighborhood character, its cumulative impact, and public policy considerations, is less developed, comprising of approximately one page of the court's 22-page Decision and Order. The court's conclusion that ESG's claims are not sustainable relies entirely on the fact that the EAS allegedly considered these areas and did not find significant adverse impact. The court's analysis of these issues is devoid of any assessment as to whether the EAS determinations of "no adverse impact" in these areas is arbitrary and capricious or rationally based. ESG submits that had the

court undertaking a careful judicial review of the EAS in these areas (as was done in connection with the "open space" claim), here too it would have annulled the Negative Declaration. At minimum, the matter should be remanded to afford the court to make a proper assessment.

In its cursory analysis of the neighborhood character assessment, the court stresses that the environmental elements in this area are derivative of other impacts considered in the EAS (citing to eleven factors listed in the CEQR TM [7]). (R.27c). Relying solely on the fact that these eleven areas are examined in the EAS, and that the EAS did not find significant impacts in these areas, the court concludes ESG's claim (Seventh Cause of Action), that the City failed to take a hard look at neighborhood character, cannot be sustained. ESG submits that the court's conclusion is in error, particularly, as the court disregards its own conclusion that the EAS analysis of the open space factor is irretrievably flawed.

Moreover, as described in detail below, the EAS analysis of the proposed project is not rationally based in at least one further aspect, namely, the impact of the proposed project's shadows.

The Supreme Court does not even address ESG's Eight Cause of Action, namely, that the City failed to take the required hard look at the project's impact on

[7] The factors are A) Land Use, Zoning, and Public Policy; B) Socioeconomic Conditions; C) Community Facilities; D) Open Space; E) Historic and Cultural Resources; F) Urban Design and Visual Resources; G) Shadows; H) Transportation; and I) Noise.

public policy, including the City's own climate change policy. Nor does the court address the cumulative impact of the proposed project (Ninth Cause of Action). The shortcomings of the EAS in these areas are further set forth below.

The court's reliance on *Real Estate Bd. Of New York, Inc. v. City of New York*, 157 AD2d 361, 365 (1st Dept. 1990), for the proposition that ESG "do not argue that the respondents failed to follow the guidelines set forth in the CEQRTM in their consideration of these elements", is misplaced. The cited case does not impose a blanket policy that a reference to the CEQR TM is mandatory. Rather, that case stands for the proposition that a petitioner's disagreement with the methodologies and conclusions reached by an agency, not based on any valid evidence, does not warrant invalidation of an agency's reasoned analysis. *Id.*, *accord, Akpan v. Koch*, 75 N.Y.2d 561 (1990).

In any event, as shown by the Record, ESG does reference specific sections of the CEQR TM that were not complied with by the City. In reference to the neighborhood character assessment, ESG cites to the CEQR TM Ch. 21, at 21-1 and 21-4 ("For example, a project may affect a defining neighborhood feature if a significant adverse shadow impact was identified on sunlight sensitive features of an historic building or park and that resource was determined to be central to a neighborhood's character") (R.2445-2446). For the public policy assessment, ESG has referenced the CEQR TM Ch 4, at 4-1 (a proposed prospect's "compliance

with, and effect on the area's …applicable public policies "should be analyzed) (R.269). There is no specific chapter in the CEQR TM that directly addresses "cumulative impacts." However, SEQRA does and ESG references the relevant section, 6 NYCRR § 617.7(c)(1)(xi) (changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment) (R.263). This SEQRA requirement is included in the CEQR TM Chapter One, Procedures and Documentation, TM 1-8, as noted by ESG in the Record (R.2450-2451).

Thus, the Record addresses the court's misplaced impression that ESG did not argue that the City failed to follow the guidelines set forth in the CEQR TM in the consideration of these elements.

B. THE EAS ASSESSMENT OF THE PROJECT'S IMPACT ON NEIGHBORHOOD CHARACTER HAS NO RATIONAL BASIS

The Supreme Court analysis of the EAS assessment of the proposed project's impact on Neighborhood Character is deficient. ESG respectfully submits, had the court done an appropriate review of this issue, within the constraints of a court's limited review powers (*see, supra*), it should have concluded that the Negative Declaration is not rationally based.

A neighborhood character assessment "considers how elements of the environment combine to create the context and feeling of a neighborhood and how

a project may affect that context and feeling." CEQR TM, Ch.21, at 21-1. It "focuses on whether a defining feature of the neighborhood's character may be significantly affected." CEQR TM, Ch.21, at 21-1.

The CEQR TM recognizes that parks may be central to a neighborhood's character." CEQR TM, Ch. 21, at 21-4. ESG is a key attraction to the neighborhood and serves a unique and critical role in the community, making it central to the neighborhood's character.

Under the CEQR TM, a neighborhood character assessment is "generally needed" if a project "has the potential to result in significant adverse impacts" in any of the following technical areas: Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Open Space; Historic and Cultural Resources; Urban Design and Visual Resources; Shadows; Transportation; or Noise. CEQR TM, Ch. 21, at 21-1. A neighborhood character assessment is also generally needed "when the project may have moderate effects on several elements that define a neighborhood's character."14 CEQR TM, Ch. 21, at 21-1. By either standard, the EAS should have included a neighborhood character assessment. It did not. HPD thus failed to take a hard look at neighborhood character. Had it done so, it would have required an EIS. (R.107).

Here there can be no dispute that Elizabeth Street Garden is a valuable neighborhood asset. It is a Community Garden and more. It is a key attraction to

the neighborhood and serves a unique and critical role in the community, making it central to the neighborhood's character. The Garden is a well-known attraction to residents and visitors alike. The Garden is a community gathering place. It has hosted hundreds of free, public events for organizations around the City, drawing people to the neighborhood. (R.104-106).

It hosts educational opportunities for public school students and events for many organizations including, the New York Public Library, the Chinatown YMCA, the Fifth Precinct of New York City Police Department, the Lower East Side Ecology Center, and the Museum of Modern Art (MoMA). *Id.* It is supported by local businesses and provides a space for cultural performances such as art shows, a movie screening, and the annual Harvest Festival. It provides space for recreation, such as Tai Chi, Qi Gong and Yoga workshops. *Id.*

The Garden is an outdoor classroom that enhances public school students' education and offers them a rare opportunity to interact hands-on with nature. Elizabeth Street Garden has partnered with Public Schools 1 and 130, and in 2018 hosted educational workshops for 550 students throughout the school year. *Id.*

It further is a veritable outdoor museum, boasting artworks of museum quality, such as a gazebo designed by the Olmstead Brothers and a balustrade designed by Jacques Henri Auguste Greber. *Id.* 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*.

As Renee Green said "from the beginning, the Garden became an important part of my life. My husband and I used to walk together in the Garden before he passed away. Now that I am alone, the Garden has become more important to me. I love speaking to people from the neighborhood, other parts of the country, and all over the world. As I have aged and my arthritis and asthma have worsened, limiting the amount of walking I can do, the Garden has become a focus point in my life …. There is very little public green space in Little Italy and SOHO. The demolition of the Garden will be devastating to the community." (R.28a-28b).

And, as Poppy King, a successful entrepreneur and business owner, who has lived a few blocks from the Garden for almost twenty years, eloquently described the Garden "it has everything the city should be Protecting not Destroying…. It is a place for all generations, regardless of race, gender, or socio economics, to spend quality time and regenerate so that all of us can be better citizens and better humans…. Why tear down a space that is already operating as a heart and soul for a neighborhood…" She ends with the following about the community "It… has a jewel in its midst that will forever serve the community in a way that nothing could replace or attract as the Elizabeth Street Garden does." (R.80-81)

If the proposed project moves forward, as proposed, it will destroy the Garden, clearly impacting the character of the neighborhood. Because of this potential, a neighborhood character assessment was indicated. A neighborhood character assessment "focuses on whether a defining feature of the neighborhood's character may be significantly affected." CEQR TM, Ch. 21 at 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 Ch. 21 at 21-4.

At minimum, a preliminary assessment of neighborhood character impacts is appropriate where, as here, the project has "the potential to result in any significant adverse impacts" with respect to open space, zoning, historic and cultural resources, and public policy. Nevertheless, no such assessment was included in the EAS. As a result, there is no rational basis for the Negative Declaration on this issue.

The City's contention that the "open space" included in the proposed project will mitigate the loss of the Garden has no merit. The 6,700 square feet[8] of ground-level open space that will remain if Elizabeth Street Garden is destroyed and the land developed will be cast in shadow, (R.108-109, R.113), and will not have the

[8] The additional 1,700 square feet of "open space" proposed to be included comprises of a tunnel without access to the open sky. (R.1905) Thus, it not comparable to the open space provided by the Garden, either quantitatively or qualitatively.

capacity to support existing uses and/or at their current scales (R.111). The reduction in open space would prevent it from playing a vital role in the community, as does Elizabeth Street Garden.

Clearly, had the Supreme Court properly considered these facts, it should have found that the Negative Declaration lacked a rational basis. At minimum, the matter should be remanded for a proper assessment.

C. THE AGENCY FAILED TO TAKE A HARD LOOK AT PUBLIC POLICY

As noted, the Supreme Court decision does not address the impact of the Proposed Project on public policy. Here, again, a proper review should have concluded that the Negative Declaration is not rational.

Under CEQR, a proposed project's "compliance with, and effect on, the area's . . . applicable public policies" should be analyzed. CEQR TM, Ch. 4 at 4-1. HPD did not take a hard look at public policy. The EAS nowhere identified or analyzed whether the Proposed Project is compatible with City's policy, set forth in Executive Order No. 26, of delivering climate actions that support the goals of the Paris Agreement or the City's policy and legal obligations to expand green infrastructure. *See, City of New York, Office of the Mayor, Executive Order No. 26* (June 2, 2017). Green spaces, such as the Elizabeth Street Garden, help limit climate change: "The open green space of urban parks can produce an `oasis effect,' cooling the immediate area by roughly 2.7 to 7.2 degrees Fahrenheit. This

effect can extend beyond the park's boundary and into the surrounding neighborhood, cooling nearby blocks." (R.31e).

Furthermore, trees can be effective at mitigating climate change. Increasing the number of trees in New York City has been part of environmental policy at least since the Bloomberg administration, which implemented the MillionTreesNYC initiative. In making MillionTreesNYC part of its efforts to promote sustainability, see MillionTreesNYC, NYC Parks, at https://www.milliontreesnyc.org/html/about/about.shtml, the Bloomberg administration recognized the role trees play in slowing global climate change. Destroying Elizabeth Street Garden with its many trees will detract from the urban forest and is contrary to the City's policy of limiting the impact of climate change. Therefore, the Proposed Project may have a significant adverse impact with respect to public policy and an EIS is required.

Green infrastructure also assists in combatting combined sewer overflows (CSO) and stormwater runoffs. In recognition thereof, the City has committed itself to make best efforts to implement green infrastructure projects to reach certain benchmarks with respect to reduction of stormwater runoff to control CSOs. In 2012, this commitment to green infrastructure became legally binding under an Order on Consent with the New York State Department of Environmental Conservation ("DEC"). CSO's are defined in the order of consent as "discharges of

untreated domestic sewage from combined sewer systems, and industrial waste waters, combined with storm water. CSO's occur when wet weather flows are in excess of the capacity of combined sewer systems and/or the water pollution control plants they serve." *See, In the Matter of the Violations of Article 17 of the Envtl. Conservation L.* and Part 750, *et seq.*, of Title 6 of the Official Compilation of Codes, R. and Reg of the State of N.Y. by The City of NY and The N.Y. City Dep't of Envtl. Protection, Order on Consent, DEC Case No, C02-20110512-25 (DEC, Mar. 8, 2012) ("2012 Consent Order"). As these are "officially adopted and promulgated public policies," and thus, should be considered. CEQR TM 4-5

"Green spaces act as mini reservoirs that mitigate flooding during large storms . . . ." (R.31d). Expanding green open space, parks or otherwise, is part of the City's effort to control CSO's by limiting storm water runoff. (R.31c-31d). HPD should have taken a hard look at the Proposed Project's impact on the City's legal obligations and policy relating to CSOs. It did not.

The destruction of the Garden and elimination of much of the green, open space is therefore contrary to the goals of the City's green infrastructure policy and the 2012 consent order.

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." (R.31f, R.2415). 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.

Additionally, the EAS does not consider the impact of rising urban heat, a grave climate change concern (R.31e, R.2412). The Garden measurably reduces urban heat. The Trust for Public Land 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. (R.31c. 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. (R.2413). If the Garden is destroyed, this cool island may cease to exist because, even though the Proposed Project purports to have green space, it will be predominantly paved and the existing mature trees, which significantly reduce urban heat, will be gone. (R.2413). Additionally, there would not be a garden where people could take refuge. *Id.*

In short, the EAS fails to take a hard look at the Proposed Project and assess its impact on public policy. Here too, the Supreme Court should have concluded

that the Negative Declaration had no rational basis and ordered the preparation of an EIS to evaluate the significant impacts of the destruction of an open green space.

D. THE AGENCY FAILED TO TAKE A HARD LOOK AT CUMULATIVE IMPACTS

Finally, the Supreme Court failed to address the proposed project's cumulative impact. A significant adverse impact on the environment is indicated by "changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in substantial adverse impact on the environment." 6 NYCRR § 617.7(c)(1)(xi). As set forth in the preceding sections, Proposed Project may have a significant adverse impact in several technical areas. Even if, arguendo, the adverse impact in any one of these technical areas is not so significant as to merit an EIS, under SEQRA, the lead agency must assess if, when considered together, there may be substantial adverse environmental impact. The EAS failed to assess the cumulative impact of the destruction and development of Elizabeth Street Garden. Consequently, HPD failed to satisfy the hard look requirement. As the foregoing subsections indicate, had HPD taken a hard look, it would have found that the project may have a significant adverse impact on the environment, requiring an EIS.

The sole action taken by the City in connection with considering the "cumulative impact" was HPD checking the box on the EAS Full Form for no

cumulative effects. (R.862). 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 (R.889). 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.

This demonstrates that the City's action on this issue was arbitrary and capricious and, therefore, the Supreme Court should have annulled the Negative Declaration on this ground also.

CONCLUSION

For the reasons set forth above, this Court should affirm the Decision, Order and Judgment of the Supreme Court annulling and vacating the approvals given to the Project by the City Planning Commission and City Council and requiring the preparation of a full EIS. Additionally, the Negative Declaration should be annulled and vacated on the alternate grounds stated. Alternatively, as to the

zoning analysis, the decision, order, and judgment below should be vacated and remanded with instructions for the Supreme Court to determine the issue on the merits.

Dated: New York, New York
March 20, 2023

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of

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

Case No. 2022-05170

Petitioners-Respondents,

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-Appellants.

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1. The index number in the court below is 152341/2019.

2. The full names of the original parties appear in the caption above. Petitioner Alan Reiver has died, but his executor has not yet moved to be substituted as a party.

3. This action was commenced in Supreme Court, New York County.

4. This proceeding was commenced by notice of petition on March 5, 2019. The respondents answered on September 26, 2019.

5. Petitioners commenced this proceeding to annul the negative declaration arising out of the environmental review of an affordable housing project for senior citizens.

6. This appeal is from a decision and order of the Honorable Debra A. James, Supreme Court, New York County, entered on November 1, 2022.

7. This appeal is being taken on a fully reproduced record.