SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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FRIENDS OF ELIZABETH STREET GARDEN, DEBORAH GLICK, YUH-LINE NIOU, JEANNINE KIELY, KENT BARWICK, EMILY HELLSTROM, BARRY LOEWER,

Petitioners-Plaintiffs,

For a Judgment Pursuant to CPLR Art. 78 and Declaratory Judgment,

-against-

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF THE CITY OF NEW YORK, PENNROSE, LLC, HABITAT FOR HUMANITY NEW YORK CITY, INC., MANHATTAN COMMUNITY BOARD 2, GALE BREWER AS MANHATTAN BOROUGH PRESIDENT, NEW YORK CITY PLANNING DEPARTMENT, NEW YORK CITY COUNCIL, BILL DE BLASIO AS MAYOR OF THE CITY OF NEW YORK

Respondents-Defendants

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AMENDED PETITION/COMPLAINT

Index No. 152561/2019

Michael S. Gruen, as attorney for the Petitioners-Plaintiffs named above, alleges as their Petition and Complaint:

This proceeding/action concerning the proposed disposition of City property, then and still used as a public sculpture garden, for development as a senior low rent housing facility, with retail, office and other uses was filed on March 8, 2019. Two sets of stipulations of the parties, so ordered by the Court, permitted ULURP proceedings to move forward, making it possible for judicial review to address the plan in its final form.

Under these stipulations, all rights, objections and defenses of the parties are preserved.

That process has resulted in several significant changes in the plans for the project. Those changes have to an extent eliminated former issues but the replacement procedures have raised new and different issues.

This amendment is made to address such changes and otherwise bring the pleading up to date. To the extent reasonably possible, the paragraph numbering containing numbers only corresponds to the original numbering; and paragraph numbers followed by a capital letter represent new material.

I. Introduction

1. This action concerns an exceptionally beautiful and popular garden on City-owned property. Elizabeth Street Garden combines lush vegetation including mature trees, an open lawn, flowering garden beds created by a local landscape architect, and maintained by local residents and school children working with horticultural and landscape professionals, with a large collection of outdoor high-quality sculpture provided by Allan Reiver, also a neighbor, who conducts a business and gallery for the retrieval and resale of fine sculptures from outstanding old buildings under demolition. The Garden attracts more than 100,000 visitors each year, including local elementary students, families and seniors, as well as residents from around the City and tourists from around the world.

2. The site's earliest known from farmstead to urban development was as a free school for financially needy students starting in 1822. It was converted into a public school in 1854. School use continued into the mid-20th century and a portion of the then larger site was transferred for housing. Beginning February 1, 1991, the City leased the remainder of the site and the Garden was created. In 2013, Petitioner Friends of Elizabeth Street Garden, a not-for-profit charitable organization, transformed the Garden into a heavily-used park by offering public educational events and classes at the Garden, opening the Garden to the public twelve months a year, weather permitting, and more than 40 hours a week during the warm weather months, and funding improvements to the front and rear lawns and planting beds. Friends also developed a significant base of supporters for saving the Garden as a New York City Park including nearly every local elected official – Rep. Jerrold Nadler; Rep. Nydia Velazquez; State Sen. Brad Hoylman; State Sen. Brian Kavanagh; Assemblymember Deborah Glick; Assemblymember Yuh-Line Niou; NYC Comptroller Scott Stringer; District Leaders Vittoria Fariello, Paul Newell and Daisy Paez; Manhattan Community Board 2; former NYC Public Advocate Letitia James; former State Sen. Daniel Squadron; former NYC Parks Commissioner Adrian Benepe. Supporters also include 20 park and community organizations; and hundreds of volunteers. The group has secured more than 10,000 supporting letters and signatures of support from local residents and small business owners, and its work is supported by hundreds of volunteers.

3. The City has now developed a plan to sell the property to a consortium which would operate it for a period stated to be 60 years as a combination of low-cost senior housing coupled with commercial office, community facility, and retail rental space. Petitioners recognize and appreciate the need for low-cost housing and would endorse it at virtually any location other than this Garden. They also recognize that public open space is exceptionally meagerly provided in the one-mile diameter area around the lot at issue. (See next paragraph).

In December 2015, Manhattan Community Board 2 (CB2) passed a resolution in support of building affordable housing at 388 Hudson Street, but *only if* the Garden were saved *in its entirety*. (CB2's resolution is annexed as Exhibit A). This alternative location, owned by the City, is within the same Community District, and considerably larger, and therefore would provide more housing for local seniors. The City rebuffs that recommendation and insists on proceeding with demolition of the Garden. The City, more sensitively, supported a similar park-for-housing "swap" in Chelsea, where it recently cut the ribbon for a new park on West 20th Street (formerly a parking lot) and will build substantially more housing on a larger City-owned site two miles north. See https://www.thevillager.com/2019/08/chelsea-gets-first-new-public-park=in-decades and https://www.thevillager.com/2015/11/done-deal-w-20th-st-gets-its-park/.

4. The area around the Garden has a severe deficiency of parks and other publicly available open space. According to the environmental assessment statement (EAS) for this project, prepared by a private firm on behalf of Respondent Pennrose, LL.C, for Respondent Department of Housing Preservation and Development (HPD), the City's policy calls for 2.5 acres of public open space for every 1,000 residents of a given area. Less than 1.5 acres for every 1,000 residents is deemed minimal. The area around the Garden – having an approximate diameter of one mile – would have only 0.149 acres of public open space per 1,000 residents according to the EAS, if the project went forward. That is 94% lower than what the City's policy calls for. (A copy of portions of the EAS is annexed as Exhibit B; Attachment E (Noise), Appendices 2 (Phase 1A Archaeological Assessment), and 4 (Transportation Issues), and section labeled Figures are omitted as immaterial for present purposes.)

5. For the Court, the question, of course, is legality. As rich as is the Garden for cultural and essential open-space enjoyment, the proposed project is rife with illegality and blatant disregard of the law. The issues include:

- The EAS forms the basis for a negative declaration adopted by HPD. That is a statement that the proposed project will not impose any significant environmental risk. Respondent Planning Commission certified the negative declaration, thereby starting the fast-track Uniform Land Use Review Process (ULURP) by which certain projects, including this, are approved or rejected by the Council. In this case, however, the EAS on which it is based points to the possibility of buried hazardous waste on site, and promises that it will be studied in the indefinitely defined future. Thus, contrary to the intention that a negative declaration obviates the need for a full-scale environmental impact statement because it assures that there will be no significant environmental risk, this EAS does the opposite – it states that there is distinct possibility of significant environmental risk. A different declaration, called a conditioned negative declaration, is, in some cases, available for such a situation. Where such a conditioned negative declaration is available, it would require more procedural steps than have in fact been taken here. Thus, the negative declaration made here is invalid.

- Even if that invalidity could be cured, there is an even greater problem. A conditioned negative declaration is impermissible in a Type I action (one which, by statutory definition, presumptively would cause significant environmental damage).[1] . This project is declared by the EAS to be a Type I action. That means that the so-called "negative declaration" is void and that the ULURP process, which has ended by the Council's approval of the project and disposition of City land to accomplish it had never legally begun. HPD must do an EIS; only then can the ULURP process re-occur.

- The Environmental Assessment Statement (EAS) dismisses adverse impacts as insignificant over and over by jumping to unreasoned conclusions and ignoring the guidelines of the City's CEQR Technical Manual. HPD's conclusion that an approximately 2.5% reduction in the area's public open space is of no consequence is a typical example of the great many errors in the EAS.

- The plan calls for approximately 6,700 square feet of "open space" on the project site. That is at least 1,300 square feet short of what the Zoning Resolution requires. The project as planned is, therefore, illegal.

- Nevertheless, the EAS suggests that the provision of this 6,700 square feet, and the assurance that it will be open to the public after construction of the new building will mitigate the loss of the existing of 20,000 square feet of Garden. It does not balance into that judgment that 6,700 square feet is all the yard area that is planned even though the zoning requires 8,000 square feet. Nor does it take into account that the offered substitute space will include a substantial, but seemingly unappealing, corridor only 30 feet wide and about 67 feet long, taking up about 2,000 of the 6,700 square feet of open area planned for the western side of the site; that it will take decades for newly planted trees (if any) to grow back to the size of existing trees; and that the "open area" will be under far more shadows than the present open land.

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[1] See 6 NYCRR § 617.7(d), permitting use of a negative declaration for unlisted actions; no provision allows a negative declaration for Type I actions; Merson v. McNally, 90 N.Y.2d 742, 753 (1997) ("a lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself"). Merson allows that there might be an exception where a need for mitigation arises in the course of assessment and negotiation results in a mitigating solution. But that does not appear to be the case here where the result, whatever may have been the means of reaching it, merely defines an issue without agreement on a solution that actually mitigates the environmental issue.

- Trust obligations apply to the subject property, both as a result of private impositions and standard public obligations requiring the City and its employees and officials to treat land at any time set aside for educational use as trust property.

- The extravagantly generous deal that HPD offers the developer consortium, including a $1 price tag on the property violates the State Constitution's gift and loan prohibition.

6. The original Petition was filed on March 8, 2019, and promptly served on all Respondents. It alleged the claims set forth above in substantially the same terms alleged here. Thus, Respondents were fully aware of the risks of proceeding with the ULURP process and cannot credibly claim inconvenience in having to repeat the process.

7. [Omitted]

II. Parties

A. Petitioners:[2]

Civic Group:

8. Friends of Elizabeth Street Garden was incorporated in 2014 with the mission of supporting the Elizabeth Street Garden. It has done that both by assisting in its operations, including arranging educational programming, and by providing financial support. It is exempt from taxation under IRC § 501(c)(3). It is not a membership corporation, but measures its support in terms of contributions of time and services, grants, and petitions and letters of support, and estimates that over 5,000 people have participated in one or more of those ways. Most of the organization's supporters live within a few blocks of the Garden and use it frequently.

Residents:

9. Jeannine Kiely resides on Mercer Street in the SoHo district of Manhattan. She is president of the Friends of Elizabeth Street Garden. In that capacity, and for personal pleasure, she and her family spend a great deal of time in the Garden on a frequent and regular basis. Her home is about a seven-minute walk from the Garden.

10. Kent Barwick lives on Mott Street a block away from the Garden. He is the chairman of the board of the Friends. He frequently visits and enjoys the Garden. As a former Chair of the City's Landmarks Preservation Commission, former President of the Municipal Art

[2] For convenience the Petitioners/Plaintiffs will be referred to herein as "Petitioners," and the Respondents/Defendants will be referred to as "Respondents."

Society, a founder and former board member of the New York Landmarks Conservancy and the Historic Districts Council, Mr. Barwick is uniquely sensitive and devoted to the beauty of the Garden and the importance of preserving and increasing the amount of attractive open space available to the public.

11. Emily Hellstrom lives on Crosby Street in the SoHo district of Manhattan. She is a board member of the Friends. She and her husband and three children visit and enjoy the Garden. She initiated the Garden Education and Volunteer programs for Friends. Her home is a five-minute walk from the Garden.

12. Barry Loewer resides in a condominium apartment he owns with his wife located at 14 Prince Street, Manhattan, which is about a half block from the Garden. He is a professor of philosophy at Rutgers University. He regularly uses the Garden for exercise and relaxation. The property tax assessment on his condominium apartment, for which he is jointly responsible with his wife exceeds $1,000 per year.

Elected Officials:

14. Deborah Glick is the Assembly Member for the 66th Assembly District. The Garden is located a block outside of her Assembly District. Her position calls for her to visit all areas of her district frequently. She is familiar with, and concerned about, the shortage of public open space in much of her district and peripheral to it. She particularly admires the Garden as one of the most attractive open spaces in the area, and one of the very few that is covered with vegetation rather than concrete. When her tours bring her to the NoHo Little Italy area, she makes a point of visiting the Garden purely to personally enjoy it. Assemblymember Glick is a member of the Assembly's Committee on Environmental Conservation and has been actively supportive of other park preservation efforts, including litigations. She believes this case is important to her constituents, as well as personally to herself, as a means of protecting open space and ensuring that proper attention is given to environmental issues at all stages of planning. She also supports low-income housing, especially when it is located on sites where facilities of great importance to the community are not already situated.

15. Yuh-Line Niou is the Assembly Member for the 65th Assembly District which includes the site of the Garden and extends to the south to cover the downtown area. She has visited the Garden and planted herbs and vegetables there.

B. Respondents:

16. The City of New York is a municipal corporation. The project is located within the City. The City's principal offices are located in New York County.

17. The Manhattan Community Board 2 is a division of the City of New York. It has its principal office at 3 Washington Square Village, #1A, New York, N.Y. 10012. It has the right under ULURP to comment on proposed ULURP projects. It has done so with respect to the subject project. It advised against the project, and offered recommendations if the project should be adopted contrary to its advice. No relief is sought in this proceeding against this Respondent.

18. Gale Brewer is the Borough President of Manhattan and one of the officials having authority to participate in the ULURP process by providing opinion and recommendations on the proposed project. She has issued her report (expressing discomfort at having to choose between public open space or low-rent housing), endorsing the project but with conditions including that it must provide 30% more open space. No relief is sought in this proceeding against this Respondent.

19. The New York City Planning Commission is a department of the City. Its principal office is located at 120 Broadway, New York, N.Y. 10271. The Commission has "certified" the project to proceed into the ULURP system, an action that confirms that the requisite documents have been submitted for circulation to the other involved agencies in the ULURP process, but the Commission does not at that stage pass on the merits of the proposed project. However, upon completion of review by Borough President Brewer and the Community Board, the project has now entered a stage in which the Commission did positively pass on its merits. Petitioners' request for declaration that the negative declaration is void may be deemed to have the effect of voiding the certification by the Commission.

20. The New York City Council is the legislative body of the City of New York. It has its principal office at City Hall, New York, N.Y. 10007. It has the authority to approve or disapprove of the project, or within certain limits, to approve the project with modifications. It has approved the project with a perplexing modification declaring that the pedestrian tunnel is a required "open space" notwithstanding that it does not qualify as "open space" under the applicable provisions of the Zoning Resolution.

21. The Mayor is the chief executive officer of the City. He has veto rights over the decision of the Council. His principal office is located at City Hall, New York, N.Y. 10007.

22. The New York City Department of Housing Preservation and Development is a department of the City. It is a promoter of the proposed plan. It has designated itself as lead agency of the project under SEQRA, and is the adopter of the EAS and negative declaration for the subject project. Its principal office is located at 100 Gold Street, New York, N.Y. 10038.

23. The New York City Board of Education is, on information and belief, a body corporate of the State of New York. It is the beneficiary of certain trust provisions concerning the subject real property. Its principal office is located at 52 Chambers Street, New York, N.Y. 10007.

24. Pennrose, LLC is a Pennsylvania limited liability company. It is a sponsor of the project and a member of the coalition that would assume ownership of the subject real property if the project is approved. Its principal office is located at One Brewery Park, 1301 North 31st Street, One Brewery Park, Philadelphia, PA 19121. It also has an office at 260 Broadway, New York, N.Y. 10007.

25. Habitat for Humanity New York City, Inc., is a New York State not-for-profit corporation. It is a sponsor of the project and a member of the coalition that would assume ownership of the subject real property if the project is approved. In addition, it is expected to be a tenant of all 11,200 square feet of office space at the project (EAS Full Form pp. 1, 4 and 5, Exhibit B), at a rent below market level (see accompanying affidavit of Jeannine Kiely). Its principal office is located at 111 John Street, 23rd floor, New York, N.Y 10038.

26. RiseBoro Community Partnership Inc. is a sponsor of the project and a member of the coalition that would assume ownership of the subject real property if the project is approved. In addition, it is expected to provide social services at the project. Its principal office is located at 565 Bushwick Avenue, Brooklyn, N.Y. 11206.

III. Jurisdiction; Venue

27. The proceeding addresses procedural and analytical errors in the SEQRA assessment of potential environmental injury flowing from replacing a public open space with a mixed use building to be built to full zoning limits (and beyond). The proceeding is hybrid, brought under CPLR Article 78, Gen. Munic. L. § 51, and for declaratory judgment.

28. Venue is in the County of New York pursuant to CPLR 504 on the ground that the causes of action arose in that County. In addition, it is noted that the primary Respondent, the City of New York, and most other Respondents have their principal offices in the New York County, and the real property which is the subject of the proceeding is located in the County of New York.

IV. FIRST CAUSE OF ACTION: Environmental Review (SEQRA/CEQR): Procedural Deficiencies Void the Environmental Assessment and Render ULURP Proceeding Illegal and Premature.

29. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 28 hereof.

30. The City Department of Housing Preservation and Development (HPD) has issued a "negative declaration" stating that the project will have certain environmental effects but that they are insignificant. This is based on an EAS form which is seriously deficient in its

reasoning, in its coverage of the issues it identifies, and in its failure to consider other significant issues. It fails to take a "hard look" at the issues. Rather it is a flimsy evasion of SEQRA and a patent effort to justify a client's desired result rather than to provide what SEQRA requires: a fair and unbiased gathering of facts and presentation of them, and reasoned assessment of their environmental impacts.

31. The EAS (page 1) identifies the project as Type I meaning that it has certain characteristics identified by SEQRA regulations which cause it to be subject to "the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." Although listing of an action as Type I carries with it the cited presumption, the lead agency can reach a determination that the action is, in effect, benign. (6 NYCRR §§ 617.4(a)(1) and 617.6(a)(2)). The lead agency in that case issues a negative declaration or conditioned negative declaration (if the latter is legally available).

32. HPD issued a negative declaration, i.e. a definitive determination that the project presents no risk of significant environmental damage. Inconsistently, however, HPD's EAS recites that possible environmental injury could arise because of the presence of hazardous materials below the surface of the subject premises. The possibility is surmised on the basis of information that fuel oil tanks and metal spraying equipment have at times been present. The EAS indicates that testing is required to ascertain risk of hazardous materials and possible effect on ground water, and states that such testing will be conducted at an unspecified time in the future. The EAS does not state any surmised or anticipated results of the testing, nor provide any assurance that any necessary curative work will be undertaken, nor assure that cost of such rehabilitation will be underwritten by a particular entity which guarantees that it will be done and paid for. The EAS states that testing is scheduled for September 2018, but, on information and belief based on absence of visible testing activity, and the parties' stipulations dated April 17, 2019 and July 22, 2019, assuring notice to Petitioners before any boring is conducted, no such testing has occurred. (See EAS, Exhibit B pages B-7 to B-9; EAS Appendix 1 Section 3.3.1).

33. The statement that there is in fact a likelihood that hazardous materials are buried on the subject premises and that the presence of those materials may pose a likelihood of significant negative environmental impact, is incompatible with a negative declaration which, by name and definition (6 NYCRR § 617.2(z)) assures in writing "by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts." The statement that testing must be conducted to ascertain the presence and significance of such products and their potential impacts implicitly places a condition on the negative declaration: if the potential impact is significant, steps will have to be taken to remove or ameliorate the impact and the negative declaration is thereby qualified by incorporation of that condition. This injects speculative possibilities into the negative declaration which should clearly conclude that there are no negative findings and the proposed action may proceed without further environmental review. The so-called "negative declaration" is clearly not that, but rather would be best described as a conditioned negative declaration defined in 6 NYCRR §617.2(h).

34. Trying to overcome the problem of how to treat a negative declaration that is in practical actuality a conditioned negative declaration is difficult. Adoption of a conditioned negative declaration requires various procedural steps that, on information and belief, have not been taken. They are (a) coordinated review of possible significance with the other involved agencies; (b) imposing conditions to ensure that the risk of hazardous waste is satisfactorily mitigated; and (c) providing for a 30-day public comment period following public notice of the conditions that have been imposed. (6 NYCRR § 617.7(d)(1)).

35. Even more problematical is that the regulations do not permit a conditioned negative declaration at all in a Type I case. (6 NYCRR § 617.7(d)(1)).[3]

36. In sum, the so-called negative declaration is a nullity. Judicial declaration to that effect is fully compatible with the requirement of 6 NYCRR § 617.7(f) that HPD has no choice but to rescind the declaration.

37. The same section offers HPD the opportunity after rescission of making a positive declaration, initiating the preparation of a full EIS. But the present ULURP process has been completed and has timed out under the restrictive time schedule of Charter §§ 197-c and 197-d. If the Respondents wish to proceed, they would have to adopt a proper EIS, and then proceed again through ULURP.

38. (Omitted)

39. The adoption of the negative declaration is illegal, fraudulent, beyond the authority of the lead agency, and a waste of public resources.

40. (Omitted)

V. SECOND CAUSE OF ACTION: Declaratory Judgment with Respect to Other Errors in The SEQRA/CEQR "Negative Declaration"

41. Petitioners repeat and reallege the allegations contained in Paragraphs 1 to 28 hereof.

A. The SEQRA/CEQR process.

[3] The cited provision affirmatively states that a conditioned negative declaration is available for unlisted actions, and the necessary inference is that a CND is not available in other actions. See Merson v. McNally, 90 N.Y.2d 742, 753 (1997) ("a lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself").

41A. The action has been determined by HPD's Environmental Assessment Form to be Type I, that is to say, an action presumptively is likely to cause significant environmental damage and may require an environmental impact statement.

42. An action should be deemed to have possible significant environmental impacts if it comes within a series of examples contained in the applicable regulation, which list is followed by the caveat, "The following list is illustrative, not exhaustive."

43. Particularly relevant listed examples include:

> (ii) the removal or destruction of large quantities of vegetation;
>
> (v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;
>
> (vii) the creation of a hazard to human health;
>
> (viii) 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;
>
> (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.

(6 NYCRR § 617(c)(1)).

44. The SEQRA regulation requires application of the following criteria in determining "significance":

> The significance of a likely consequence (i.e., whether it is material, substantial, large or important) should be assessed in connection with:
>
> (i) its setting (e.g., urban or rural);
> (ii) its probability of occurrence;
> (iii) its duration;
> (iv) its irreversibility;
> (v) its geographic scope;

(vi) its magnitude; and
(vii) the number of people affected.

6 NYCRR § 617.7(c)(3).

45. Applicable criteria are also contained in an executive order of the Mayor known as the CEQR Technical Manual. It is found at https://www1.nyc.gov/site/oec/environmental-quality-review/technical-manual.page.

B. Description of The Present Use of the Subject Parcel.

46. HPD's environmental analysis generally refers to the parcel as "vacant" and/or "undeveloped." Such a description may have suited its then purpose of trying to characterize it as "blighted" so as to allow real estate tax exemption and other owner/occupant advantages. (See UDAAA Gen. Munic. L. § 690 ff.). That may have been thought to have the incidental advantage of encouraging a perception of the Garden as unworthy of environmental protection. But it is a description that even HPD which adopted the EAS implicitly concedes is inaccurate. When addressing the Garden as actual public open space, the EAS does explicitly recognize that the parcel is open space, improved for public use, and actually used by the public, and is, therefore, comparable to the relatively few public parks and recreational areas in the neighborhood, and includable in an inventory of significant public open spaces, most of which are designated parkland. Indeed, in that portion of the EAS, the writer recognizes that the parcel is well-maintained and exceptionally well-attended. Significantly, the EAS omits from that inventory a substantial number of open areas that are not as regularly open to the public as is the Garden, or lack sufficient seating space, and, therefore, do not qualify as "public." (See EAS C-11 to C-13, Exhibit B hereto).

47. The Garden is, in fact, much more than what the cold statistics of the EAS inventory suggest. It is a unique park-like venue in the form of a sculpture garden. It is extremely attractively landscaped. It is adorned with dozens of high-quality outdoor sculptures. It has extensive seating. It provides free public programming year-around, including educational activities for children concerning such topics as gardening, arts and cultural events, and wellness. In addition, the Garden provides environmental and STEM educational programming for school groups, serving 650 students annually, including several Title I schools such as PS 1, PS 130 and City-As-School High School. In fact, its entire concept qualifies it as outdoor museum space providing art education by its very being. Conceptually, it is comparable to the outdoor sculpture garden of the Museum of Modern Art. (See photographs appended to initial Petition as Exhibit A).

47A. These circumstances, which inevitably include that the availability of open space is itself a very high priority concern of the government of an intensively built City such as New York, like the challenge of answering to competing concerns, both addressing the larger goal of maintaining livability and health: housing versus open space. By rushing into a "negative

declaration" based on incomplete and faulty review, the proponents missed doing the kind of investigation of alternative possibilities that an environmental impact statement would have required. As many of the Petitioners had urged, and as Community Board 2 urged in the course of the ULURP process and before,[4] there was another City-owned lot available for a project such as the housing effort, a larger lot on which more housing could be built, involving no difficult problems, and located within the same Community District 2, but HPD and other interested parties refused to consider it. The City could have had both cakes: housing and parkland. But it thoughtlessly evaded even entertaining the idea.

C. The Proposed Project

48. HPD proposes constructing a new building of near maximum height and bulk allowable by zoning for its location in the Special Little Italy Zoning District established by the Planning Commission in 1977. (See ZR 109-00 et seq.) It is designed to have greater lot coverage (i.e. structure that covers the surface of the lot) than is allowed, thus reducing open space to at least 1,300 square feet less than the zoning requires. It is also proposed to dedicate to public use approximately 6,700 square feet of planned outdoor open space, a sharp reduction from the approximately 20,000 square feet now occupied by the Garden, and well short of the approximately 8,000 square feet of open space that the zoning requires. (See ZR 190-122, the lot being partially a through lot and partially an interior lot, with a total area of approximately 20,000 square feet).

49. Although the ostensible justification for the building is to provide low rent housing for the elderly, the residential units would occupy only 81% of the gross area (75,421 square feet of residential use. The balance includes 15,655 square feet assigned to retail and office space use, including 11,200 square feet for use of one of the sponsors, a charitable group that would have a reduced rent deal. Another 1,685 square feet is designated for community facility use; a more precise description of that use is not offered in the EAS, but it may be the occasionally so-called "breezeway" located along the southern wall of the new building and bordering the neighboring lot. (See EAS full form pg. 4. Exhibit B hereto).

D. Deficiencies of The EAS

i. Reduction of Available Public Open Space in the Surrounding Area.

50. As a matter of public policy, New York City highly values its open space. It has a goal of assuring that every resident can reach a park or playground within the distance of a ten minute walk (see http://s-media.nyc.gov/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf; which, a brisk walking speed of four miles per hour would be one-third of a mile). The City's CEQR Technical Manual states that, "As a planning goal, a ratio of 2.5 acres per 1,000 residents represents an area

[4] See CB2 ULURP resolution, and earlier resolution in accord. (Exhibits A and D).

well-served by open spaces. . . ." https://www1.nyc.gov/assets/oec/technical-manual/2014_ceqr_technical_manual_rev_04_27_2016.pdf, at pg. 7-6). The City even encourages builders to add to the publicly open pace with zoning bonuses for outdoor plazas, arcades and the like. (See ZR 33-13, 33-14, 37.70 and 37.80). The City has a "benchmark" standard (recognized in the EAS) that in every area there should be at least 2.5 acres of open space accessible to the public for every 1,000 inhabitants. One and a half acres per 1,000 inhabitants is considered minimal.[5] The "study area" used by HPD for assessing impacts is a circle-like area extending one half mile outward from the boundaries of the subject parcel in every direction. (See pages C-2 and C-3 of the EAS, Exhibit B hereto). In that area, the available public open space is presently 0.193 acres per 1,000 inhabitants (EAS C-14), and that is estimated to decrease (because of increased population and a very small amount of parkland now in reconstruction being put back into use) to 0.153 acres per 1,000 inhabitants by 2021. And that acreage includes the Garden. (EAS C-16). Without the Garden (and netting out the 6,700 feet of public open space the project plan calls for to replace the Garden), it is estimated in the EAS that the ratio would go down to 0.149 acres per 1,000 residents. (EAS C-17).

51. As the EAS concedes, the project would reduce the available public open space from a 2021 estimated (no action) 0.153 square feet per 1,000 inhabitants to 0.149 square feet per 1,000 inhabitants. That is a reduction of 2.61%. As the EAS says, this requires a qualitative assessment of the impact. (EAS C-17). (The EAS calculates the reduction at 2.24% by the device of taking the with-action condition of 0.149 acres of open space per 1,000 residents, subtracting that from the no-action condition of 0.153, and coming out with a difference of 0.003 rather than the more arithmetically conventional 0.004.)

52. The EAS also fails to take into account a non-resident transient populace of workers, shoppers, etc. who get to the area by public transportation or otherwise. See CEQR Tech. Manual Ch. 7 Sec. 341. That could presumably increase the total population of open space users, thereby decreasing the ratio of open space to prospective users.

53. HPD justifies the reduction in open space described above in five ways:

- First, it notes that "a majority of the study area open space resources included in the quantitative analysis were found to be in good or excellent condition. (EAS C-17). The EAS does not explain why this should be treated as an "ameliorating" condition. That violates the SEQRA standard that there must be both a "hard look" and a reasoned elaboration of the lead agency's assessment. See New York

[5] "Although a typical population mix may call for such a goal, it may not be attainable for some areas of the City, such as Midtown Manhattan, or for certain populations skewed toward certain age groups. Therefore, the City does not consider these ratios as its open space policy for every neighborhood, and consequently, these ratios do not constitute an impact threshold. Rather, the ratios are benchmarks that represent how well an area is served by its open space." (CEQR Manual at pp. 7-6 to 7-7).

City Coal. to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337 (2003) (adding that the procedural requirements of SEQRA must be strictly complied with).

Furthermore, there is no logical justification for saying that good or excellent condition reduces the demand for open space; to the minds of most people, it would increase demand. And, one cannot know that residents in the subject area suffer less from low quantity of space because the space is in good or excellent condition, without knowing the distribution of space in good and excellent condition in other areas of the City. The EAS provides no such analysis. Its conclusion is apparently drawn from excellent perception of the outcome desired by project backers rather than from reasoned analysis.

- Second, it says that 75.4% of the study area residents are between the ages of 20 and 64 "indicating a need for court game facilities and fields for sports, as well as bike paths and promenades for activities such as biking, jogging, and walking." (EAS C-17, Exhibit B hereto). But its chart of uses (C-7 to C-10) shows zero sports fields. The only park of significant size is Sara D. Roosevelt Park at 7.85 acres, which has many paved sports courts. Active sports facilities cover about 85% of its area. Only one of the other parks exceeds one acre (being Allen Malls, a long, thin, mall between street lanes, 1.7 acres, see EAS fig. C-2).

  More significantly, having selected a demographic grouping of people in the age range of 20 to 64 years, and at least implicitly finding that they are poorly served by a lack of fields and a shortage of courts, the EAS team drops the issue rather than further dividing the demographic into smaller age groups which might have more discernible interests in particular degrees of physically active sports. But the preparer evidently preferred to leave the issue hanging rather that give it a "hard look."

- Third, "Moreover, as part of the Proposed Development, an approximately 0.15-acre open space resource would be constructed on a portion of the Development Site, which would be made available for use to the public." (EAS C-7, Exhibit B hereo). That is double-dipping. The EAS has already counted in that space quantitatively. The EAS is not in a position to say that this 0.15 acre space is going to be so exquisitely attractive that it will absorb more visitors than other equivalently sized spaces. And it does not pretend to. All it implicitly does is ask the reader to mindlessly assume that it must be making a good point. That is not what an environmental assessment is for.

- Fourth, it notes that the border of the study area (being census tracts situated in whole or in part within one-half mile of the Garden) touches the border of Washington Square Park, which it assumes (without recitation of any evidence

whatsoever) could easily absorb more users, so, it concludes, there is no problem. The holes in this reasoning are voluminous That the border of Washington Square Park touches the border of the study area tells nothing about how much further a user would have to go to reach the center of that Park (the answer, by extrapolation from the information on the applicable map in the EAS at figure C-1 is about 600 feet or somewhat over another tenth of a mile). It would primarily be the new residents of the project who create the additional need. By intent of HPD and the sponsors, they are elderly persons. It would be logical to assume that they are less capable than a younger population group to take on even a half-mile walk, and that only gets worse if the distance gets longer. Also, no attention is paid to the impact on Washington Square Park and the needs of its surrounding residents. Is it already over-used? Or is it pleading for more use? The EAS provides no answer.

- Fifth, it rationalizes treating the reduction as insignificant on the theory that the area is already so short of public open space that an additional loss does not matter. The CEQR Manual actually advises to do the opposite. The Manual says that the lower the ratio is to begin with, the more concerned the agency should be about any loss no matter how small. (The EAS does quote the Manual, at the beginning of the "Open Space" section, as advising that "[a] five percent or greater decrease in the open space ratio is considered to be 'substantial', and a decrease of less than one percent is generally considered to be insignificant *unless open space resources are extremely limited.*" (Emphasis added).) But 16 pages later, when the EAS does its third-of-a-page qualitative assessment, the EAS makes no mention of the italicized advice above. The EAS does not quote at all the following admonition from the Manual: "However, the existing open space ratio may be so low that even an open space ratio change of less than 1 percent may result in potential significant open space impacts. In that case, the potential for open space impacts should be further assessed." (CEQR Manual 7-8). The drop here, according to the EAS, is 2.24% from the "no action" level of 0.153%.[6] That deserves serious assessment and elaboration. But that is not provided..

54. There is another strong reason for close qualitative study, one that the EAS omits entirely. The public open spaces within the study area of the EAS provide ample examples of the range of quality. Nearly all are entirely or primarily pavement; few, such as a) the paved DOT plazas at Astor Place and Forsyth Street Plaza at the base of the Manhattan Bridge, b) the paved Grand Canal basketball court, c) the paved children's parks at DeSalvio Playground, Vesuvio Playground, First Park and ABC Playground, d) the paved Greenstreets at Division Street, Thompson Street and Mercer Plaza in front of the NUY co-generation plant, and e) the Allan Street Mall, a paved bicycle path with some planting beds and seating alongside, in any

[6] That is almost 90% below what is considered minimally acceptable.

way resemble landscaped parks, though (c) through (e) have a modicum of greenery. Furthermore, Sara D. Roosevelt Park, the largest open space in the study area at 7.85 acres or 55% of the study area open space, received a "D" grade from New Yorkers for Parks in 2016.[7] Since 2016, Nike and KAWS resurfaced and painted the enclosed basketball courts at Stanton Street inside the Roosevelt Park, but no other capital projects have been completed or started, except for reconstruction of a comfort station at Sara D. Roosevelt Park.[8] The Garden is easily among the best of the landscaped areas. Surely the loss of even a half acre of very superior, and uniquely, landscaped public open space is very much more adverse than the loss of an equal amount of unappealing standard paved space. The EAS should address the quantity and relative quality of non-recreational spaces and, more specifically, take unique quality into account when it denies that the loss of a small area in a study area that has very little public open space to begin with can be significant.

55. In sum, the EAS assessment of open space issues goes only so far as to show that parks and other open spaces in the area are rare, generally small, and with an exception or two (notably the Garden), not great. That could lead to constructive thinking, such as consideration of alternatives, but the EAS preparers preferred to shrug and say, "so what."

ii. Shadows.

56. The EAS shows that shadows cast by the proposed new seven story construction will be heavily present, over much of the day. (EAS Figures B-2a and B-2b). They will substantially exceed existing shadows as the Garden has only two small garden utility structures on it now and is surrounded by lower buildings on other lots. On information and belief, the additional shadow presence will negatively affect conditions for vegetation.

57. The EAS incorrectly states that the anticipated additional shadows do not count for environmental assessment purposes because they would not extend to neighboring properties. That is not what the CEQR Manual prescribes. It states unequivocally that, "the assessment of shadows on project-generated open space should be conducted and documented with the same level of detail as other sunlight-sensitive open space resources when such project-generated open space is included qualitatively as part of a detailed analysis required Chapter 7, 'Open Space.'" That sentence begins with the implicit recognition that, if there was no open space before, the generation of new open space does not call for a shadow study because the environment (with

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[7] NY4P's Report Card on Parks "examines 12 categories of park features: athletic fields, bathrooms, courts, drinking fountains, immediate environment, lawns, natural areas, pathways, playgrounds, sitting areas, trees, and water bodies. Each feature is evaluated for performance in four categories: maintenance, cleanliness, safety, and structural integrity. Surveyors record feature assessments on tablet computers and provide photographic documentation for each unique feature evaluation." A score between 60-69 receives a D. http:www.ny4p.org/client-uploads/pdf/Report-Cards/NY4P_Report_Card-CPI2016.pdf.

[8] https://www.nycgovparks.org/parks /sara-d-roosevelt-park/projects.

respect to open space) is only gaining. That strongly suggests that, if there was open space, with no shadows or limited shadows, prior to project work and the project work would cast shadows that were not cast before (as is clearly the case here), that is a change that does affect the environment and must be addressed.

58. Again, the EAS deals with guidance from the Manual by ignoring what the preparer (and its client) find inconvenient.

iii. Neighborhood Character.

59. This is a loosely defined category. Chapter 21 of the CEQR Technical Manual does not specifically define neighborhood character, but uses many terms that suggest what must be included. Among them are landscaping, parks, and historic buildings. (See CEQR Manual 21-3 and 21-4). (See e.g. Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 366 (1986); cf. Ifrah v. Utschig, 98 N.Y.2d 304, 308 (2002)). Here, several factors deserve assessment regarding impact on community character. But they have not received it.

60. The Garden Itself. The Garden is unique in terms of its conception, its design, its popularity. Unlike many conventional playgrounds, sports grounds, and even small parks, this Garden defines the neighborhood. The Garden has been recognized as a major public asset by The Cultural Landscape Foundation[9] and is included in many guide-books as a destination to visit, attracting more than 100,000 visitors each year, including local elementary students, families and seniors, as well as residents from around the city and tourists from around the world. Photographs appended to the initial Petition as Exhibit A well illustrate its attractions. Two not-for-profit corporations backed by neighborhood and more remote contributors are exclusively devoted to one thing: the Garden. It is deemed so important to the neighborhood that Community Board 2 (in whose district the Garden is located) has urged, in the context of the recent ULURP review, that it must be saved. (https://ny.curbed.com/2019/1/28/18200719/elizabeth-street-garden-redevelopment-have-green-shot-dowsn-by-community-board-2).

61. The project, if approved, almost certainly means the end of the Garden, in both size and quality. Of its over 20,000 square feet of open land, only 6,700 will remain open. Much of that (approximately 1,100 square feet) will be a narrow corridor along the southern side unlikely to be of significant use other than as a corridor. (See par. 7 above). Construction will unquestionably require removal of all sculpture, and will likely kill virtually all trees and plants. The likelihood of re-creation of even a substantially reduced sculpture garden must be considered unlikely, and would, in any event, be subject to control of the new owner (however much the new owner anticipates public input). It will never be a sizable sculpture garden. Judging from the scaled site plan Figure 2 in Figures section near end of EAS) approximately 1,100 of the total 6,700 square feet of open space consist of a narrow strip of land measuring

[9] https://tclf.org/elizabeth-street-garden.

about 30' by 70'. One cannot expect that such a narrow strip will be a high-quality attraction. It will be quite unlike the present Garden measuring between approximately 80 feet and 136 feet wide and 185 feet long. (Id.)

62. Special Little Italy District Zoning Provisions. The Garden is in the Special Little Italy District ("SLID") established to preserve neighborhood character. Open space, especially available for public use, trees and ground vegetation are encouraged and, to a moderate extent, required. (See generally ZR 109-00, 109-14, and 109-17). While the zoning does not require that entire lots be landscaped, the spirit of the law is endorsement of the concept of open recreational space with attractive landscaping. The destruction of the Garden, and the inevitable loss of many mature trees in the course of construction, is inconsistent with that spirit.

63. The EAS gives no consideration to the value of the Garden as an asset that contributes to community character.

63A. The Planning Commission's report on adoption of the SLID zoning, declares that "the area's most significant and characteristic qualities [include] . . . the vitality of the street life, the scale of the buildings, the mix of uses, and the myriad of retail stores . . . ." With a view to preserving these characteristics and promoting them in new buildings, the Commission generally limited the height of new buildings seven stories or 75 feet, retaining street walls, and encouraging planning of trees. It also identified 18 buildings as worthy of preservation and directed that they may not be demolished or altered on the exterior without special permission of the Commission. (See Commission Report N760061 ZRM, Exhibit C hereto). One of these buildings is adjacent to the subject lot; another seven are located on blocks directly adjacent to the subject block. Thus, a park-like garden with much historic sculpture is a highly suitable complement to the historic venue. Yet this is not a factor appreciated by the EAS.

iv. Climate Change Hazards

64. Superstorm Sandy of 2012 wreaked havoc from which the City has still not fully recovered. Although the project site is not within a FEMA mapped area, it was powerfully affected by Sandy. It had no electricity for five days. It had not subway service for six days. The impact for everyone in the area was no doubt devastating. Thought should be given to how it would affect a concentrated new population of elderly persons who may be less able to cope with the inevitable hardships. Such an issue should surely be considered in the context of the SEQRA category of "creation of a hazard to human health." But the EAS does not address it.

v. Effect of Non-compliance with SEQRA

64A. "No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with." (6 NYCRR § 617.3(a)).

VI. THIRD CAUSE OF ACTION: The Proposed Project Would Provide Insufficient Unbuilt Area Under Applicable Zoning (Declaratory Judgment)

65. Petitioners repeat and reallege the allegations contained in Paragraphs 1 to 28 hereof.

66. The applicable zoning bars structures from covering more than 60% of the area of the subject lot. (ZR 109-122). That means that at least 40% of the lot area must remain free of "lot coverage" (meaning, essentially, any structures). Respondent HPD has erroneously claimed (and may still claim) that only 30% of the site area must remain free of "lot coverage."

67. Accordingly, the project plans in the ULURP proceeding until about 15 days before the June 26, 2019 vote on the Council's resolution show lot coverage of all but approximately 6,700 square feet. See EAS A-4). The lot size is stated in the EAS as being 20,265 square feet (Id. 3), meaning that planned "lot coverage" is 13,565 square feet, or close to 70%. As lot coverage should be no more than 60% (12,159 square feet), open space should be approximately 8,160 square feet.

VII. FOURTH CAUSE OF ACTION: The Council's resolution is arbitrary and capricious and does not qualify as consistent with a comprehensive plan (Declaratory judgment and Injunction

67A. Petitioners repeat and reallege the allegations contained in Paragraphs 1-28 and 66-67 hereof.

67B. The applicable zoning for the subject site is C6-2 subject to an overlay of provisions initially adopted in 1977 and titled Special Little Italy District ("SLID"). (ZR 10-00 et seq.) The general purpose of SLID is to preserve the special character of the area known as Little Italy, including its "most significant and characteristic qualities, such as the vitality of the street life, the scale of the buildings, the mix of uses, and the myriad of retail stores." (City Planning Commission Report N760061 ZRM, Exhibit C hereto). In particular, it sets limits on "lot coverage" (the percentage of lot space which is built on in any way so as to interfere with openness from ground to sky; see definition at ZR 12-10). For the subject lot, as well as most other lots throughout the Special District, the "lot coverage" may not exceed 60%, meaning that at least 40% of the lot may not be built on and must remain open.

67C. In their Environmental Assessment Statement and elsewhere, the promoting governmental Respondents (i.e. HPD, City Planning Commission, City Council) have continually claimed that the project will not violate any zoning provisions and will not require amendment of the existing applicable zoning.

67D. Petitioners asserted in their initial Petition, filed March 8, 2019, and served promptly thereafter, that 70% "lot coverage" would violate ZR 109-122 which allows only 60% "lot coverage," putting Respondents on notice of error. (Initial Petition Pars. 65-67).

67E. At least in terms of communication with the public, the promoting governmental Respondents maintain plans to overbuild in terms of lot coverage, although the reports of Community Board 2 and the Manhattan Borough President on the matter both urged that additional open space be added to the plan. (The reports are Exhibits D and E respectively).

67F. For the first time, on June 11, 2019, the Council's land use department wrote to the Planning Commission on June 11, 2019, requesting advice from the Commission pursuant to Charter § 197-d(d) as to whether a modification to the plan, would require additional ULURP or SEQRA consideration.[10] (If it would, the effect would be that the Council may not approve the modifications. Charter § 197-d(d)).

67G. The proposed modification on which the Council's department requested advice read as follows:

> The disposition is restricted to require the provision of a minimum of approximately 8,400 square feet of open space which shall be accessible to the public in perpetuity, of which a minimum of approximately 1,700 square feet need not be open to the sky. Such approximately 1,700 square foot portion 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. Such open space need not satisfy any defined term within the New York City Zoning Resolution (ZR), however, this shall not be construed to waive any applicable requirements of the ZR as applied to the Disposition Area.

A copy of the letter is annexed hereto as Exhibit F.

67H. The proposed 8,400 square feet of open space – an increase of approximately 1,700 square feet over the amount previously planned – purportedly would have satisfied the 60% limitation (on the basis that the size of the lot is in the area of 20,000 square feet, of which 40% would be approximately 8,000 square feet).

67I. However, what is purportedly given by the first clause of the proposed modification, ending in "in perpetuity," is taken away by the rest of the proposal. In particular,

a. The additional "minimum of approximately 1,700 square feet need not be open to the sky." That disqualifies it from being "open space" the reciprocal of "lot coverage."

b. Setting the size of this disqualified addition of non-open space as a "minimum" rather than a "maximum" of 1,700 square feet, allows the possibility of expansion of the non-open space that is not open to the sky into

[10] It appears that the matter reached the Council on or about May 8, 2019. https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3932924&GUID=AF80FF8E-94D4-4768-9C85-890D9509AD05&Options=ID|Text|&Search=haven+green.

real open space of approximately 6,700 square feet planned for the portion of the lot abutting Mott Street.

c. The specification that "approximately 1,700 square foot portion 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" rather clearly places the new non-open space within the passageway shown on plans as leading from Elizabeth Street toward Mott Street along the southern property line. That means that, contrary to it being "open space" in any sense of the term, and particularly contrary to the defined meaning of "open space" in ZR 12-10, this space will be walled on both sides of its length and will be surmounted by six stories of building, thus in no way "open to the sky" as "open space" is generally required to be.

d. That the additional so-called "open space" "shall function as an entrance to the portion of open space that is open to the sky," further confirms that it is to be located in the pedestrian tunnel described in sub-paragraph c above.

e. Finally, the modification closes by declaring that "Such open space need not satisfy any defined term within the New York City Zoning Resolution (ZR), however, this shall not be construed to waive any applicable requirements of the ZR as applied to the Disposition Area."

67J. The Planning Commission responded on June 26, the very day of the Council's intended vote, that it does not find that any additional ULURP or SEQRA review will be required by the modification. (A copy of its response is annexed as Exhibit J). Significantly, however, the Commission did not state that it approves the content of the modification.

67K. In addition, the promoting government Respondents have made it all but impossible to verify their zoning calculations. The length of property lines varies from one drawing to another. (Exhibit I hereto). As property lines of this lot do not run at right angles or parallel to one another, and drawings do not provide space calculations within them (and do not purport to have been produced by a surveyor) it is impossible to calculate over-all space or open space or lot coverage from the drawings. (See e.g. pg. 16 of ULURP package, Exhibit H, emphasis added in color). Drawings are marked ("draft"). (See e.g. all zoning analysis drawings). In short, measurements and calculations of area lack reliability.

67L. The Council adopted the plan, with the modification, on June 26.

67M. The Respondents have failed to investigate alternatives to the plan, including alternative means of compliance with zoning, and alternative locations including 388 Hudson Street, a location owned by the City, being considerably larger, and without impediments to creation of more affordable housing.

67N. The plan, with or without the modification, violates the Zoning Resolution in failing to provide for sufficient open space.

67O. The plan is arbitrary, capricious and fails to comply with law because it is not consistent with any comprehensive plan.

67P. The plan with its modification constitutes illegal spot zoning.

VIII. FIFTH CAUSE OF ACTION: Declaratory judgment that the site may not be disposed of pursuant to PHFL § 576-a for insufficient consideration. and cannot generate property tax exemption or other special privileges under that Act.

68. Petitioners repeat and reallege the allegations contained in paragraphs 1-28, and 91-96 (below) hereof.

69. As stated in paragraphs 68-72 of Petitioners' initial Petition, HPD and others involved in the planning of the project formerly planned that this would be an Urban Development Action Area Act (Gen. Munic. Law Art. 16) project. (See EAS pg. A-2, Exhibit B hereto). UDAAA offers various special advantages for the improvement of City-owned properties that are to be transferred to private ownership for urban development purposes (among other qualified sites). The key qualification is that the development site must be "blighted" or "slum" or vulnerable to becoming so by virtue of surrounding conditions. (Gen. Munic. L. §§ 691, 694). The EAS asserts that the subject site is eligible solely for the reason that it is "vacant" (the short-hand term that the EAS generally uses in describing the property, except where it is obliged to acknowledge that the property has been transformed into a well-maintained and well-attended park-like open area, featuring a collection of dozens of large outdoor sculptures). The EAS, in other words, equates vacancy with blight and construes all vacancy as a degrading condition.

70. While "vacant" is a term the UDAAA statute uses, the context shows it to mean unused. A residential building, for example, might be "blighted" if it is consistently vacant because of its poor condition. The statute does not remotely suggest, on the other hand, that Central Park or any of the other more than 1,700 parks and similar facilities operated by the Parks Department (www.nycgovparks.org/about/faq) is "blighted" simply because it is not, for the most part, free of structures.

71. Presumably in recognition that the "blight" thesis was not very persuasive, immediately before the matter reached the Council, its statutory umbrella was changed to Private Housing Finance Law § 576-a which provides that, "Notwithstanding any other provision of general, special or local law, charter or ordinance, a municipality may sell, lease or otherwise dispose of real property to a housing development fund company without public auction or sealed bids, provided that notice of such sale, lease or other disposition is published and a hearing is held before the local legislative body not less than ten days after such publication. (See Kiely Affidavit, par. 4).

72. As comprehensive as the quoted law appears to be, it does not immunize the planned transaction from the effect of any constitutional provision. As alleged in the Ninth Cause of Action of this Amended Petition, Article VIII Section 1 prohibits governmental gifts, gifts are what appear to be contemplated as to the subject property.

72A. On information and belief, it is intended that the disposition will be made for, at most, nominal consideration

72B. For the reasons stated in paragraphs 91-96 hereof, a transfer for inadequate compensation would be unconstitutional and, therefore, void.

72C. On information and belief the intention had been to provide other financial benefits to the developers under UDAAA, including property tax exemption. No such benefits are available under PHFL § 576-a and any attempt to provide them should be precluded.

VIII. SIXTH CAUSE OF ACTION: Declaratory judgment that approval of disposition pursuant to PHFL §576-a was not properly granted under ULURP

72D. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 28 and 69-72C hereof.

72E. Charter §197-d(d) precludes the Council from making any modification of the terms of approval by the City Planning Commission of a project subject to ULURP unless the Council submits the proposed change to the Commission for determination that the change will not require further ULURP or SEQRA consideration. All proposed modifications are covered by this provision. The Charter provision allows only one such request to the Commission. The Council exhausted its authority to make such a request when it submitted its request concerning the modification to provide that space in a pedestrian tunnel surmounted by six stories of occupiable building space should be deemed to be "open space." (See Fourth Cause of Action).

72F. The Planning Commission approved the application of HPD on April 10, 2019. Its approval recited on page 1 that the application was for an Urban Development Action Area Project, that being a project authorized by Gen. Munic. Law Art. 16. (A copy of the approval is annexed as Exhibit J).

72G. The Council adopted its Resolution of approval of the disposition and project on June 26, 2019. (A copy of the Resolution is annexed as Exhibit K). The Council's action is very explicitly for the sale of the "Disposition Area . . . pursuant to Section 576-a(2) of the Private Housing Finance Law. (Exhibit K, Pg. 2).

72H. As the Council's Resolution differs from the Planning Commission's approval, it is void.

VI. SEVENTH CAUSE OF ACTION: Declaratory judgment that the westerly portion of the subject property is subject to a charitable trust declaration dedicating the property exclusively for educational use in perpetuity, and injunctive relief to prevent transfer of the property in violation of that declaration, and requiring that Petitioners be notified of any proceedings Respondent may undertake to modify or deviate from such terms.

73. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 28 hereof.

Dedication of the site to educational use

74. The Public School Society, for basically the first half of the 19th century, was the leading provider of free public education in New York City. It inspired other organizations to provide free public education, and its activities led to the formation of the City's Board of Education in 1842. The Society was formed in 1805 by an illustrious group led by then Mayor DeWitt Clinton.[11] In 1822, it acquired property on Mott Street for a new school (its fifth) which it constructed in the same year. That property is part of the subject site, on the northwesterly side abutting Mott Street.

75. In the same year, the Society (then, and until 1826, called the Free School Society) proclaimed that its schools

> are the property of the public, for the perpetual reception of indigent children. Five houses have already been constructed, principally by the aid of private donations, in different parts of the city of New York. They constitute a real estate which will be held in perpetuity for the benefit of the lower classes of the community . . . .[12]

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[11] Before that Clinton was an Assemblymember, State Senator, and U.S. Senator. Later he became Lieutenant Governor and then Governor of the State.

[12] This may not have used the word "trust." But it incorporated the concept, and satisfied all rules for the creation of a charitable trust. The FSS Schools serve FSS's eleemosynary public benefit mission. They do so in perpetuity. And, they amount to property of the public. Then, as now, "in perpetuity" was a serious commitment not to be made lightly, but also not to be taken absolutely literally as it was and is subject to adjustment under the *cy pres* doctrine. See Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 17 U.S. 1, 51 (1819), overruled by Vidal v. Girard's Ex'rs, 43 U.S. 127, 196 (1844), as to a different issue.

William Oland Bourne, History of the Public School Society of the City of New York (New York: William Wood 1870) pg. 53 (emphasis added). (The book is hereafter cited as "Bourne." (Cited pages from Bourne are annexed as Exhibit L).

76. This statement appeared in a "memorial" (a petition) to the State Legislature asking that the State not finance real estate investment by the Bethel Baptist Church which at that time was seeking to build a school very near the Society's Mott Street site. The Society's memorial argued that the State should not support religious institutions. Even though the Church intended to use such funding for a school, there was no separation between religious and school functions, the Society argued, and the Church could readily convert the school building to religious uses. The Society, as it said, created no such risk as its sole purpose, as stated in its charter, was education. (Bourne pp. 52-55 Exhibit L, in which the memorial is emphasized in color). And, as its statement quoted above attests, it committed its real property forever to charitable educational use.

77. In the same memorial, the Society further declared its concurrence with the State's past practice of limiting educational grants solely to payment of teachers, and for no other use, except where the grant is to "an institution expressly incorporated for purposes of educating poor children, and where real estate virtually becomes the property of the public," i.e. an organization such as the Society. (Bourne 52-55 (Exhibit L hereto)).

78. Again and again, the Society made public statements confirming the charitable trust status of its real property.

An FSS Board resolution of February 14, 1824 reads in part:

> Resolved that this Board will on behalf of the Society consent to the passage of a Law that shall render the property of this Institution unalienable and sacredly pledged for the avowed objects of this Institution, and places the schools under the general supervision of the Common Council.

Bourne 83 (Exhibit M hereto) (emphasis added). Common Council refers to the City's legislative body.

79. In November, 1824, the State adopted legislation turning over the function of allocating State educational funding in New York City to a new City agency. As the City had already clearly expressed its opposition to the Bethel educational venture, that had the effect of terminating the Bethel controversy. (Bourne 74-75 and Act of November 19, 1824 (together, Exhibit N hereto)).

80. The Society's effort to nail down, with utmost certainty, its commitment to maintain its schools forever in charitable trust continued.

At the invitation of the Society, the Legislature enacted a law on January 28, 1826, providing:

> That the said society is hereby authorized to convey their school edifices, and other real estate, to the Mayor, Aldermen and Commonalty of the city of New-York, upon such terms and conditions, and in such form as shall be agreed upon between the parties, taking back from the said Corporation a perpetual lease thereof, upon condition that the same shall be exclusively and perpetually applied to the purposes of education.

(Bourne 101-102 and Act of January 28, 1826 (together, Exhibit O hereto)).

81. No transfer of title to the City occurred at this time – that only happened in 1853. But the 1826 Act at least had the effect of State endorsement of the concept that the Society should be bound, as its own declarations had sought, to perpetual administration of its schools for the purpose of education. The Society now had political endorsement backing up underlying common law that supported the view that it had created a trust obligation when it made its 1822 declaration.

82. The Society had good reasons to want to establish such a trust over its educational properties. These include:

a. Such a commitment would encourage the donation of land and funds for purchasing land and constructing. For example, in or about 1806, Col. Henry Rutgers gave a lot to the Society, providing that it may be used exclusively for educational purposes and that, if the Society transferred it, or ceased to use it for education, or ceased to exist, the lot would revert to the Presbyterian Church located at the corner of Henry and Rutgers Streets.

b. In this case, the declaration of trust (re retaining real property for ever in use as educational property) may be viewed as a necessary and practical burdening of the land in order to (i) encourage future donors to give property of any sort, or money, knowing that the Society intended to keep the educational venture going; (ii) differentiate the Society from religious institutions which might use property, the acquisition of which was funded by the State, for purely religious uses, thereby improving the Society's competitive position; (iii) assure "customers" (i.e. students and their

families) that the Society intended to remain viable and, particularly, to maintain each school in operation.

Transfer of site to the City Board of Education subject to the charitable dedication

83. In 1842, the State established the City's Board of Education and gave it supervisory powers over the Society. The Board constrained the Society's efforts toward further growth and effectively competed for students. (See https://en.wikipedia.org/wiki/New_York_City_Department_of_Education and https://www1.nyc.gov/assets/records/pdf/featured-collections/board-of-education-records.pdf at page 32 for date of formation; see generally Bourne 536-548 (Exhibit P hereto) for commentary on Board efforts to constrain Society, and 540 for formation of Board.

84. In 1853, the Society transferred all of its assets to the new Board of Education. The deed declares that the transfer is subject to all "incumbrances," a term that includes any conditions that might impair the value of the property. (A copy of the deed, along with a non-cursive transcript of it, is annexed as Exhibit Q). The Board, therefore, took title subject to the charitable trust commitment. Even absent the exemption of all incumbrances, the Society had created a trust for the public, a beneficial property interest, and could not eliminate a beneficial interest which it no longer owned.

85. The current operation of the property as an outdoor museum park for outdoor sculpture, and the many educational events and activities that Petitioners Elizabeth Street Garden Inc. and Friends of Elizabeth Street Garden offer are consistent with the Society's educational commitment. Operation of a mixed use building primarily for low income senior housing, plus retail stores and office space for a charity that promotes low income housing might be augmented with incidental educational purposes, but such are certainly not the primary intended uses.

86. The subject property is now under the management of Respondent HPD and Respondent City. As the Council has adopted a resolution purporting to authorize transfer of the site, it is likely that the City might at any time transfer the property (subject to its obligation to give notice to Petitioners before doing so). Accordingly, Petitioners have no adequate remedy at law.

87. To Petitioners' knowledge, no previous application has been made for the relief requested herein.

IX. EIGHTH CAUSE OF ACTION: For Declaratory judgment that the City hold title to the subject property for the benefit of the Board of Education and it must be used for educational, recreational, and other public purposes. (Charter § 521(a)), and the City Council and Council members and other officers and employees have a fiduciary

responsibility to the Board to administer it for the benefit of the Board (Charter § 1110); and for injunctive relief to enforce such obligations.

88. Petitioners repeat and reallege the allegations contained in paragraphs 1-28 and 74-87 hereof.

89. Upon information and belief: The City and HPD seek to sell the subject property to the project sponsors for one dollar. They will require the purchasers to operate it (at least, that is, the residential portion) as low-income housing for a period believed to be 60 years but which may not have been conclusively fixed. After that, the property would be free of any obligations other than those affecting all property in the City. It has been stated by HPD that the project will be financed in part by a City loan program known as "SARA," by the Low-Income Housing Tax Credit, and by other vaguely described means. It further appears that Habitat for Humanity will use of some 11,200 square feet of space at a reduced rate of rent. (Jeannine Kiely Aff. 8-16-19 Par. 3). When the project was to be treated as an Urban Development Area Action Project, it was anticipated that it would have tax exemption for 20 years (declining during the last ten years), and that may still be the case. (Kiely Aff. Par. 4) As the paucity of detail revealed at the public meeting referred to in the Kiely Affidavit indicates, discovery appears necessary to learn all the financial details.

90. None of this arrangement (and other terms that may be attached) appears to provide any benefit to the charitable beneficiary of the existing trusts, namely the Board of Education. The terms do not appear to have been put together with any regard to the interests of the Board. That is surely not because the property has no value. If, as the City evidently claims, the City is free to transfer it, it would have significant value. Indeed, the ULURP description submitted to the Council by the Planning Commission values the property at $47,520.000. (A copy is annexed as Exhibit R).

X. NINTH CAUSE OF ACTION: For Declaratory Judgment and injunctive relief: The Terms of The Sale of The Property and All Related Transactions Are So Favorable to The Developer Consortium As to Constitute an Illegal Gift and Loan.

91. Petitioners repeat and reallege the allegations contained in Paragraphs 1-28, 74-87, and 89-90 hereof.

92. Referring to Paragraph 89 and the fourth and subsequent sentences of Paragraph 90 hereof, the reduced or nominal purchase price, and all such other benefits, individually and as a group, constitute excessive cost to the City, substantially more than is necessary to induce the consortium to undertake the project, a benefit that causes the City to underwrite a project which, at least in part, does not qualify as a public benefit project, and is otherwise so excessive as to

amount to a gift to the consortium in violation of the State Constitution's Gift and Loan Clause, Article VIII Section 1.

93. Full disclosure of all terms relating to the said deal are necessary to enable Petitioners and the Court to assess the degree of excess and the amount of the gift and/or improper loan.

94. To Petitioners' knowledge, no previous application has been made for the relief requested herein.

95. No available legal remedy is sufficient.

96. The transactions complained of in this Cause of Action are illegal, fraudulent, beyond the authority of the lead agency and other Respondents, and a waste of public resources.

WHEREFORE, Petitioners respectfully request the following relief:

A. As to the First Cause of Action: Declaratory judgment that the negative declaration pursuant to SEQRA is illegal and void, and that the ULURP process was initiated prematurely and is illegal and void.

B. As to the Second Cause of Action: Declaratory judgment that Respondents HPD and City have violated SEQRA as alleged, and that the negative declaration is therefore illegal and void.

C. As to the Third Cause of Action: Declaratory judgment that the zoning allows at most 60% "lot coverage."

D. As to the Fourth Cause of Action" Declaratory judgment that the project violates that limitation by exceeding the 60% limit, and that the modification of the Council's approval of the plan – in arbitrarily declaring that built space is "open space," while asserting that no change is being made by zoning – is irrational, does not conform to a comprehensive zoning plan, and at least de facto constitutes illegal spot zoning.

E. As to the Fifth Cause of Action: Declaratory judgment that the site may not be disposed of pursuant to PHFL § 576-a for insufficient consideration. and cannot generate property tax exemption or other special privileges under that Act.

F. As to the Sixth Cause of Action: Declaratory judgment that approval of disposition pursuant to PHFL §576-a was not properly granted under ULURP.

G. As to the Seventh Cause of Action: Declaratory judgment that the westerly portion of the subject property is subject to a charitable trust declaration dedicating the property exclusively for educational use in perpetuity, and injunctive relief to prevent transfer of the property in violation of that declaration, and requiring that Petitioners be notified of any proceedings Respondent may undertake to modify or deviate from such terms.

H. As to the Eighth Cause of Action: Declaratory judgment that the City hold must be used for educational, recreational, and other public purposes. (Charter § 521(a)), and the City Council and Council members and other officers and employees have a fiduciary responsibility to the Board to administer it for the benefit of the Board (Charter § 1110); and injunctive relief to enforce such obligations.

I. As to the Ninth Cause of Action: Declaratory Judgment that The Terms of The Sale of The Property and All Related Transactions Constitute an Illegal Gift and Loan. and injunctive relief: and injunctive relief to prevent such illegality; and provision for discovery.

J. As to all Causes of Action, such discovery as may be needed.

K. As to all Causes of Action: Injunctive relief as may be necessary or appropriate.

L. Award of attorney's fees, costs and disbursements.

M. Such other and further relief as the Court may deem just and equitable.

Dated: August 16, 2019

Respectfully Submitted,

Michael S. Gruen

Attorney for Petitioners/Plaintiffs
249 West 34th Street, #402
New York, NY 10001
(212) 643-7050

Verification

State of New York)
) SS:
County of New York)

The undersigned, being duly sworn, deposes and says that she is a party to the within proceeding/action; that she has read the foregoing Petition/Complaint, and that to the best of her personal knowledge, the said pleading is true, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true. The undersigned further deposes and says that, as to statements concerning historical events, her knowledge derives from books identified in the said pleading and other archival research that she has engaged in or supervised; and as to matters alleged on information and belief, on documents persons and other sources she believes to be reliable.

Jeannine Kiely

Sworn to before me
this 16th day of August 2019

Notary Public

MICHAEL S. GRUEN
Notary Public, State of New York
No. 02GR6347529
Qualified in Queens County
Commission Expires September 06, 2020