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

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IN THE MATTER OF NEIGHBORS UNITED BELOW CANAL, JAN LEE, DCTV, EDWARD J. CUCCIA, BETTY LEE, and AMERICAN INDIAN COMMUNITY HOUSE

Index No.

Oral Argument Requested

Petitioners,

For a Judgment pursuant to Article 78 of the CPLR

-against-

MAYOR BILL DE BLASIO, et al.,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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Petitioners Neighbors United Below Canal ("NUBC"), Jan Lee, Downtown Community Television ("DCTV"), Edward J. Cuccia, Betty Lee, and American Indian Community House ("AICH") (together, "Petitioners"), submit this memorandum of law in support of their petition pursuant to Article 78 of the CPLR seeking to vacate Respondents' approvals of a new jail to be constructed at 124-125 White Street (the "Manhattan Jail") on the grounds that:

(a) Respondents violated the procedural requirements of the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR") by: (1) changing the location of the Manhattan Jail after public review of the Draft Scope of Work for the Draft Environmental Impact Statement ("DEIS"), thus depriving the public of an opportunity to fully comprehend the Manhattan Jail project and its actual location at the beginning of the environmental review process, and (2) approving the Manhattan Jail prior to the lead agency's issuance of the required SEQRA Findings[1];

(b) Respondents violated the substantive requirements of SEQRA and acted arbitrarily by failing to adequately define the characteristics of the Manhattan Jail, and failing to identify and take a hard look at the potential significant adverse impacts of the Manhattan Jail;

(c) Respondents violated the Uniform Land Use Review Procedure ("ULURP") by grouping the Manhattan Jail together with three other jails to be located in Brooklyn, Bronx and Queens into one combined ULURP application, and, further, by certifying that the ULURP application was complete before it was actually complete, making it impossible for the application to undergo meaningful public review in violation of the New York City Charter;

(d) Respondents acted arbitrarily and capriciously and in excess of their jurisdiction by approving land use actions without enough information about the Manhattan Jail, thereby

[1] Except as specifically stated otherwise herein, all references to SEQRA shall be deemed to also refer to CEQR. *See Akpan v Koch*, 75 N.Y.2d 561, 567, (1990) (noting that CEQR "implements SEQRA in the City of New York").

depriving the public of meaningful review of the Manhattan Jail and necessitating the City Planning Commission's creation of an ultra-vires post-ULURP review process that will be devoid of any public input; and

(e) Respondents violated the New York City Charter by failing to meaningfully apply the Fair Share Criteria and consider the extent to which the neighborhood character of Chinatown would be adversely affected by the Manhattan Jail.[2]

PRELIMINARY STATEMENT

The Manhattan jail is one of four facilities proposed by the City as part of the Borough Based Jail System ("BBJS") project to replace the jails on Rikers Island. The BBJS went from conception to approval within 20 months – an extraordinarily short time period for any project, let alone four new jails in four different boroughs.

Petitioners challenge the City's approval of the Manhattan jail because of the very consequential procedural and substantive errors that occurred before the City approved the Manhattan Jail in the midst of the Chinatown and Little Italy National Register Historic District. While it is not illegal to move a project through SEQRA and ULURP quickly, the City must comply with the specific requirements of these statutes before it can approve a project.

One of the most basic underlying principles under SEQRA and years of jurisprudence is that no matter how meritorious a particular agency might believe its proposed action to be, it may not short-cut and disregard SEQRA's strict procedural and substantive obligations. The City in this case followed a strategy that is contradictory to, and undermines, the fundamental requirement that agencies consider all relevant areas of environmental concerns and examine them rationally before approving a project.

[2] Unless otherwise indicated, all capitalized terms not defined herein have the same meaning as set forth in the Verified Petition. Respondents are sometimes hereinafter collectively referred to as the "City."

The shortcuts the City took on the way to approving the Manhattan jail were numerous and momentous. There is no dispute that the City conducted public scoping on the wrong jail site and failed to issue SEQRA findings. These procedural violations bookended the City's SEQRA review and resulted in an illegal environmental review process that cannot be cured by subsequent invitation-only meetings for select members of the community, and thus cannot support any of the approvals that followed.

The City's haste in getting the BBJS approved also made a mockery of the substantive requirements of SEQRA and ULURP. The City started the environmental review and certified the ULURP application as complete before even basic project information was available, including, for example, where the Manhattan Jail would actually be located, what it looks like, how it will be constructed, and how long demolition and construction will take. Then, to further shave off time, the City combined all for jails into one extremely complicated and unprecedented ULURP application. Due to self-imposed urgency, the City thus pursued a strategy that thwarted meaningful deliberation of basic information about the project, both on the part of the public and the City's own agencies, and deferred analyses of significant potential environmental impacts. The process was so rushed and lacking basic information that the City Planning Commission had to craft an ultra vires post-ULURP approval review process to enable it to provide what it described as "meaningful input" once the project is actually designed.

The City also completely disregarded obvious elements that characterize the Chinatown neighborhood and how the new jail will potentially destroy it. The new jail project will have immediate and very long term and wide-ranging impacts on the Chinatown community and the character of the neighborhood. These impacts include, but are not limited to: air quality, noise, and traffic impacts from a lengthy and complicated demolition and construction project right

next to the Chung Pak senior living center in Chinatown, which has never fully recovered from 9/11 and is already overburdened with City facilities; public health impacts from re-mobilizing dust from the World Trade Center destruction; the permanent closure of the White Street pedestrian-only public plaza; the direct and potentially indirect displacement of local businesses that provide necessary income to Chung Pak; damage to the landmarked DCTV building one half block away from the Manhattan Jail site that is not only a historic resource but also a cultural center that serves the community; demolition and construction dust that will jeopardize the outdoor food vendors that are unique to Chinatown and serve both residents and tourists alike; and potential disturbance of archeological artifacts significant to Native Americans.

Despite these impacts, the City concluded that the new jail would not significantly impact the neighborhood because it already "co-exists" with two jails. However, the two jails on site, the South Tower and the North Tower, are half the size as the proposed Manhattan Jail and only 13 and 14 stories, respectively. They are located on either side of the White Street pedestrian-only public plaza that the City promised to Chinatown when the North Tower was built in the late 80s, and which allows light and air to permeate the neighborhood and serves as a major artery between Chinatown and neighborhoods west of Centre Street. The City's conclusion that the Manhattan Jail would not impact the Chinatown neighborhood because two jails are already located on the site is thus a gross oversimplification that reflects a complete failure to understand the true character of the neighborhood surrounding the site and a predetermined outcome by the City that the Manhattan jail would go forward regardless of the significant adverse environmental impacts.

Similarly, when the City purported to study alternatives to the new jail, as required under SEQRA and under the City's Fair Share Criteria, the City determined that there were no

alternatives to placing the jail at 124-25 White Street after considering only one other City-owned site. Then, when the proposed new jail became smaller during the City Council review of the project, the City dismissed without consideration any possibility of adaptively re-using and updating the existing jails to provide more modern amenities, while at the same time avoiding the major disruption to the Chinatown community associated with building a new jail.

This case is not a referendum on criminal justice reform. Petitioners do not seek a determination from the Court on the desirability of the BBJS plan. Rather, Petitioners are asking the Court to examine whether the City complied with applicable statutes and regulations that require it to genuinely consider environmental impacts and provide for meaningful public input before approving a massive jailscraper that will have significant adverse environmental impacts on a community that deserves and had been promised better. Because the City has not complied with the law, Petitioners respectfully request that this Court annul and void all the approvals for the Manhattan jail.

STATEMENT OF FACTS

The facts and circumstances relevant to this proceeding are set forth in the Verified Petition, dated February 13, 2020, the accompanying affidavits of Edward J. Cuccia, sworn to February 4, 2020 ("Cuccia Aff."), George Janes, AIPC, sworn to February 11, 2020 ("Janes Aff."), Judith Zelikoff, PhD, sworn to February 7, 2020 ("Zelikoff Aff."), Jan Lee, sworn to February 12, 2020 ("J. Lee Aff."), Keiko Tsuno, sworn to February 12, 2020 ("Tsuno Aff."), Betty Lee, sworn to February 3, 2020 ("B. Lee Aff.", Iakowi:He'Ne', sworn to February 9, 2020 "Iakowi:He'Ne' Aff."), Kerri Culhane, sworn to February 3, 2020 ("Culhane Aff."), and the exhibits thereto, all of which are incorporated herein by reference.

ARGUMENT

POINT I.

RESPONDENTS FAILED TO COMPLY WITH THE STRICT PROCEDURAL REQUIREMENTS OF SEQRA

The basic purpose of SEQRA is "to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of State, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement. ECL § 8-0109(2); 6 NYCRR 617.1(c). SEQRA has both procedural and substantive elements that must be complied with and it is the role of the courts to assure that an agency has satisfied SEQRA, procedurally and substantively. *In re Neville v. Koch*, 79 N.Y.2d 416, 424 (1992). Where the court finds that the requirements of SEQRA have not been followed, the appropriate remedy is to declare the challenged approval null and void. *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363-364 (1986). *See also In re New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 348 (2003) ("SEQRA's policy of injecting environmental considerations into governmental decisionmaking is 'effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations."). As explained by the New York Court of Appeals, "[t]he mandate that agencies implement SEQRA's procedural mechanisms to the 'fullest extent possible' reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute." *Id. at* 350. The judicial mandate for "strict compliance" with SEQRA is not a "meaningless hurdle," but instead is intended to "insure

that agencies will err on the side of meticulous care in their environmental review" and not be tempted to "cut corners." *Id.* at 348.

The record demonstrates that DOC, the Lead Agency under SEQRA, failed to strictly comply with SEQRA's procedural requirements from the very beginning of the process to its not quite culmination, and cut multiple corners in order to get the City-wide BBJS project approved quickly. First, at the very outset, DOC conducted required public scoping on a location of the Manhattan Jail that was then changed, post-scoping, to a different location three blocks away, and DOC never conducted scoping on the new location. Second, DOC failed to issue a SEQRA Findings Statement, *i.e*. an "explicit finding" that the law has been complied with and that material adverse environmental effects as identified in the EIS have, to the extent practicable, been minimized or avoided. 6 NYCRR § 617.11(d)(5). As a result of these procedural failures, the entire environmental review of the Manhattan Jail is fatally flawed and the City's land use approvals authorizing development of the Manhattan Jail at 124-125 White Street based thereon should be annulled.

A. <u>The Positive Declaration and Draft Scope Covered a Different Site Than The DEIS</u>

The purpose of the DEIS is "to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process." ECL 8-0109(4). "Scoping" provides the road map for the DEIS. It is the "process by which the lead agency identifies the *potentially significant adverse impacts related to the proposed action* that are to be addressed in the draft EIS including the level of detail of the analysis, the range of alternatives, the mitigation measures needed and the identification of irrelevant issues." *See* 6 N.Y.C.R.R. §

617.2(ag) (emphasis added). Scoping provides a "written outline of topics that must be considered and provides an opportunity for early participation by involved agencies and the public in the review of the proposal." *Id*. Although public scoping for DEIS was optional under SEQRA at the time the Manhattan Jail was proposed, public scoping has always been mandatory in New York City under CEQR. *In re Ordonez v City of New York*, 60 Misc. 3d 1213(A), 2018 N.Y. Slip Op. 51093(U) *3 (Sup. Ct. N.Y. County 2018).

Here, on August 14, 2018, Respondent DOC declared itself Lead Agency and issued an Environmental Assessment Statement and a Positive Declaration requiring the preparation of a DEIS. Petition ¶ 60. On that same day, DOC also issued a Draft Scope of Work for the DEIS. *Id*. ¶ 63. All of these public documents identified 80 Centre Street as the location of the proposed Manhattan Jail. Petition, Exhibit 19.

The public scoping meeting for the DEIS was held on September 27, 2018 and the public comment period on the Draft Scope of Work ended on October 29, 2018. After the close of the public comment period on the Draft Scope of Work, and when the DEIS was issued on March 22, 2019, the location of the jail had been changed to 124-125 White Street, three blocks away.

As the City recognized at the time it began the SEQRA process, 80 Centre Street is close to the civic core and comparably scaled buildings. Petition ¶ 75. It is also surrounded on three sides by existing large government buildings. Petition ¶ 76. 124-125 White Street is dramatically different from 80 Centre Street site. It is even closer to residences and immediately adjacent to the Chung Pak Senior Center, which houses over 100 low income seniors. It is directly across a narrow street (Baxter Street) from residences and small businesses, where Petitioner Betty Lee lives. B. Lee Aff. ¶ 1. The landmarked DCTV Building owned by Petitioner DCTV is located

three blocks from 80 Centre, but only one-half block from 124-125 White Street. Tsuno Aff ¶¶ 3, 46, 48.

The Manhattan Jail will also result in the closure of the pedestrian only public plaza on White Street that was promised to the Chinatown community when the North Tower was built, and its eventual replacement, after years of construction, with a long, narrow tunnel. This will deprive the neighborhood of light, air, and of a central pedestrian artery that provides access between Baxter and Centre Streets, and is the one 50-foot break in a wall of buildings between Hogan Place and Walker Street. B. Lee Aff. ¶ 4; Petition ¶ 40. In addition, locating a new jail at 124-125 White Street will result in the direct displacement of 6,300 square feet of local retail space located in the North Tower at 124 White Street that was leased to the Chinatown community, again, as partial mitigation for the construction of the North Tower. Petition ¶ 105. The Manhattan Jail will also preclude a community development opportunity for Chinatown at 125 White Street. *Id.* ¶ 76.

By conducting Scoping for the DEIS on a different location than the location ultimately studied in the DEIS, DOC failed to provide the public with an accurate description of the proposed project and precluded the public from meaningfully participating in the process of identifying potentially significant adverse impacts related to the proposed action to be addressed in the DEIS, including but not limited to the level of detail of the analysis, the range of alternatives, and the mitigation measures needed. The Court of Appeals has noted that this "[o]pportunity for public participation and engagement is an essential and mandatory part of the SEQRA process" and recognized that "at each step, the agency must provide for public comment, usually through a written public comment period." *In re Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 426 (2017). Significantly, Petitioners, DCTV and Edward Cuccia

decided not to participate in Scoping because the Draft Scope identified 80 Centre Street and they were satisfied that the jail would be enough of a distance away so that it would not cause them significant harm. *See* Tsuno Aff. ¶ 49; Cuccia Aff. ¶ 8. Changing the location of the Manhattan Jail post-Scoping deprived these Petitioners and countless other members of the community of the opportunity to participate at the earliest possible time of the environmental review.

Had the location been identified as 124-125 White Street, DCTV would have raised its significant concerns regarding construction impacts to the DCTV building located approximately 120 feet away from the project site, including the impact of the jail on DCTV's theater addition currently under way, which is accessed from White Street, and the impact to students, employees, audience members who utilize DCTV and travel to DCTV along White Street from east of Centre Street. Tsuno Aff. ¶¶ 51-52. Petitioner Edward Cuccia would have raised concerns regarding how the construction will impact his immigration and asylum clients who have often escaped hardship and persecution and are often suffering from PTSD, as well his elderly clients who have mobility challenges, and his employees, who will be subjected to dust, air pollution, and noise from construction on a daily basis. Cuccia Aff. ¶ 4-7.

By not identifying the ultimate location in the Draft Scope of Work, DOC violated its own guidance to present the location of the project as discussed in the CEQR Technical Manual.[3] *See* CEQR Technical Manual, at 2-8 (stating that for "site specific" actions, "[t]he location and physical dimensions of the project must be presented, including the blocks and lots affected"); *see generally* CEQR Technical Manual, at 2-1 (stating that "site specific" projects "are those proposed for a specific location, where approvals specific to the site are required to allow a particular project to proceed."). Moreover, the Draft Scope failed to "address[] the interplay

[3] The CEQR Technical Manual is the City's guidance document for implementation of SEQRA. It is available at https://www1.nyc.gov/assets/oec/technical-manual/2014_ceqr_technical_manual_rev_04_27_2016.pdf.

between the proposed [P]roject *in its particular location* and conditions in the surrounding area." *See* CEQR Technical Manual at 4-14 (emphasis added). Because the Scoping process in Manhattan did not actually cover the proposed action that is the subject of the DEIS and FEIS, the City failed to satisfy the basic objective of a Draft Scope as described in its own guidance: "*describe the proposed project with sufficient detail about the proposal and its surroundings to allow the public and interested and involved agencies to understand the environmental issues*." *See* CEQR Technical Manual at 1-11(emphasis added.)

NUBC, as well as other interested community members, made several requests that another Scoping Session be held on the correct location, all of which were ignored. Petition ¶¶ 82-83; J. Lee Aff. ¶ 20.

The City fully admits that it changed the location of the new jail post-Scoping. But in response to outcry about this significant switch, in the FEIS response to comments the City merely states that it "has complied with all SEQRA/CEQR procedures in providing for public review during the environmental review process for the proposed projects" because it held four public meetings to receive comments on Draft Scope and extended the public comment period. Petition, Exhibit 32 at pp. 10-5 and 10-6. This is completely non-responsive and disingenuous. Only one Scoping meeting was held in Manhattan and it identified 80 Centre Street as the location of the proposed Manhattan Jail. Petition ¶ 139. The three other scoping meetings were held in the Bronx, Queens and Brooklyn and did not provide any public review regarding the jail at 124-125 White Street. *Id*.

Subsequent review of the Manhattan Jail through the City's ULURP process and the City's so-called "Neighborhood Advisory Committees" ("NACs") do not absolve the City of its failure to meet the strict procedural mandates of SEQRA. The NACs were not open to the

public and were limited to select "community leaders" as a sort of ill-defined task force. *See* Jan Lee. Aff. ¶ 46. The NAC members for each jail were hand selected by the City, in consultation with the respective Council Members. *Id.* ¶¶ 32, 46. These invitation-only meetings from which press was also excluded were not a substitute for the required Scoping process. *See Williamsburg Around the Bridge Block Assn. v. Giuliani*, 223 A.D.2d 64, 74, (1st Dep't 1996) (rejecting City's use of a "Task Force" to develop a protocol for measures to contain lead dust from bridge project, and characterizing this process as "something of an ersatz EIS" that "only allowed limited public participation and scrutiny").

Respondents' failure to comply with the strict procedural mandates of SEQRA also violates basic environmental justice precepts, which are aimed, in significant part, in overcoming "the lack of meaningful public participation by minority and low-income communities in the permit process, the unavailability or inaccessibility of certain information to the public early in the permit process, and the failure of the permit process to address disproportionate adverse impacts on minority and low-income communities." *See* N.Y.S. Dep't of Environmental Conservation, Commissioner Policy 29, "Environmental Justice and Permitting" (March 19, 2003); Zelikoff Aff. ¶¶ 8-9.[4]

DOC's procedural noncompliance has caused it to fail to fulfill its fundamental SEQRA obligation and also thwarted public participation in identifying the relevant areas of environmental concern, regarding the Site that is the subject of the DEIS and FEIS. 124-125 White Street poses distinct potential significant adverse impacts from the site that was the subject of the

[4] *See also* https://www1.nyc.gov/site/sustainability/onenyc/environmental-justice.page (explaining that the City's strategic OneNYC plan aims to promote Environmental Justice, stating that "it is imperative that we empower communities through public dissemination of data and the creation of venues for participatory planning. We need the help of community stakeholders to identify at-risk populations, toxic 'hot spots', research gaps, and effective implementation strategies. Only through the joint deployment of scientific expertise and local knowledge will we achieve clean, healthy, livable, and sustainable communities across the city").

Draft Scope of Work. Accordingly, the approvals for the Manhattan Jail should be annulled. At the very least, DOC, as Lead Agency, should be ordered to supplement the EIS after issuance of a Draft Scope of Work tailored to 124-125 White Street, and then hold a public scoping meeting on this Draft Scope for 124-125 White Street.

B. The Lead Agency's Failure to Issue a Findings Statement Also Violated SEQRA

The record establishes that the Lead Agency failed to comply with SEQRA's procedural requirements in another vital respect. After preparation of a FEIS and prior to undertaking or approving an action, SEQRA requires the lead agency to issue findings that the provisions of SEQRA have been met. 6 NYCRR 617.11(a). A "Findings Statement" is "a written statement prepared by each involved agency . . . after a final EIS has been filed, that considers the relevant environmental impacts presented in an EIS, weighs and balances them with social, economic and other essential considerations, provides a rationale for the agency's decision [as to whether to proceed with an action], and certifies that the SEQR requirements have been met." 6 N.Y.C.R.R. §§ 617.2(p) and 617.11(d)(1-5).

The Lead Agency's Findings Statement is an important milestone and must be made "within 30 calendar days after the filing of the final EIS." 6 N.Y.C.R.R. § 617.11(b). The Lead Agency's Findings Statement allows other involved and interested agencies to make their final decision to undertake, fund, approve or disapprove an action that has been the subject of a FEIS. 6 N.Y.C.R.R. § 617.11(c). "By circulating the reasons for its environmental decision, the lead agency gives an outward sign that environmental values and consequences have been considered." *See Glen Head--Glenwood Landing Civic Council v Town of Oyster Bay*, 88 A.D.2d 484, 492 (2d Dep't 1982) (internal citation omitted).

Here, the absence of any Findings Statement made by DOC in the public record reveals that DOC has not fulfilled its statutory mandate as Lead Agency for the Manhattan Jail. *See id.* at 491-492 ("the lead agency is the one which must co-ordinate the social, economic and environmental factors involved in order to arrive at a decision, and therefore it is the lead agency which must render the requisite environmental findings as part of the decision. … we regard any contrary interpretation as subversive of the statute whose compelling logic requires the decision-making agency to analyze the social, economic and environmental mix before deciding the ultimate issue.") Moreover, "[w]hen a lead agency fails to make the required findings, neither the public nor a reviewing court knows what factors were considered, and they cannot be satisfied that the required hard look has been taken." *See id.*at 492. DOC's failure to issue findings is a violation of SEQRA's strict procedural requirements that renders its environmental analysis and the approvals based thereon *per se* illegal.

As the Lead Agency failed to comply with SEQRA by not issuing the requisite Findings Statement, it was then improper for the CPC and City Council to rush ahead and make final decisions to approve the Manhattan Jail without DOC having first certified that "consistent with social, economic, and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable." 6 N.Y.C.R.R. 617.11(d)(5).

The recent case of *Northern Manhattan Is Not For Sale v. City of New York,* No 161578/2018, 2019 WL 6916075, 2019 N.Y. Slip Op. 33698(U) (Sup. Ct. N.Y. County 2019), is directly on point. There, the Office of the Deputy Mayor for Housing and Economic Development

served as the lead agency under SEQRA/CEQR for a proposed rezoning in northern Manhattan. The City Council approved the rezoning before the lead agency issued its Findings Statement. The Court annulled the rezoning, finding that "if the lead agency had not issued its statement of findings prior to the resolutions passed by the Council, then the Council was not provided with the opportunity to review the most recent and relevant information, rendering its process of review incomplete, superficial, and arguably, a nullity." *Id.* at *4.

As in *Northern Manhattan Is Not For Sale*, the Court should annul the CPC and City Council resolutions approving the Manhattan Jail.

POINT II.

THE MANHATTAN JAIL IS INSUFFICIENTLY DEFINED AND INCAPABLE OF RATIONAL ENVIRONMENTAL IMPACT REVIEW

In addition to the procedural violations discussed above, which alone at a minimum mandate that the City re-start the SEQRA process, the City violated SEQRA in that although it purported to conduct an environmental review of the Manhattan Jail project, it could not make rational assessments about potential significant adverse impacts because the project was and remains so ill-defined.

There are no set designs for the Manhattan Jail. As noted by the CPC, "the reality is that the design will not be set … [until] after the ULURP process has been completed." Petition ¶ 123 and Exhibit 3 at 76. This is because the City has decided to proceed with a Design-Build process for all of the jails, which means that the City will eventually enter into a contract that will cover both the design and construction of each jail. Since the City has not yet entered into such a contract, the plans for the jail consist only of "very preliminary massing diagrams." Petition, Exhibit 3 at 76. As recognized by the CPC, this not the way the City proceeds with significant construction projects that require both land use approvals and associated environmental review.

Id. Usually, "projects before the Commission typically follow a *Design – Bid – Build* development process … The first phase of this Design – Bid – Build process is the schematic design phase, where the conceptual design of the project achieves approximately 30 percent completion." *Id.* (emphasis in original). As a result, designs for the project would be much further advanced than what was available for the Manhattan Jail when the project underwent SEQRA review. *See id.* This is the first time that the City has attempted a Design-Build process for a project of this magnitude. Janes Aff. ¶¶ 37-38.

The City's desire to proceed with a Design-Build process for the Manhattan Jail does not exempt the City from SEQRA's mandate to identify the relevant areas of environmental concern, take a "'hard look' at them, and [make] a 'reasoned elaboration' of the basis for [its] determination." *Chinese Staff & Workers Assn.,* 68 N.Y.2d at 363-364. Under the City's own guidance in the CEQR Technical Manual, "the first step in an environmental assessment is to define project characteristics" and "[w]ithout adequate definition of project characteristics, reasonable assessments *cannot* be made as to the project's likely effects." CEQR Technical Manual, at 2-3 (emphasis added). Moreover, as the City's own guidance further notes, an ill-defined project critically inhibits the public's opportunity to participate in the environmental review process. *See id*. ("The project definition also serves to inform all interested and involved persons and agencies about the proposal and is typically contained in a 'Project Description.'").

Where there is only very preliminary information about a project, such as was the case here, SEQRA and CEQR provide a course of action in the form of preparation of a generic or programmatic EIS, which contemplates further environmental review when more details become available and establishes "thresholds and criteria for supplemental EISs to reflect specific significant impacts, such as site specific impacts, that were not addressed or analyzed in the generic

EIS." *See* 6 NYCRR § 617.10(c); 62 RCNY § 6-13. Instead of taking the time necessary to adequately define the Manhattan Jail so that SEQRA's requirements could be fulfilled, or acknowledging that supplemental environmental review would be necessary to address site specific adverse impacts once the project was defined and opting for a generic or programmatic EIS as specifically provided for in SEQRA and CEQR, the City cut corners again and rushed ahead without identifying the relevant areas of environmental concern or taking a hard look at them. *See* Point III, *infra*.

In the DEIS, DOC failed to define the basic characteristics of the Manhattan Jail that may have potential significant adverse environmental impacts on the surrounding community, leaving out basic information including but not limited to: what the building will actually look like and how it might or might not fit in with its surroundings; security features both at ground level and above; lighting; how the existing buildings will be demolished and the new buildings will be constructed and how long demolition and construction will actually take; where construction staging will occur; whether surrounding streets will be closed or blocked; where cranes will be located; whether the site is contaminated and how contamination will be handled; and whether the site contains archeological resources.

DOC's "make it up as you go along" approach violates the entire statutory and regulatory scheme established under SEQRA. The lack of information about the Manhattan Jail prevents the FEIS from providing reasonable assessments about potential significant adverse impacts and violates the public's right to participate in informed decisionmaking that incorporates public input. *See Coalition Against Lincoln West v City of New York*, 60 N.Y.2d 805, 807 (1983) (DEIS must "provide an adequate basis for public consideration of [project] impact[s]"). DOC's decision to initiate public review of a DEIS so lacking in basic information also violates the

public's right to Due Process. *See CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 316 F. Supp. 3d 635, 652 (S.D.N.Y. 2018) ("In this Circuit, '[t]he fundamental requirement of due process is the opportunity to be heard' at a meaningful time and in a meaningful manner." (citations omitted).)

In comments on the DEIS, the public noted the lack of information and the City response, over and over again, was that more would be revealed in post approval studies, *see* Point III.B, *supra,* or that is used "reasonable" estimates, such as for construction impacts. But SEQRA is not a guessing game. If significant studies are deferred and impacts are merely estimated, as was overwhelmingly the case here, there is no real project to assess and no real opportunity for public consideration and comment. The appropriate option in such a case would have been to proceed with a generic or programmatic DEIS, acknowledging the need for supplemental study as more information became available. But obviously this did not comport with the City's desire to get through the process quickly, rather than meaningfully.

The failure of the FEIS to define the project's characteristics triggers DOC's obligation to, at a minimum, prepare and circulate for public comment an adequate supplemental EIS. *Glen Head--Glenwood Landing Civic Council* , 88 A.D.2d at 494–95 (requiring supplemental environmental impact statement where "significant information [was] received by the [reviewing agency] after completion of the environmental impact statement," noting that SEQRA's "circulation and comment requirements insure 'informed decision making by providing procedural inputs for all responsible points of view on the environmental consequences of a proposed . . . action,' guard against lead agency error or bias, and help the lead agency identify problems, thereby improving its evaluation of a proposed project" (citations omitted)).

POINT III.

THE CITY VIOLATED SEQRA BY FAILING TO TAKE A "HARD LOOK" AT THE POTENTIAL SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS OF THE MANHATTAN JAIL

Assuming for argument's sake only, that City did not violate SEQRA's strict procedural requirements (which it did), and that it adequately defined the Manhattan Jail so that reasonable assessments regarding the project's likely effects could be made by the lead and involved agencies with meaningful public participation (which it did not do), the Petition should be granted for the additional reason that the DEIS and FEIS failed to comply with the requirements under SEQRA that the lead agency "[(1)] identif[y] the relevant areas of environmental concern, [(2)] [take] a 'hard look' at them, and [(3)] [make] a 'reasoned elaboration' of the basis for [its] determination." *Chinese Staff & Workers Assn.*, 68 N.Y.2d at 363-364, *quoting In re Jackson v. New York State Urban Dev. Corp*., 67 N.Y.2d 400, 416 (1986); *In re Hubbard v. Town of Sand Lake*, 211 A.D.2d 1005, 1006 (3d Dep't 1995).

Mere preparation of an EIS is not proof of a hard look. Nor does the fact that an EIS was prepared warrant deferential review by the Court when the EIS is completely deficient, as is discussed in detail below. *See In re Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, 20 N.Y.3d 148 (2012) (despite agency's discretion in preparing an EIS, it must supplement when the EIS is missing information that is "essential to an understanding of the environmental impact" of a project).

Here, in the City's haste to obtain approvals of the land use application authorizing development of the Manhattan Jail, DOC's environmental review failed to fulfill the fundamental "hard look" obligation under SEQRA to identify and take seriously the potential significant adverse impacts posed by the Manhattan Jail. DOC failed to conduct any real analysis of alternatives, summarily dismissed and ignored identified impacts, and unlawfully substituted

vague assurances of future studies and mitigation for its obligation to undertake a comprehensive environmental review of environmental impacts *before* approving the jail. The deficiencies of DOC's environmental review, summarized below, demonstrate that DOC failed to take the requisite hard look. As a result, this Court should annul Respondents' approvals and require DOC to conduct a de novo environmental review.

A. The City Violated SEQRA By Failing to Consider Reasonable Alternatives to the Manhattan Jail

SEQRA mandates that an EIS set forth alternatives to the proposed action, including alternative sites if appropriate, and to "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." *See* ECL § 8-0109(1), (2)(d); 6 N.Y.C.R.R. § 617.14(f); *In re King v. County of Saratoga Indus. Dev. Agency*, 208 A.D.2d 194, 198 (3d Dep't 1995) (FEIS for proposed new landfill was adequate because it included analysis of potential alternatives to the project, including a recycling and reuse facility, extending the life of the existing landfill, and siting the new landfill on alternate sites). *See* also *Jackson*, 67 N.Y.2d at 416.

Alternatives have been characterized as the "heart of the SEQRA process" because they provide a safeguard that the lead agency will choose the project that best minimizes adverse consequences. *See In re Shawangunk Mountain Envtl. Ass'n v. Planning Bd.*, 157 A.D.2d 273, 276 (3d Dep't 1990) (annulling environmental review which did not include review of possible alternatives); *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 50 (4th Dep't 1995) (development agency violated SEQRA because it did not consider any alternatives to its project to develop a retail shopping center, including petitioners' proposal to consolidate the proposed facilities on a portion of the site). Although an agency need not analyze every conceivable alternative, it must evaluate all reasonable alternatives. *See, e.g., Webster Assocs. v. Town of*

Webster, 59 N.Y.2d 220, 227-28 (1983); *Aldrich v. Pattison*, 107 A.D.2d 258, 276 (2d Dep't 1985). Under the City's guidance, evaluation of alternatives consists of three steps – framing and describing the alternatives; assessing the impacts of the alternatives; and comparing the effects of the alternatives to the effects of the proposed action. *See* CEQR Technical Manual at 3U-300. DOC's departure from its guidance without explanation and its failure to evaluate a range of reasonable and feasible alternatives to the proposed Manhattan Jail, is yet another defect in the environmental review.

By August 2, 2018, the City had identified a grand total of two locations for a jail in Manhattan: 80 Centre and 124-125 White Streets. Petition ¶ 57; J. Lee Aff. ¶ 6. From the outset, DOC did not consider any sites outside of the Chinatown community, which already bears more than its fair share of city facilities. *See In re Silver v. Dinkins*, 158 Misc. 2d 550, 554 (Sup. Ct. N.Y. County.), *aff'd*, 196 A.D.2d 757 (1st Dep't), *appeal denied*, 82 N.Y.2d 659 (1993) (noting that the Lower East Side and Chinatown were overburdened with City facilities and holding that DSNY's analysis of alternative sites to locate a new garage and fueling facility was inadequate because it was limited to City-owned sites); *see also* Point V, *supra*.

After it conducted Scoping on 80 Centre Street, DOC determined that 80 Centre Street was no longer a viable site due to "public comments provided on the Draft Scope of Work and through the City's community engagement process" and because of "the complexity and cost of moving 80 Centre's multiple occupants and disruption to court operations". Petition, Exhibit 32 at p. 10-42. DOC thereafter avoided any evaluation of 80 Centre Street as a reasonable alternative. This is not an adequate alternatives analysis under SEQRA.

DOC also failed to evaluate redesign and adaptive reuse of the existing jail. Because 125 White Street is eligible for listing in the S/NR and as a NYC Landmark, the redesign

option should have been considered. *See* Culhane Aff. ¶ 43. Redesign and adaptive reuse are the preferred approaches to avoid significant impacts to historic resources. Culhane Aff. 43; *see also* CEQR Technical Manual Section 520-521.3.

The failure to consider adaptive reuse as an alternative is a glaring deficiency in DOC's environmental review, particularly in light of the fact that the City ultimately reduced the size of the Manhattan Jail to 880 beds (18 beds fewer than the existing condition). Petition, Exhibit 35; Culhane Aff. ¶ 43; J. Lee Aff., Exhibit C. DOC simply concluded that the existing facility did not meet the requirements for a modern detention facility and that "existing facilities at the Manhattan Site cannot be renovated to meet the needs of the contemporary facilities envisioned." Petition, Exhibit 32 at p. 10-185. These statements in the FEIS, however, were based upon accommodating 1,150 beds — not 880 beds. Additionally, DOC claimed that it cannot move administrative uses to off-site locations in order to generate sufficient floor area. But again, this statement was made before the reduction from 1,150 beds to 880 beds. The October 11, 2019 CEQR Technical Memo prepared to consider the environmental impacts of the changes made to the BBJS project during the City Council review does not contain any reconsideration of alternatives due to the reduced size. Petition, Exhibit 35. In light of the reduced size and bed reduction, DOC must analyze adaptive reuse of the existing jail, including the potential of relocating administrative offices to make room for the amenities it seeks for occupants of the jail. *See* Culhane Aff. ¶¶ 43-44; *see also* J. Lee Aff., Exhibit C.[5]

[5] DOC's alternatives analysis is also inadequate because the DEIS and FEIS failed to consider sizing the jails in proportion to the population of the boroughs where they are located, or the fact that relations of people arrested in Staten Island will have to travel even further to Brooklyn, Manhattan or Queens than they do now. *See* Janes Aff. ¶ 43. The Lippman Report called for the construction of five jails, "one in each borough." Petition, Exhibit 16 at p. 17. A jail in each of the five boroughs is also consistent with the underlying policy that each borough should carry its fair share of the burden of housing detainees.

B. Critical Analyses Were Improperly Deferred

Besides failing to undertake a meaningful analysis of alternatives, the DEIS and FEIS defers critical analyses that are essential for the public and other agencies to understand the environmental impacts of the project, and that are necessary to the development of mitigation measures of undisputed importance. Instead, DOC made vague commitments that critical analyses in the areas of construction, archeological resources, hazardous materials and socioeconomic impacts would be part of future studies and required in the eventual Design-Build contract requirements.

Requiring the project sponsor to conduct studies *post-FEIS* and *post approvals* in order to determine the project's specific impacts, their magnitude, and mitigation is clearly inconsistent with the strict procedural and substantive requirements of SEQRA. The Court of Appeals has unambiguously held that "mitigation measures are of undisputed importance" and other analyses that are "essential to an understanding of the environmental impact" of a project cannot escape public comment and agency review under SEQRA. *In re Bronx Comm.*, 20 N.Y.3d at 152, 156.

In re Bronx Committee concerned a proposal to locate public schools on a contaminated site. *Id*. at 152. The EIS prepared for the project, however, "fail[ed] to discuss [] the methods [the agency] adopted for long-term maintenance and monitoring of the controls it used to prevent or mitigate environmental harm." *Id*. at 153. The Court rejected as "without merit" the respondent agency's argument that "it should not have to describe the long-term maintenance and monitoring measures in a supplemental EIS because (1) it reasonably chose not to decide on those measures before its EIS was filed and (2) it adequately described them in the site management plan approved by the DEC as part of the Brownfield Program." *Id*. at 156. The Court flatly rejected the agency's argument that "submission of the site management plan to the DEC, or the approval of

that plan as part of the Brownfield process" would in any way "justify short-circuiting SEQRA review." *Id*. As the Court held, "[t]he Brownfield Program and SEQRA serve related but distinct purposes." *Id*.

By taking action to approve the Manhattan Jail and deciding to worry about the consequences later, the City violated SEQRA. Like the agency in *Bronx Committee*, DOC sought to "justify short-circuiting SEQRA review" by coming up with plans later to analyze and address significant areas of environmental concern. This does not come close to satisfying SEQRA's hard look requirement. *Id*. (a supplemental EIS is called for "[w]here important decisions about mitigation can only be made after the initial remedial measures are complete").

1. Construction Impacts

With respect to construction impacts and mitigation, the FEIS states again and again that future studies and plans are necessary, yet these future studies will never be subject to public review. *See e.g.*, Petition, Exhibit 32 at p. 10-41 ("[s]tudies for the proposed detention facility foundations, including geotechnical investigations, would be conducted as the design-build process for the proposed project proceeds"); p. 10-147 ("[c]onstruction mitigation measures would be enforced by the City and required of the future design-build contractor"); p. 10-161 (an assessment of traffic and pedestrian conditions during construction "would be made in coordination with the NYCDOT and its Office of Construction Mitigation and Coordination as necessary in order to identify routine traffic control measures that could address potential disruptions."); p. 10-12 ("the Applicant will consult with LPC to develop and implement appropriate mitigation measures to partially mitigate the potential for the potential significant adverse impacts to historic and cultural resources"); p. 10-166 (implementation of noise reduction measures and emission control measures "to the extent practicable and feasible . . . would be part of the Design-Build contract requirements with the proposed project"); p. 10-18 (a CPP will be

prepared and that construction will comply with Department of Buildings Technical Policy and Procedure Notice ("TPPN") #10/88.).

In response to comments relating to the lack of any rational explanation or analysis of construction-related traffic impacts or consideration the extensive efforts that would be required to demolish the existing buildings at 124 and 125 White Street, the FEIS conceded that the lack of information about the Manhattan Jail prevented the City from being able to take the requisite hard look:

> *Because detailed plans for the proposed detention facility and detailed construction logistics, including any necessary street or sidewalk closures, are not known at this time, the level of specificity necessary to quantify the extent to which traffic operations would be disrupted as a result of street network access accommodations requested to facilitate the construction effort cannot be made at this time.* As the design-build process is initiated, an updated assessment of traffic conditions would be made in coordination with the New York City Office of Construction Mitigation and Coordination (OCMC) and the New York City Department of Transportation (DOT) as necessary in order identify feasible measures that could mitigate any potential disruptions".

Petition, Exhibit 32 at p. 10-164 (emphasis added). This is exactly the type of abdication of responsibility and short-circuiting of the SEQRA process that the Court of Appeals in *Bronx Committee* found insufficient to satisfy the requisite "hard look."

Under the City's own CEQR guidance, a proper assessment of construction impacts should include, among other things, a discussion of construction impacts to land use and neighborhood character, community facilities, traffic, transit and pedestrians, air quality, noise and natural resources. *See* CEQR Technical Manual at 3S-200. For instance, if the construction activity will result in closure of a sidewalk, walkway or stairway, these impacts should be analyzed. If the construction will disrupt the services of a community facility, change an entrance or close the facility temporarily, these impacts should be analyzed. Further, if construction will cause the emission of dust, or generate noise from truck traffic, blasting, demolition, etc., these impacts

should be analyzed. *See id*. The FEIS contains no explanation for the City's departure from its own guidance.

The City's "after-the-fact" approach is plainly unlawful. *See In re Abate v. City of Yonkers*, 264 A.D.2d 517, 518-519 (2d Dep't 1999) ("[A]fter-the-fact SEQRA compliance . . . has been held to be an empty exercise, which in effect, 'rubber-stamps' a decision which has already been made."); *In re Penfield Panorama Area Cmty., Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 350 (4th Dep't 1999) ("By deferring resolution of [potential environmental] issue[s], [an agency] fail[s] to take the requisite hard look at [] area[s] of environmental concern." Moreover, SEQRA cannot be satisfied by future action that requires another agency's approval. *In re Bronx Comm.*, 20 N.Y.3d at 156.

The FEIS makes clear that the City remains completely in the dark as to what the construction impacts will be for a building of this type that is not yet designed. Janes Aff. ¶ 36. Without a building design for a building form that the City has never constructed, the City simply cannot make rationale conclusions regarding construction impacts. *Id*.

2. Archeological Resources

The FEIS recognized that the Manhattan Jail site "would have served as an important resource to the local indigenous population." Iakowi:He'Ne' Aff., Exhibit A. at p. 4.5-8. Again, however, DOC has deferred identification of impacts, stating that it intends to undertake additional analysis solely "in consultation with the LPC," without public review and input. *See* Petition, Exhibit 32 at p. 10-13 ("mitigation measures are expected to include Historic American Buildings Survey (HABS) documentation of the architectural resource including sufficient information about 100 Centre Street, to which it is connected, as well as the implementation of a Construction Protection Plan (CPP) . . . additional archaeological analysis in the form of Phase 1B archaeological testing or monitoring would be completed in consultation with LPC for those

archaeologically sensitive portions of the White Street streetbed that would be disturbed by the proposed project.").

The current jail was built on sacred lands formerly occupied by Native Americans without their consent or consultation. Iakowi:He'Ne' Aff. ¶ 15. The City's plan to conduct post-approval archeological investigations completely outside of the public purview not only violates SEQRA, it also inflicts unique injury on Native Americans and violates long-standing treaty obligations and the United Nations Declaration on the Rights of Indigenous Peoples, which give Native Americans the right to maintain and protect the past manifestations of their cultures. *See Id*. ¶ 5. That cannot happen without publicly available information regarding potential archeological resources.

3. Hazardous Materials

In its rush to approval, DOC did not provide a complete Phase I Environmental Site Assessment ("ESA") or any Phase II ESA, Remedial Action Plan ("RAP") or Construction Health and Safety Plan ("CHASP") as part of the DEIS for the Manhattan Jail. While these documents have been included in the FEIS, their inclusion does not cure DOC's failure to identify the extent of hazardous materials on the site, remediation that would be required, or effects of exposure to hazardous materials on vulnerable populations in the study area.

The Phase II ESA found, among other things, SVOCs and metals in excess of restricted residential cleanup objectives, contaminated groundwater beneath the site, soils that will have to be disposed of as contaminated, and very high soil vapor concentrations in one portion of the building. Significantly, the Phase II ESA concluded that "a more detailed survey, including intrusive sampling, is warranted to fully evaluate the environmental impacts (specifically hazardous building materials and/or conditions) associated with full building demolition." *See* FEIS Part 14, Appendix E at p. 8497 available at https://a002- ceqraccess.

nyc.gov/ceqr/ProjectInformation/ProjectDetail/13546-18DOC001Y#b. Admittedly then, the environmental impacts of full demolition remain unknown and undisclosed even now.

The RAP proposes many construction measures to address contaminated soils and soil vapors, well as hazardous building materials. These measures include a vapor barrier, clean fill, and methods for the stockpiling of contaminated soils. The RAP also describes proposed measures for queuing of trucks ("on site when possible"), dust control and air, VOC and PM monitoring, all to be conducted within the "exposure zone" which is not clearly defined. *See id*. at pp. 10371, 10377-79. All of these proposed measures should have been available for public review, comment and questioning when the DEIS was issued. DOC cannot evade public review by inserting voluminous previously missing but still incomplete materials regarding hazardous materials into a FEIS, as there is no "substitute for the extended period and comprehensive procedures for public and agency scrutiny of and comment on the draft EIS." *Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 228 (1983).

4. Socioeconomic Impacts

The DEIS recognized that "five commercial retail storefronts" would be displaced as the result of the project. This direct displacement is recognized in the CEQR Technical Manual as "an example of direct displacement that would warrant additional analysis might be the demolition of buildings on a local retail corridor for a highway or other non-retail use." *See* CEQR Technical Manual at 5-6. Without any explanation for its departure from this guidance, the City failed to fully consider the potential impacts both on these businesses and their employees, as well as on socioeconomic conditions in the immediate area. The FEIS statement that "[t]he City intends to work with affected business on future relocations plans" constitutes improper deferral of an important mitigation measure and also fails to account for the employees of these businesses. Relocation assistance for small business and tenants was still unaddressed even after the City

Council approved the Manhattan Jail. *See* Petition, Exhibit 38 at 17. The City should have done the required analysis up front and identified specific mitigation measures before approving the project. *See* CEQR Technical Manual at 5-22 (mitigation measures include helping to seek out and acquire replacement space, relocation assistance, moving expenses, payment of brokers' fees, and payments for improvements to replacement space).

C. DOC Ignored Public Comments on a Number of Issues

In addition to deferring many critical analyses, in other instances the City hid behind the CEQR Technical Manual as a means to avoid consideration of potentially significant adverse impacts, even though these issues were raised in comments on the DEIS. The City's conclusion that there would be no significant adverse public health, neighborhood character, historic and cultural resources, open space, shadows, noise, socioeconomic and traffic impacts from the Manhattan Jail despite contrary evidence was arbitrary and capricious, and failed to satisfy the hard look standard under SEQRA. Although these issues were raised by Petitioners and others, they were dismissed in the FEIS without even a cursory environmental review because, according to the City, no analysis was warranted "per the CEQR Technical Manual."

Contrary to what has become the City's modus operandi, the CEQR Manual may not be used as a shield against an agency's obligation to take a hard look at all potential significant adverse environmental impacts. Recently, in *Northern Manhattan Is Not For Sale,* the court considered whether the City had complied with SEQRA in connection with a rezoning in the neighborhood of Inwood in Manhattan. The court rejected the City's rote adherence to the CEQR Technical Manual as a valid reason for not addressing various public comments. The court found that the CEQR Technical Manual is a guidance document, not a "rule or regulation requiring such strict compliance." 2019 WL 6916075, at *3, 2019 N.Y. Slip Op. 33698(U) at 4. As such, the court found that the City's application of the CEQR Technical Manual "without regard to other

facts and circumstances relevant to the regulatory scheme of the statute," including public comments, did not satisfy the City's obligation to "take a hard look at the relevant areas of concern identified by the public and thus, failed to provide a reasoned elaboration of the basis for its determination of each one." *Id*. at *3, 2019 N.Y. Slip Op. 33698(U) at 5.

Here, the City repeated its irrational practice by dogmatically yielding to the CEQR Technical Manual and in the process failed to appropriately consider public comments. *See In re Ordonez*, 60 Misc. 3d 1213(A), 2018 N.Y. Slip Op. 51093(U), at 23 ("when a lead agency uses the mathematical formulas in the guidelines without applying discretion or considering the development at issue — as if it were, in fact, a rule — then the analysis rather than the manual is vulnerable, under the arbitrary and capricious standard").

1. Public Health

The City completely ignored comments from Petitioners and others concerning the need for a public health assessment to identify the public health implications posed by the project.

Among the information presented to DOC in comments on the DEIS were studies documenting the negative impacts of construction on vulnerable populations, including the elderly residing next door to the Manhattan Jail in Chung Pak; on food security for the Chinatown community; and increased exposure to air contaminants due to particulate matter emitted from the World Trade Center collapse. *See* Petition, Exhibit 14 (Exhibits B, H, J and K to NUBC Comment Letter).

Rather than consider and evaluate comments regarding public health, the City irrationally relied upon a generic statement in the CEQR Manual that "for most proposed projects, a public health analysis is not necessary" where no significant unmitigated adverse impact is found in other CEQR impact areas. *See* Petition, Exhibit 32 at p. 10-128. ("As presented in the DEIS, the air quality analysis determined that there would be no significant adverse air quality impacts

resulting from the proposed detention facility. Therefore, as per the CEQR Technical Manual, no public health analysis is warranted."). This general statement presumes that the technical analysis in the other impact areas actually took a 'hard look' at the potential significant adverse impacts and that the air quality analysis truly captured potential impacts.

The FEIS, for example, wholly failed to consider the age of the affected population, including, but not limited to, the Chung Pak seniors living directly adjacent to the site, the children attending Transfiguration and other nearby schools, including PS 1, PS 124, PS 130, St. James/St. Joseph's, and Murray Bergtraum High School, workers in surrounding small businesses, or the physical and mental health impacts of the air and noise from the proposed project on a population which has already uniquely suffered the impacts from 9/11. *See* Zelikoff Aff. ¶¶ 5-11 (explaining that pre-existing conditions and vulnerabilities must be taken into account to assess public health impacts). After reviewing the FEIS, Professor Judith Zelikoff concluded that:

> The FEIS has grossly generalized (if addressed at all) the potential adverse public health and environmental effects that can result from the proposed demolition and construction at 124-125 White Street. Furthermore, the FEIS does not account at all for susceptible or vulnerable populations living, working, playing or going to school in very close proximity to the Site; neither does the FEIS account for this population's response to even low concentrations (NAAQS levels) of PM and other potential hazardous air pollutants (VOCs, SVOCs, metals, lead and/or lead-based paint, fuel oil, PCBs, or asbestos) either alone or in combination. A FEIS inclusive of these factors as well as a comprehensive and detailed plan for preventing or mitigating increased air pollution during the proposed long-term (4+ years) demolition and construction, is vital to the health, well-being and safety of the community, but is completely lacking.

Zelikoff Aff. ¶ 20.

The determination that no public health assessment is warranted, despite the numerous public comments that the project will impact public health is irrational and unlawful. *N. Manhattan Is Not For Sale,* 2019 WL 6916075, at *2, 2019 N.Y. Slip Op. 33698(U) at 2. DOC should have conducted an assessment of public health impacts, taking into account the pre-existing

conditions in Chinatown, including the presence of WTC dust, and the vulnerable populations living there. *See* Zelikoff Aff. ¶ 5, 20.

2. Neighborhood Character

DOC completely ignored NUBC's comments regarding impacts to the neighborhood character of the Chinatown community from the new jail, which are required to be analyzed under SEQRA and CEQR. *See In re Golten Marine Co. v. New York State Dep't of Env'tl. Conservation*, 193 A.D.2d 742, 742-43 (2d Dep't 1993) (affirming annulment of negative declaration where agency did not analyze community character). *See also* ECL § 8-0105(6) (defining "environment" as "physical conditions which will be affected by a proposed action, including . . . existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character").

The FEIS dismissed comments that the City failed to recognize the Chinatown and Little Italy Historic District's national significance and to comprehend the project's threat to community character and sense of place. *See* Culhane Aff. at ¶ 23, 27, 30-40; Janes Aff. ¶ 29. The existing neighborhood character has achieved a balance between the Civic Center and the residential neighborhoods of Chinatown and Little Italy. *See* Janes Aff. ¶¶ 33-34. Even with a reduced height, the scope and size of the proposed jail disturbs that balance, affecting the neighborhood character. *Id*. It is impossible to look at the photo-renderings and conclude anything other than that the project will significantly impact neighborhood character. *Id.* ¶ 25. Again, DOC disregarded NUBC's comments without any substantive response, deferring to the CEQR Technical Manual. *Id.* ¶ 34.

The FEIS also ignored other elements raised by Petitioners in comments to the DEIS that give the Chinatown and Little Italy Historic District its distinct personality and feel: the White Street pedestrian plaza and artwork; landmarked buildings in the Chinatown and Little Italy

Historic District; food vendors that supply Chinatown residents with a unique and fresh food supply; highly ornamental facades and other architectural features of the Tribeca East, SoHo, and Chinatown and Little Italy historic districts – to name a few. The darkening of the streets and parks by the proposed jail, the threat to historic and cultural resources and adverse impacts on day-to-day living will all have a tremendous negative impact on the character of the neighborhood. *See* Culhane Aff. ¶ 36, 42; Tsuno Aff. ¶ 45; B. Lee Aff. ¶¶ 4, 7, 10, 12.

3. Historic and Cultural Resources

The City also failed to address numerous comments on the DEIS that dealt specifically with historic preservation or cultural resources issues. *See* Culhane Aff. 29; Petition, Exhibit 32 at pp. 10-78, 10-79, 10-80. Particularly egregious is the exclusion of the landmarked firehouse, located a mere half-block from the Manhattan Jail, from any consideration of construction-related impacts.

The firehouse is owned by Petitioner, DCTV, and is one half block away from the Manhattan Jail site. The French Renaissance style firehouse was built in 1895. It is an outstanding example of civic architecture and New York City's commitment at the time to achieve architectural excellence. The firehouse is delicate, and has undergone extensive restoration and repairs, at great expense to DCTV, to save and maintain what is one of City's well-known architectural jewels. *See* Tsuno Aff. ¶ 3, 17-18.

DOC recognized the firehouse as one of ten known architectural resources in the study area, yet excluded it from the from the study area for consideration of construction mitigation and protection measures because it is slightly more than 90-feet outside the study area. This error, which is contrary to the City's own guidance that if a project's construction activities are located within 400 feet of a historic or cultural resource, potential hazards should be assessed, CEQR Technical Manual 22-7, leaves the City and petitioner, DCTV, to guess as to what the impact of

the Manhattan Jail will be on the firehouse and the services it has provided to the community and surrounding area for over fifty years.

While there are NYC DOB requirements for assessing construction-related vibrations within 90 feet of a New York City Landmark, this does not supplant the analysis that is required under SEQRA, or justify DOC's use of too limited a study area. Construction-related impacts, such as falling objects, vibration, dewatering, flooding, subsidence, or collapse are genuine concerns – none of which have been identified or analyzed with respect to the firehouse. *See* Tsuno Aff. ¶ 31. Nor has DOC evaluated the impact of the Manhattan Jail on the services that DCTV provides to the community (honored youth programs, master classes, film screenings, community space, and production of award winning documentary films); the potential indirect displacement of employees; or the void that will exist in the underserved community that DCTV supports. *Id.* Employees cannot safely produce award winning films and students cannot safely learn in the midst of constant dust, noise and vibration of a massive demolition and construction project. *Id.*

In addition to adverse impacts to the structural integrity of the firehouse and DCTV's important contributions to the community, DCTV is left to guess as to construction logistics, and whether White Street, between Lafayette and Centre Streets, will become a staging area that blocks access to the entrance of DCTV's documentary theatre that is nearing completion. *Id.* The Academy Qualifying theatre will include additional community space and be completely interactive, allowing millions to participate and benefit. All of these potential adverse environmental impacts were illegally and illogically ignored by the City.

4. Open Space

DOC also acted arbitrarily by ignoring public comments concerning open space impacts and dogmatically relying on the CEQR Technical Manual as its justification. *See* Janes

Aff. ¶¶ 12-14. Petitioner NUBC, expressed concern that the DEIS did not evaluate the impact of the Manhattan Jail on Columbus Park, which is catty-corner to the jail site, and on Collect Pond Park. *See* Petition, Exhibit 14 at pp. 23-24. DOC "responded" that the Manual had been followed and there were no significant adverse open space impacts. Petition, Exhibit 32 at p. 10-62; Janes Aff. ¶ 12. DOC, however, ignored NUBC's comment as well as the guidance in the Manual that "the boundaries of the study area should reflect existing conditions and may be irregularly shaped." Janes Aff. ¶ 12, citing, CEQR Technical Manual - Open Space 310. DOC should have used the flexibility provided by the Manual to create a smaller study area, which would have more accurately assessed and disclosed impacts on Columbus Park. *Id.* Its failure to do so, in light of NUBC's comments and the plain text of the Manual, was arbitrary and capricious and artificially reduced the purported impacts of the project on open space.

Perhaps the most demeaning rationalization of all was DOC's refusal to include an analysis of impacts to the recreational rooftop space at Chung Pak and the White Street pedestrian plaza between Centre and Baxter Streets. Both of these spaces were created out of negotiations with the City when the North Tower was built. Petition, Exhibit 9 at p. 17.

DOC stated that it did not need to evaluate private recreational space on the roof of Chung Pak because the CEQR Technical Manual did not require the inclusion of "privately-owned open spaces that are not open to the public on a consistent basis" in the quantitative analysis. DOC again ignored Petitioner's and other public comments, and also failed to acknowledge that private open space may be considered qualitatively, if a project is likely to have impacts on public open space. Janes Aff. ¶ 3.

Even more galling, is DOC's refusal to study the plaza as an open space resource because "it does not function as an open space," Petition, Exhibit 32 at p. 10-66. The only reason

this plaza doesn't function as open space is because DOC itself illegally commandeered what was supposed to be a pedestrian only plaza for its own vehicles sometime after September 11th. Petition ¶ 39. This plaza nevertheless remains a vital and active artery in Chinatown, and its loss will have significant adverse environmental impacts on Petitioners, all of which were ignored in the FEIS. *See* B. Lee Aff. ¶ 7; J. Lee Aff. ¶ 18; Culhane Aff. ¶ 22.

The Manhattan Jail now "threatens to undo many of the gains the Chinatown community worked for tirelessly" in connection with the North Tower. Petition, Exhibit 9 at p. 17. The history and significance of these open spaces were ignored by DOC, which again, relied rigidly on the CEQR Technical Manual to reach its erroneous conclusion that the Manhattan Jail would not result in any potential adverse open space impacts.

5. Shadows

DOC ignored NUBC's comments that the shadow analysis in the DEIS omitted several historic resources that are sunlight sensitive. *See* Petition, Exhibit 14 at p. 25; Culhane Aff. ¶¶ 41-42; Janes Aff. ¶¶ 15-20. DOC summarily dismissed these comments, claiming that all historic resources with sunlight-sensitive features were identified and analyzed. Janes Aff. ¶ 15-20. In this instance, DOC inexplicably excluded sunlight-sensitive resources, including, but not limited to, the former Police Headquarters and the Firehouse, discussed above and to the highly ornamental facades and other architectural features of the Tribeca East, SoHo, or Chinatown and Little Italy historic districts as Sunlight-Sensitive Resources of Concern, even though numerous individual resources in these districts (e.g., Most Precious Blood Church, the Firehouse Engine 31), would be adversely impacted by the limitation of light. Culhane Aff. ¶¶ 39, 40, 42. In addition, according to the FEIS, only the Manhattan Bridge Arch and Colonnade would bear any potential shadow impacts but reducing the amount of light reaching this New York City Landmark was deemed insignificant. Culhane Aff., Exhibit F at 4.4-9.

DOC did not provide any substantive response to NUBC's comments concerning shadow impacts. Janes Aff. ¶ 15; Culhane Aff. ¶ 44.

6. Noise

The DEIS and FEIS failed to address the noise impact issues raised by Petitioners and others with respect to the Manhattan Jail. The noise analysis in the DEIS was defective because it, among other things, ignored that the predicted noise levels during construction contained in the DEIS are sufficiently high such that the project would cause potential significant noise impacts on occupants of Chung Pak, school children and small businesses around the site. *See* Petition, Exhibit 14 at p. 30. In response, DOC summarily concluded that "the DEIS included a detailed analysis of construction noise and the projected intensity and duration of construction noise were considered as is consistent with guidance for construction noise analysis included in the CEQR Technical Manual. The projected intensity and duration of construction noise at this receptor was determined not to rise to the level of a significant adverse impact." Petition, Exhibit 32 at p. 10-166. Remarkably, the City admitted there would be intermittent noise, which, according to the City, only means that "the noise level would not occur for each hour of every day during the construction period." *Id*. at p. 10-168.

Because DOC's response in the FEIS completely ignored the public comment and request for some empirical basis for DOC's erroneous and illogical determination, the potential significant adverse noise impacts are unknown. DOC has failed to take a hard look at the potential noise impacts raised by the public and failed to provide a reasoned elaboration of the basis for its determination that there would be no significant adverse noise impacts from construction of the Manhattan Jail.

7. Socioeconomics

DOC also arbitrarily dismissed NUBC's comments regarding socioeconomic impacts, including that the study area boundaries were too small. *See* Petition, Exhibit 14 [NUBC Comment Letter] at p. 22; Culhane Aff. ¶ 37. DOC concluded that there would be no significant adverse indirect business displacement because only 28 employees would be displaced as a result of the project. Petition, Exhibit 32 at p. 10-59. DOC established an insufficient 400-foot study area based on an average area suggested in CEQR. *See* Petition, Exhibit 33 at 4.5-6 and Figure 4.5-1. However, DOC ignored its own more specific guidance for establishing a Study Area, which provides that: "Larger study areas may be appropriate in certain circumstances, such as when projects are large in scale, located just outside a well-defined neighborhood that they may affect, or may result in truck routes or other project related traffic some distance from the proposed site." CEQR Technical Manual, Section 310; Culhane Aff. ¶ 37. As discussed in the Culhane Aff., the "bulk of the proposed jail constitutes a large-scale development on the edge of a well-defined neighborhood, mandating a wider study area with greater attention paid to the defining character of the neighborhood and its sense of place." Culhane Aff. ¶ 38.

Moreover, with regard to indirect business displacement, if a "project would entail construction for a long duration that could affect the access to and therefore viability of a number of business, and the failure of those business has the potential to affect community character, a preliminary assessment for construction impacts on socioeconomic conditions should be conducted." *See* CEQR Technical Manual at 22-7. DOC could not possibly have taken the potential displacement of DCTV employees into account, since DCTV alone has 60 employees plus over 100 teachers. *See* Tsuno Aff. ¶ 14. Nor did it take into account potential displacement of other businesses nearby. *See* Cuccia Aff.

NUBC commented that tourism provides a major basis for the economy in Chinatown and Little Italy, but the FEIS failed to substantively address this concern. Petition, Exhibit 32 at p. 10-61. DOC also failed to address the loss of revenue to Chung Pak, which relies on rental income from thirteen ground floor commercial tenants, and several other units it leases to non-profit organizations. DOC's response was again, conclusory, dismissive and without any empirical basis: "It is unlikely that buildings within the study area, including the Chung Pak building, would have market conditions change substantially as a result of the proposed detention facility as compared to the existing and No Action conditions." Petition, Ex. 32 at p. 10-61. *See also* Cuccia Aff. ¶¶ 9-10.

Similarly, the DEIS failed to consider how Project construction would impact businesses located on Worth Street or food vendors in Chinatown, despite comments from NUBC, which included a study of the project's impact on the provision of fresh fruits and vegetables and resultant food security of residents in Chinatown. *See* Petition, Exhibit H; J. Lee Aff. ¶ 30.

DOC should have but did not address all of these impacts. DOC's determination that an assessment of potential indirect residential and business displacement impacts of the Manhattan Jail is not needed per the CEQR Technical Manual was improper. *See* Petition, Ex. 32 at p. 10-60.

8. Traffic and Transportation

The City completely failed to take a hard look at the traffic impacts from the Manhattan Jail. As set forth in the February 8, 2019 letter from Brian T. Ketcham, P.E., ("Ketchum Letter") annexed to J. Lee Aff. as Exhibit C, the FEIS traffic analysis is fatally flawed for several reasons. Most glaringly, it is missing intersection levels of service for all of the roads surrounding the Manhattan Jail site. Although there are many potentially affected intersections, the FEIS only includes two minor intersections – Centre and Walker Streets, and Walker and Baxter Streets.

Because the project site is near several other busy intersections that are already heavily congested, these intersections should have been analyzed. *See id.* at p. 6; *see also* February 11, 2020 letter from Daniel M. Broe, PhD ("Broe Letter"), annexed to J. Lee Aff. as Exhibit B at p. 2. This is in contrast to the other three jail sites, for which level of service conditions are provided for all relevant surrounding intersections in the existing, no action and with action condition, as well as conditions during construction. J. Lee Aff., Exhibit C at p. 6. Without this critical but missing information, the projected traffic conditions cannot be evaluated and, if necessary, mitigated. *Id.*

Several commenters on the DEIS suggested the need for the FEIS to evaluate intersections including along Canal Street and other severely congested locations. Petition, Exhibit 32 at Comments 9-19, 9-42, 9-68. Canal Street is located immediately north of the project site and based on the estimates provided in the FEIS, the new MDC facility would add up to 27 new vehicles per hour to the complicated 5-leg intersection at Canal Street/Mott Street during the AM peak hour. J. Lee Aff., Exhibit B. The FEIS refers to a 50 vehicle per hour threshold that is published in the CEQR Technical Manual to justify not including this and other intersections in the analysis. Nevertheless, according the CEQR Manual (Chapter 16, Section 313.1), the 50 vehicle per hour screening threshold should be used as a guide and not as an absolute cut-off to require a detailed traffic analysis:

> it should be emphasized that proposed projects affecting congested intersections have at times been found to create significant adverse traffic impacts when their trip generation is fewer than 50 trip-ends in the peak hour, and therefore, the lead agency may require further analysis of such intersections of concern.

Moreover, the total number of projected new vehicles generated by the project (and the number of vehicles likely to be added to affected intersections) appears to be underestimated in the FEIS, because the FEIS failed to analyze rush hour periods of traffic. Rather, the FEIS only analyzed "shift change" peak hours (7:00 a.m. and 3:00 p.m.) despite the guidance in the CEQR

Technical Manual that proposed projects that peak during non-rush hour periods may need to consider project impacts during typical rush hour periods "since even a moderate level of … activity may overlap with background commuter travel peaks and … would create a significant adverse impact necessitating mitigation." J. Lee Aff., Exhibit B at p. 2.

The FEIS also failed to address public comments seeking an analysis of potential impacts to emergency vehicle response times. This is a particularly glaring omission because the project site is adjacent to the Chung Pak Senior Living Center, which is more likely to require emergency vehicle response and to be affected by delays. The traffic congestion that already exists along Canal Street, Worth Street, Centre Street, and the narrow one-lane roadways that run through the Chinatown neighborhood already present challenges to emergency vehicle response times. J. Lee Aff. Exhibit B at p. 3. By altogether omitting the major access routes to the site that will receive project and construction related traffic (including Canal Street and Worth Street), and underestimating the project's traffic contribution, the FEIS does not and cannot adequately address the potential increases in delays to that will be encountered by general traffic flows, or the possible lengthening of EMS response times. *Id*.[6]

For all of the reasons stated above, it is clear that while it went through the motions of preparing an environmental impact statement, the City did not actually take the hard look required to satisfy SEQRA. Accordingly, the land use approvals for the jail must be annulled and the City should be required to prepare a supplemental EIS.[7]

[6] The Broe Letter, J. Lee Aff., Exhibit B, identifies several other flaws in the FEIS traffic analysis, including the undercounting of vehicles and pedestrians upon completion, the failure to assess impacts during demolition and construction, and truck loading or unloading.

[7] After the City Council approved the Manhattan Jail, for the first time in the RFQ, the City identified construction of a temporary intake processing facility as part of the Manhattan Jail project. Petition ¶ 193. This building was not included in the environmental review of the Manhattan Jail, further underscoring the haste with which the City is proceeding in this matter. By segmenting a necessary component of the project from environmental review, the actual

POINT IV.

RESPONDENTS VIOLATED ULURP BY PROCESSING ONE LAND USE APPLICATION FOR ALL FOUR JAILS, CERTIFYING THE BBJS APPLICATION AS COMPLETE WHEN IT WAS NOT, AND CREATING AN *ULTRA VIRES* POST-ULURP APPROVAL PROCESS TO COMPENSATE FOR THE INCOMPLETE APPLICATION

In addition to engaging in a procedurally and substantively flawed environmental review process, respondents violated ULURP in several ways. First, respondents arbitrarily and capriciously certified one ULURP application for vastly disparate land use actions for four large jail buildings across four different boroughs (the "Certification"), which is not authorized under the NYC Charter and is contrary to the way the City has treated similar applications in the past. Second, even if combining all four jails into one ULURP application was not arbitrary and capricious and was permissible, the ULURP application was certified as complete before it actually was complete, causing confusion and impeding meaningful review of the application by the public, community boards, borough presidents and the CPC itself. Finally, because the application was certified before it was actually complete, respondent CPC made up a post-ULURP approval process that is *ultra vires* and, again, will deprive the public and other participants that are required to have input *during* the ULURP process from providing such input.

A. The Respondents Determination to Allow all Four Jails to be Considered in One ULURP Application was Illegal and Arbitrary and Capricious

ULURP was established in 1975 in the City Charter to democratize land-use decision making by establishing a standardized procedure for the public review of proposed use,

impacts from the Manhattan Jail are unknown and minimized. New York courts disfavor segmented environmental review because a project "that would have a significant effect on the environment [can be] broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project." *See generally In re Schultz v. Jorling*, 164 A.D.2d 252 (3d Dep't 1990) (segmentation keeps to a "minimum [the true] environmentally harmful consequence[s of a project], thereby making it more palatable to the reviewing agency and community"). By segmenting the intake facility, DOC is "considering only a part or segment" of the Manhattan Jail, which is clearly "contrary to the intent of SEQR." 6 N.Y.C.R.R. § 617.3(g)(1).

development or improvement of real property subject to City regulation. N.Y. City Charter § 197-c. It is supposed to provide a transparent uniform process and a vehicle for public participation in the City's significant land use decisions, with defined roles for the public, applicable Community Boards and Borough Presidents, the CPC, the City Council and the Mayor.

For significant land use actions, such as those that are necessary to construct a massive jail in Chinatown, the New York City Charter requires adherence to ULURP. The Manhattan Jail alone involves 4 separate land use actions in addition to site selection. The other three jails proposed as part of the BBJS involve an additional 11 land use actions. Despite this complexity, the City took the unprecedented step of moving forward with a single ULURP review covering all of the four boroughs' disparate land use actions, with the Mayor's Office announcing that such consolidation is being pursued to "allow for a more expedited review," and the Speaker of the City Council likewise publicly admitting that consolidation of the review process for wholly disparate land use dispositions is being pursued to "shave time off" the approval process. *See* Petition ¶¶ 226-27.

The City's decision to move forward with a single ULURP for each of the four borough's disparate land use actions is arbitrary and capricious. Neither the Charter nor the applicable regulations provide for a single ULURP and clearly contemplate borough-specific review and actions. *See* City Charter § 197-c; 62 RCNY § 2-02. Such consolidation does not advance any proper public purpose, but rather, appears aimed at stacking the deck in favor of the BBJS project and neutralizing potential opposition and dissent – a vote against one jail results in a vote against the whole BBJS; a vote for one jail results in a vote for the whole BBJS. To date, the only identified purpose offered by the City for combining the ULURP processes for the four separate sites was expedience, which is simply not a viable reason to upend ULURP.

An agency cannot reach a different conclusion in a determination based on similar facts and law without explaining the reason for such an inconsistent decision. Indeed, it is *per se* arbitrary and capricious for an agency to reach different results on substantially similar facts and law without explaining on the record the reason for same. *In re Charles A Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 520, (1985); *see also In re Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vill. of E. Hampton*, 98 A.D.3d 738, 739 (2d Dep't 2012) (finding that an administrative board reviewing issues substantially similar to those previously determined requires adherence to the board's past determinations; and holding that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious, and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination.") (internal quotations and citations omitted).

When an agency determines to alter a prior stated course of action "it must set forth its reasons for doing so…. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary." *See In re Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs*, 88 N.Y.2d 35 (1996); *In re 2084-2086 BPE Assocs. v. State of N.Y. Div. of Hous. And Cmty. Renewal*, 15 A.D.3d 288 (1st Dep't 2005), *appeal denied,* 5 N.Y.3d 708 (2005). Respondents, through the Certification, have failed to satisfy either of these requirements by: (i) failing to adhere to the City's own prior precedent; and (ii) not setting forth a reason for reaching a different result on essentially the same facts. Accordingly, the Certification is arbitrary and capricious, and must be reversed.

The CPC has never before certified an application to conduct a single, city-wide review for a non-transportation land action involving a multi-borough project with individual site

selection. The CPC Resolution approving the BBJS states that there is precedent for ULURP applications that cover multiple sites, including a single disposition for space in two Staten Island ferry terminals (C 030186 PPY) and the site selection and acquisition for multiple sites for a Combined Sewer Overflow tank and open space in Gowanus, Brooklyn in 2018 (C 180065 PCK). Petition, Exhibit 3 at p. 52. The reference to these applications as "precedent" is disingenuous, as these ULURP applications were dramatically different than the ULURP application for the BBJS.

The ULURP for the Staten Island ferry terminals covered the selection of a lessee to construct, manage, maintain operate retail spaces, telecommunications venues and advertising areas and for both Staten Island ferry terminals – the St. George Ferry Terminal in Staten Island and the Whitehall Ferry Terminal in Manhattan - which constitute the departure and arrival locations of the Staten Island Ferry, depending on whether you are heading to or from Staten Island. Thus, this single ULURP concerns the retail operations of two ferry terminals that are integrally connected, as they constitute the starting or ending points of every single trip on the ferry.

The ULURP for the CSO tank and open space in Gowanus, Brooklyn covered site selection for three nearby properties on the eastern side of the Gowanus Canal to facilitate the construction of and temporary staging for a sole CSO control facility to reduce the volume of sewer overflows into canal. After construction, a portion of the three properties would be developed with open space and the remainder would remain accessible for maintenance and operation of the facility. C 180065 PCK at 2, 3 (available on DCP's website). The CPC Resolution for this ULURP references both a separate ULURP application under review (I 180039 MMK, which could not be found on DCP's website), as well as future anticipated land use applications. In addition, the environmental review documents for the CSO project notes that additional CSO-related facilities

along the Gowanus Canal will be the subject of a separate ULURP application. *See* Draft Scope of Work for Gowanus Canal CSO Project at p. 9. Clearly then, even this referenced project was the subject of more than one ULURP application.

The City's decisions with respect to the New York City Comprehensive Waste Management Plan ("SWMP") and construction of the New York City Water Tunnel No. 3 ("Water Tunnel No. 3"), presently being built by the Department of Environmental Protection to provide New York City with a third connection to its upstate water supply are substantially similar to the BBJS project and constitute prior controlling precedent that the City may not deviate from without a valid reason. Both of these are large scale, multi-borough projects that involve individual site selection. The determinations of SWMP and the Water Tunnel No. 3 are instructive insofar as each selected site underwent an individual ULURP land action review. The stated goal of SWMP was to create a network of land-based transfer stations and long-haul trucking to export residential waste and sought to eliminate the impact of trucks wherever possible. Even though all waste stations were necessary for the New York City-wide SWMP to be implemented, each of the site-specific actions underwent its own ULURP review. Similarly, while each of the supply shafts necessary for Water Tunnel No. 3 to connect to the existing distribution system, as well as other facilities, are located throughout multiple boroughs, each site underwent an individual land use process with its own CPC report.

The City has ignored long-standing precedent and has further failed to state a reason for reaching a different result in this case. In fact, the City's sole stated reason for certifying a single ULURP review for four boroughs at once is expedience, for which there is no precedent or basis. Like the SWMP and Water Tunnel No. 3, the proposed borough-based jail system is a large scale, multi-borough project that involves site selection, and the Certification at issue clearly

deviates from prior Agency determinations based on similar facts and law. The City's decision to certify the unprecedented step of moving forward with a single ULURP review was arbitrary and capricious insofar as undermined ULURP and must be annulled and reversed in all respects. *See* CPLR § 7803(3); *In re Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974).

B. Respondents Violated SEQRA and ULURP by Failing to Adequately Define the Project Prior to Commencing Environmental Review and Certifying the ULURP Application as Complete

In addition to arbitrarily grouping all four sites into one ULURP application, the DCP and CPC also arbitrarily decided to proceed with Certification of the ULURP application even though none of the four jails has been designed and there were only "very preliminary massing diagrams" available for each jail. The CPC acknowledged this when it approved the application: "the reality is that the design will not be set … [until] after the ULURP process has been completed." *See* Petition, Exhibit 3 at p. 76.

The DCP is responsible for certifying that a ULURP application is complete and ready for public review. N.Y. City Charter § 197-c(c). The CPC regulations governing ULURP require that the information in an application must be "properly organized and presented in clear language and understandable graphic form" and it must also be "fully sufficient to address all issues of jurisdiction and substance which are required to be addressed for the category of action as defined in the Charter, statutes, Zoning Resolution, Administrative Code or other law or regulation." 62 RCNY § 2-02(a)(5)(iii). The City's ULURP application was supported by design diagrams that were entirely conceptual, and admittedly the City has not identified the means and methods of either demolition of the existing jail buildings at 124-125 or construction of the new Manhattan Jail. With so little information, it was impossible for the public to fully participate in the ULURP process or for the DCP or CPC to conduct an adequate review as required by ULURP.

By certifying the application without enough information, respondents violated ULURP, invalidating their approvals of the jail and making said approval illegal as a matter of law, arbitrary and capricious. *See also* Point II, *supra*.

C. Respondents Acted *Ultra Vires* by Creating a Post-ULURP Approval Process for Review of All the Jails

The CPC included in its resolution approving the Manhattan Jail an entire post-ULURP approval process that was necessitated by the fact that the Manhattan Jail was insufficiently designed to enable the usual and appropriate level of review by the DCP or the CPC during the ULURP process.

Thus, in its resolution approving the Land Use Applications, the CPC required the DDC, a city agency that was not the ULURP applicant to brief the CPC *after* the ULURP process to provide the CPC with information that the CPC notes is "same completion threshold where the Commission typically reviews a project, and will enable the Commission to provide meaningful feedback as the Design-Build teams makes revisions to the designs." The CPC further resolved that "The Commission believes that it is critical that DCP's urban design and technical experts also remain involved … [and DDC] has agreed that, at a minimum, DCP will be involved during the development of the RFQ (Request for Qualifications) and RFPs, after each RFP is issued as a member of the technical and design evaluation teams, after award of contracts and finally, after completion of the final design to gather any additional feedback." *Id.* at p. 77.

If the CPC itself was not able to provide "meaningful feedback" during the ULURP process, the application should have never been certified as complete in the first place. Once it was certified, CPC still could have disapproved the application for lack of requisite information. Instead, in concert with DOC's rush job on the EIS, the CPC created a post-ULURP approval review and consultation that will be devoid of any of the public review or input that is required by

ULURP and would have been possible had the DCP and CPC required that the jails be further along in the design process before the Certification. The CPC's creation of this post-ULURP approval process in an attempt to make up for the fact that the application was certified into ULURP before it was actually ready for review was a violation of lawful procedure, arbitrary and capricious, and in excess of the CPC's jurisdiction under the New York City Charter and, as a result, the CPC Resolution approving the Manhattan Jail should be annulled.

POINT V.

THE CITY VIOLATED SECTION 203 OF THE CITY CHARTER

Before making a decision to site a city facility in any particular neighborhood, the CPC is required by the City Charter and Rules of the City of New York to consider "the fair share criteria adopted pursuant to § 203 of the City Charter in weighing any recommendation with respect to proposed city facilities." 6 N.Y.C.R.R., title 62, Appendix A. Among the criteria for siting or expanding City facilities are: "a) Compatibility of the facility with existing facilities and programs, both city and non-city, in the immediate vicinity of the site; b) Extent to which neighborhood character would be adversely affected by a concentration of city and non-city facilities; and c) Suitability of the site to provide cost-effective delivery of the intended services. Consideration of sites shall include properties not under city ownership, unless the agency provides a written explanation of why it is not reasonable to do so in this instance." Fair Share Criteria, §4.1. The Fair Share Criteria are "designed to further the fair distribution among communities of the burdens and benefits associated with city facilities, consistent with community needs for services and efficient and cost effective delivery of services and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites." NY City Charter § 203 [a]. These criteria guard against one community being overburdened in its coexistence with City

facilities. *In re Silver*, 158 Misc. 2d at 552-553. It is not enough to merely pay lip service to the fair share factors. Rather, "analysis of alternative sites must be meaningful." *Id.* at 554.

Although NUBC commented on the lack of a fair share analysis in its comments on the DEIS, *see* Petition, Exhibit 14 at pp. 19-20 and Exhibits E and F thereto, the response to comments chapter of the FEIS contains absolutely no reference to this comment, let alone a response as is required by SEQRA. *See* 6 NYCRR § 617.9(b)(8). The FEIS contains one paragraph addressing Fair Share. It states that an analysis of the proposed project's compliance with Fair Share criteria has been completed as part of the proposed project's ULURP application:

> As discussed in that analysis, the proposed project is compatible with and will greatly benefit from proximity to the justice and public institution facilities in adjacent and nearby lots, in particular the borough's criminal court. This proximity will significantly increase the project's operational efficiencies, leading to a reduction in time and fewer City resources to transport detained individuals with hearings or arraignments at the courthouse, thereby reducing delays in case processing.

FEIS at 4.1-16. This "analysis" does not evidence consideration of the fact that the neighborhood surrounding the Manhattan Jail site is already overburdened with a concentration of City facilities or the extent to which the character of this already overburdened neighborhood would be adversely affected by the construction of a new jail. This doesn't show consideration of the neighborhood at all, but rather only of convenience for the City and DOC.

The City's Fair Share Analysis dated March 28, 2019 (Petition, Exhibit 15) contains a total of two sites that were considered for the Manhattan Jail – 80 Centre and 124-125 White Street – both of which are in Chinatown. The City did not analyze any additional alternative sites because the Centre and White Street sites are City-owned, proximate to courthouses and accessible to public transportation. Petition, Exhibit 32 at pp. 10-181–182). The fact that two jails currently exist at 124-125 White Street is no excuse for the City's failure to engage in consideration of the fair share criteria.

The case of *In re Silver*, 158 Misc. 2d 550, is directly on point. In that case, the petitioners challenged the City's site selection for a multi-agency garage and fueling facility at the East River and South Street in Manhattan on the grounds that the City's consideration of sites failed to satisfy the Fair Share Criteria, noting that "the Lower East Side and Chinatown communities already accommodate a grossly disproportionate share of City facilities. . . . [including] 4 jails or detention centers, 11 drug treatment centers, and 12 homeless shelters." *Id.* at 552. Petitioners also argued that the respondents failed to exercise due regard for the social and economic impacts of the facility upon the areas surrounding the site, and that it would adversely affect the surrounding neighborhood. *Id*. In response, the City argued that it had identified seven alternative sites for the facility – six of which were City-owned. *Id*. at 554.

In considering the petitioners' claim, the court noted that while Fair Share doesn't dictate that the City consider a minimum number of either City-owned or privately-owned sites, the analysis of alternative sites must be meaningful. *Id.* The Court rejected that "cost-effectiveness" could be a determinative factor:

> Although it generally will be more "cost-effective" for the city to locate its facilities on City-owned property, and the acquisition of privately owned property will almost always involve associated costs, these are not proper considerations for the selection of a site under the fair share analysis. To allow respondents to rely on this reasoning in its rejection of alternative sites renders the fair share criteria illusory because it will dictate the outcome in the siting of all city facilities. *Were this the analysis the criteria intended, the city never would have occasion to locate city facilities on privately owned property*.

Id. at 555 (emphasis added). The court also found that the City had failed to consider the compatibility of the facility with existing city and non-city facilities in the vicinity of the site and noted that, in defending its view that the facility was compatible with adjacent residential and commercial uses, the City "offered only the contention that 'these types of uses have historically

coexisted in the area of the proposed facility.'" *Id*. In echoes of the present case, the court also observed that the City

> completely failed to consider the extent to which the neighborhood character would be adversely affected by a concentration of city and non-city facilities. *Apparently, respondents reasoned that since there are a large number of facilities already located in the vicinity of the site, the addition of the [new facility] would not adversely affect the area.* The criteria require that respondent consider the effect of the concentration of facilities in the area and it is clear that DGS failed to engage in such consideration.

Id. at 555-556 (emphasis added). As a result, the court found that the City had not conducted any meaningful analysis of the Fair Share Criteria and invalidated the site selection for the facility. *Id*. at 556.

The City's consideration of only two sites for the new Manhattan Jail also stands in stark contrast to its consideration of sites for a Manhattan waste transfer facility in connection with its adoption of the Solid Waste Management Plan in 2004. In that instance, the City restricted its search for a Manhattan waste transfer facility to City-owned sites (plus one privately owned site), but considered a total of 20 sites, that were then narrowed down to 15 sites (with a total of 27 facility options for the 15 sites) before the City chose the final Manhattan location, at East 91st Street. *Assoc. for Cmty. Reform Now v. Bloomberg,* 31 Misc. 3d 1209(A), 2006 N.Y. Slip Op. 51750(U) at 15 (Sup. Ct. NY County 2006), *aff'd*, 52 A.D.3d 425 (1st Dep't 2008). In that case, where the Fair Share Criteria was held to be satisfied, the court noted the absence of similar facilities in the community surrounding the East 91st Street site, and that unlike the neighborhood surrounding the East 91st Street site, other districts in Manhattan already bore their fair share of waste transfer sites. *Id.* at 7.

As these cases show, application of the Fair Share Criteria must be meaningful and substantive. It is not enough to consider only city-owned sites, the neighborhood context within

which a proposed facility cannot be ignored, nor can the prior "co-existence" of similar facilities be a deciding factor, which is exactly what the City did in this case. Unlike the other boroughs, for which the City at least identified museums, churches and other cultural sites, the Manhattan section of the City's Fair Share Analysis only discussed government buildings in the area, focusing on compatibility of the new jail with only existing courthouses and correctional facilities. *See* Petition, Exhibit 15 at p. 100 ("As the project site is situated in a mixed-use, high density area with a high number of civic uses and thus the ability to absorb new beds, there will be not be significant cumulative impact."). There is no discussion or analysis of the historic context of the Chinatown and Little Italy neighborhoods, the low-rise scale of buildings in those neighborhoods or their authentic culture and heritage. *See* Culhane Aff. ¶¶ 19, 34.

It is evident that the City failed to meaningfully consider the unique character of Chinatown and its cultural value, and that the deciding factor for the City's conclusion that the Fair Share Criteria were satisfied was merely that "a detention facility already exists at the site." Petition, Exhibit 15 at p. 123, s. 6.51.[8] The City also ignores the fact that the existing jail is much smaller than the proposed new jail and would result in significant adverse impacts to the community, both during construction and afterwards, with the permanent loss of White Street, for example. The presence of the existing jail does not relieve the City of its obligation to undertake a meaningful and substantive fair share analysis.[9] The City's failure to do so renders site selection for the Manhattan Jail illegal and the CPC's and City Council's approvals thereof should be annulled.

[8] The Fair Share Analysis is replete with other examples of the City's conclusory and dismissive approach. *See* Petition, Exhibit 15 at p. 125, s. 6.53(a).

[9] It would be completely disingenuous for Respondents to argue that no other Manhattan sites need to be considered because adjacency to the courthouse is required, since the City selected a new jail location in the Bronx that is not near a courthouse. Petition, Exhibit 14 at p. 37.

CONCLUSION

Based on the reasons stated above, as well as those set forth in the accompanying affidavits and Petition, Petitioners respectfully request that the Court grant their Verified Petition in its entirety, and issue an order: (a) annulling, vacating and reversing the approvals of the Land Use Applications for the Manhattan Jail; (b) directing Respondents to prepare a supplemental environmental impact statement after conducting public scoping, but only when they have enough information about the Manhattan Jail to adequately define the project and take an actual hard look at the potential environmental impacts; and (c) for such other and further relief the Court deems just and proper.

Dated: New York, New York
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