STATE OF NEW YORK
COURT OF APPEALS

In the Matter of	:	
NEIGHBORS UNITED BELOW CANAL, JAN LEE, DCTV, EDWARD J CUCCIA, BETTY LEE, AND AMERICAN INDIAN COMMUNITY HOUSE	:	N.Y. County Clerk's Index No. 100250/2020
Petitioners-Respondents-Movants,	:	
- against -	:	
MAYOR BILL DEBLASIO, THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, MARISA LAGO, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY DEPARTMENT OF CORRECTION, CYNTHIA BRANN, NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE, ELIZABETH GLAZER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, AND NEW YORK CITY COUNCIL	:	
Respondents-Appellants-Respondents.	:	

MOTION FOR LEAVE TO APPEAL

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N.Y. County Clerk's
Index No. 100250/2020

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed papers, the record and briefs in the Appellate Division, and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a motion term thereof, on July 26, 2021, for an order granting Petitioners-Respondents-Movants leave to appeal the Decision and Order of the Appellate Division, First Department, entered March 30, 2021, to the Court of Appeals pursuant to 22 NYCRR § 500.22 and CPLR 2103(b)(2), 5513(b), and 5602(a)(l)(i), and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 8, 2021

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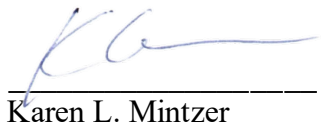

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STATE OF NEW YORK
COURT OF APPEALS

In the Matter of NEIGHBORS UNITED BELOW CANAL, JAN LEE, DCTV, EDWARD J CUCCIA, BETTY LEE, AND AMERICAN INDIAN COMMUNITY HOUSE Petitioners-Respondents-Movants, - against - MAYOR BILL DEBLASIO, THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, MARISA LAGO, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY DEPARTMENT OF CORRECTION, CYNTHIA BRANN, NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE, ELIZABETH GLAZER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, AND NEW YORK CITY COUNCIL Respondents-Appellants-Respondents.	N.Y. County Clerk's Index No. 100250/2020 **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Petitioners-respondents-movants ("petitioners") submit this memorandum in support of their motion for leave to appeal to the Court of Appeals from the decision of the Appellate Division, First Department dated March 30, 2021 (the "Decision").[1]

PRELIMINARY STATEMENT

This case presents two issues of statewide importance under the State Environmental Quality Review Act ("SEQRA").

1. The first issue involves "scoping," a process required at the outset of every review leading to the preparation of an environmental impact statement ("EIS"). Scoping serves the most basic of purposes: identifying the environmental impacts to be studied. It requires an agency that wants to build a project to seek the views of members of the affected community, both in writing and at a public meeting, as to what impacts they think most important.

Respondents-appellants-respondents, the City of New York and several of its officials and agencies (collectively "the City"), conducted scoping for a large jail to be built at 80 Centre Street, in Downtown Manhattan. The City then changed its mind and decided to build the jail at 124-125 White Street instead – but refused to do any scoping for the new site. The scoping done for the now-discarded 80 Centre Street site, the City decided, was good enough.

[1] The Decision is attached to the affirmation of Robert S. Smith submitted in support of the motion.

The Appellate Division upheld this bizarre way of proceeding, rejecting the idea "that a change in sites alone mandates that the scoping process begin anew." Decision at 2. In so doing, the Appellate Division adopted a bad rule that effectively permits agencies to avoid the scoping process. It makes no sense to assume that the important environmental impacts will be the same at one site as at another, or that the comments received from members of the public about one site will apply just as well to another. Those impacts will vary, and will be felt by different people who will want to make their own comments when the location of a project changes, as the facts of this case starkly illustrate. To pretend that a change in site is inconsequential makes it unlikely that the EIS that results from the scoping will adequately examine the most important environmental impacts, and thus frustrates the policies served by SEQRA.

We ask this Court to grant leave and to adopt a rule opposite to the one endorsed by the Appellate Division: A change in site *does* require the scoping process to begin anew.

2. The second issue arises from another shortcut used by the City to circumvent environmental review – this one affecting public health. The proposed Manhattan jail is to be built in Chinatown, a community especially vulnerable to public health risks, in part because the effects of the September 11 terrorist attacks

still linger. The EIS prepared by the City admits, and the record abundantly confirms, that the planned demolition and construction will disturb hazardous materials, creating serious public health risks for the people of Chinatown, particularly the elderly and poor.

Yet the EIS contains no public health analysis whatsoever. The City decided that no such analysis was necessary, because it was developing plans to mitigate the risks. But the mitigation plans are boilerplate, developed without any attempt at understanding the particular health risks present at the Chinatown site. This Court should grant leave to consider whether an agency may evade in this way its obligation under SEQRA to take a "hard look" at public health impacts.

PROCEDURAL HISTORY

Petitioners began this CPLR Article 78 proceeding on February 14, 2020. By a decision, order and judgment filed September 22, 2020, Supreme Court, New York County (John J. Kelley, J.) granted the petition. By its Decision of March 30, 2021, the Appellate Division reversed and dismissed the proceeding.

Petitioners were served with the Appellate Division's decision with notice of entry on March 31, 2021. Petitioners served notice of a motion for leave to appeal addressed to the Appellate Division on April 30, 2021. Petitioners were served by

mail on June 3, 2021 with notice of entry of the Appellate Division's order denying leave to appeal. This motion, filed July 8, 2021, is timely.

JURISDICTION

The Appellate Division's Decision, which denied the petition and dismissed the proceeding, is a final order and is not appealable as of right. This Court has jurisdiction pursuant to CPLR 5602(a)(1)(i).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a change in site requires a new scoping under SEQRA and the City Environmental Quality Review ("CEQR").

(2) Whether the mere existence of boilerplate mitigation plans, unaccompanied by any analysis of the serious threats to public health risks raised by a project, excuses an agency from its duty under SEQRA and CEQR to take a "hard look" at public health impacts.

FACTS

A. Background

This case arises out of New York City's Borough-Based Jail Program, in which the City plans to construct a jail in each of four boroughs to replace the

present jail at Rikers Island. Specifically, this case concerns the creation of a new 1,145,000 square foot jail in Manhattan. R 429.[2]

The Borough-Based Jail Program was conceived by a commission led by former Chief Judge Jonathan Lippman, whose task was to make recommendations for reforming the jail at Rikers Island. R58. In April 2017, the commission issued a report recommending that the new jails be located "near courthouses in civic centers, rather than in residential neighborhoods" and that "[c]onversations with local communities concerning potential locations for the jails must begin early and the City must ensure that the process is as fair, transparent, and responsive to community concerns as possible." R59.

The Borough-Based Jail Program is subject to SEQRA and to CEQR, the City's process for implementing SEQRA. SEQRA requires the preparation of an EIS as to "any action … which may have a significant effect on the environment." Environmental Conservation Law ("ECL") § 8-0109(2).

B. The City's Failure to Scope the Actual Jail Site

1. The Scoping Requirement

Scoping is the first step in the process leading to the issuance of an EIS. It has long been mandatory under CEQR (62 RCNY § 5-07) and has been required

[2] "R" refers to the Record on Appeal.

statewide under regulations of the Department of Environmental Conservation ("DEC") since January 1, 2019. *See* 6 NYCRR 617.8(a).

The primary purposes of scoping are "to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or not significant." *Id.* To achieve these goals, scoping is required to include the preparation of a draft scope of work ("DSOW") before a final scope of work ("FSOW") is prepared. Upon preparation of the DSOW, "the lead agency shall publish in the City Record a notice indicating that a draft environmental impact statement will be prepared for the proposed action and requesting public comment." 62 RCNY § 5-07(b). The DSOW is available to "any member of the public." *Id.* A "public scoping meeting" must be held between 30 and 45 days after publication of the DSOW. *Id.* at §5-07(b),(d).

2. The Two Possible Sites for the Manhattan Jail

In February 2018, Mayor De Blasio announced that the City had identified 125 White Street as the location of the new Manhattan jail.[3] But on August 2, 2018, at a closed-door invitation-only meeting, the City announced that two sites were under consideration: 124-125 White Street and 80 Centre Street. R60.

[3] NYC, Mayor de Blasio and City Council Reach Agreement to Replace Rikers Island Jails with Community-Based Facilities (Feb. 14, 2018), https://www1.nyc.gov/office-of-the-mayor/news/094-18/mayor-de-blasio-city-council-reach-agreement-replace-rikers-island-jails-with/#/0.

Both sites are in downtown Manhattan's Chinatown neighborhood, but they are several blocks apart and their immediate surroundings differ materially. The 124-125 White Street site is home to an existing jail (much smaller than the planned new one) attached to the Manhattan Criminal Court Building and located between Centre Street and Baxter Street. R53. At 96 Baxter Street, sharing a wall with the existing jail, is the Chung Pak Housing Complex ("Chung Pak"), a 13-story residential building for senior citizens, most of whom are in their mid-80s or older. R54. Directly across White Street, on Baxter Street are tenement mixed use buildings, in one of which petitioner Betty Lee resides. R1845. Parallel to Chung Pak on Walker and Centre Streets is a low-rise commercial building that is home to the Charles B. Wang Community Health Center, the CPC Chung Pak Day Care Center, the office of an immigration lawyer (petitioner Edward Cuccia), and other small businesses owned and operated by the Chinese community. For the residents, business owners and employees who live in or frequent these buildings, the construction of a large new jail at 124-125 White Street will have a major effect on their lives. If the project had been built at 80 Centre Street, they would not have experienced any similar impact.

3. The City's Choice of 80 Centre Street

The City could have kept both the 124-125 White Street and 80 Centre Street options open during the scoping process, seeking comments as to both sites – and if it had done that, the scoping issue in this case would not exist. However, when the City Department of Corrections ("DOC") began its SEQRA/CEQR review on August 14, 2018 it identified 80 Centre Street as the sole proposed project site. The DOC issued an Environmental Assessment Statement indicating that the project would have significant effects on the environment, thus making an EIS necessary. R13.

4. The 80 Centre Street Scoping

The following day, the DOC began the scoping process for 80 Centre Street. It released a DSOW treating only 80 Centre Street as a possible location in Manhattan. R13, 6231. Not only was the White Street location absent from DOC's list of "sites under consideration" (of which 80 Centre Street was the only one in Manhattan); the DSOW expressly ruled out White Street. It said that the existing White Street facilities "cannot be expanded to meet the needs of the contemporary facilities envisioned" (R6236) and that the environmental impact statement "will not evaluate … the existing North Tower of the Manhattan Detention Center Complex" (i.e., 124 White Street). R6258. The DSOW added:

> Any future proposal for the … reuse of the North Tower of the Manhattan Detention Center Complex … should it move forward, would be subject to future planning and public review processes, including a separate approval and environmental review process.

Id.

Thus, the DSOW essentially told any member of the public concerned with the immediate area of the White Street, but not the Centre Street, location: "Don't bother commenting on this DSOW." The public was misled.

Unsurprisingly, the comments received from the public on the DSOW, as they related to the Manhattan jail, focused on 80 Centre Street. *See, e.g.,* R6491 ("Is the EIS taking into consideration the historic architectural value of 80 Center Street?"); R6494 ("The City does not understand…. 80 Centre Street has a remarkable grade of integrity"); R6518 ("Given the height of the building at 80 Centre Street [and other factors]…a detailed analysis of the changes of the pedestrian experience of this project should be done"); R6522 ("80 Centre Street is where motor vehicles, bicyclists and tourists exit the Brooklyn Bridge and head uptown"); R6523 ("The proposed entrance of 80 Centre Street will be narrowly situated on Hogan Place"). No comparable comments were received about 124-125 White Street – for the obvious reason that the public had been told no development would happen there unless there was a new environmental review process. Of the

six petitioners in this case, who are affected enough by a project on the White Street site to litigate over it, four did not even comment on the proposed Centre Street project. R1923.

5. The Switch to 124-125 White Street

On November 30, 2018 – after the public scoping meeting had been held and comments on the DSOW had been received – the City abandoned its plan to construct the new jail at 80 Centre Street and opted to move the project to 124-125 White Street. In a letter to Manhattan Borough President Gale Brewer and a member of the City Council, an official of the Mayor's Office of Criminal Justice ("MOCJ") said: "we are returning to the original site of the existing Manhattan Detention Center located at 124 and 125 White Street." R3272. The letter gave two reasons: "relocating the occupants of 80 Centre Street in Manhattan would be more complicated and costly than initially anticipated"; and, if the 80 Centre Street site were adopted, "Columbus Park would be in shadows for a majority of the time, which we also heard was a point of concern for the neighborhood." *Id.*

On the day of the MOCJ's letter, Borough President Brewer wrote the Mayor, thanking him for the site change but also asking to re-start the scoping process: "the amended draft scope of work should be recirculated with a minimum of 30 additional days for public comment as well as a public meeting to discuss the

amended draft scope before continuing with environmental review." R3270. Also in December 2018, former Chief Judge Lippman remarked that "[t]he City has not been transparent enough about its decision-making process for siting and designing the new [jail] facilities." R1126.

6. The Refusal to Do Scoping for the New Site

The Borough President's request was not honored, and the City's process did not become more "transparent." In a letter from MOCJ dated January 7, 2019, five weeks after the Borough president's request was made, the City explained its reasons for rejecting it:

> [T]he issues in terms of what the environmental review should look at are not materially different between the two locations, 80 Centre Street and 124/125 White Street, and the two locations are very close, so that there is a lot of overlap between the impacted area and impacted community. Additionally, we looked at the comments we have received and saw that moving the location to 124/125 White Street was consistent with the comments we have received on 80 Centre Street. For example, some comments asked why not keep the location at 124/125 White Street, and other comments indicated that the new location addresses some of the potential impacts presented by 80 Centre Street.

R3275.

Thus, there was no new scoping process and no new DSOW was ever issued. Many community members had no idea the site had been changed. *See e.g.*,

R1853, 2118. Instead, for reasons not clear, the old scoping process was allowed to consume almost four more months after the site change was announced. On March 22, 2019, the DOC issued a FSOW addressed (to the extent it concerned Manhattan) to the 124-125 White Street site; the FSOW contained extensive responses to the comments made on the August 2018 DSOW, many of them, as mentioned above, now irrelevant. R6380.

C. The City's Failure to Look at Public Health Impacts

1. The Public Health Threats Presented by the Project

Well before the decision to build a new jail in Chinatown, the residents of that community had suffered disproportionately from airborne toxins. Following the terrorist attacks of September 11, 2001, and the resulting debris removal efforts, Chinatown was designated by the September 11th Victim Compensation Fund as one of the neighborhoods within the Exposure Zone. R57. The effects of particulates and construction debris were reflected in increased asthma rates and other lung injuries, trends that were still evident almost two decades after the attacks. R57. To this day, fallout from the September 11th attacks lingers in close proximity to the proposed construction project. A report dated February 2020 evaluates latent dust samples taken from the Chung Pak senior residence on Baxter

Street and finds that "particulate collected from this site possess markers indicative of known [World Trade Center] dusts." R2084.

It was completely foreseeable at the time the City conducted its environmental review that a huge construction project would aggravate these ills and present other significant dangers to public health. The project especially presented a threat to the area's most vulnerable residents: the oldest, many of whom live at Chung Pak, directly adjacent to the construction site, and the poorest, many of whom live in tenements in the immediate vicinity of the project. R464.

The evidence presented by petitioners to Supreme Court demonstrates in detail why the public health impact of this project should have been one of the City's major concerns. The evidence shows, among other things, that:

- A major construction project in Chinatown will have serious impacts on senior communities, and specifically on the residents of Chung Pak. R549-572.
- Air particles resulting from construction have been associated with conditions including cardiovascular disease, lung cancer, chronic obstructive pulmonary disease and early-onset dementia. R650, 2095.

- Certain "vulnerable populations … may be more susceptible to the effects of air pollution", among them the elderly and people of Asian descent. R2095.
- World Trade Center dust particles "could be impacted and reentrained as a result of proposed demolition work occurring at 124-125 White Street." In view of "the well-established toxicological effects associated with exposure to WTC dusts and the scale of work involved with construction of a new jail building, resulting exposure scenarios could lead to serious and negative health outcomes for the exposed population." R2078.
- Repeated and prolonged exposure to noise can cause "adverse physiological and psychological effects that degrade both health and well-being," particularly among older adults who "are at increased risk to noise pollution due to sensory changes that take place in the aging process." R651.

Thus, the City had every reason to study thoroughly whether and to what extent the proposed project would endanger the health of the people of Chinatown. It chose to ignore the dangers.

2. The DEIS

On March 22, 2019, at the same time it issued the FSOW (referred to in the discussion of scoping above), DOC issued a DEIS for the White Street location. R9585. The DEIS contains much information that should have led the agency to give close attention to public health risks. Most strikingly, it makes clear that the White Street location (especially the southerly part of it, 125 White Street) contained dangerous contaminants that would be disturbed by the new construction. The DEIS says:

> As currently contemplated, all existing structures/facilities on the Manhattan Site would be demolished/removed and new buildings would be constructed. Given the age of the structures that would need to be demolished at MDC South [i.e., 125 White Street], it is likely that they contain substances that are typical of older buildings, for example ACM [asbestos-containing materials], LBP [lead-based paint], and/or PCBs.

R10595.

But the DEIS says nothing specific – it says virtually nothing at all – about what the effect of the release of these and other contaminants, or other potentially harmful aspects of construction, would be on public health. As to that, the DEIS states only a conclusion:

> "the proposed project at the Manhattan Site would not result in *unmitigated* significant adverse impacts in any of the technical areas related to public health (hazardous

> materials, water quality, air quality, or noise). This analysis concludes that the proposed project would not result in a significant adverse public health impact." R9635 (emphasis added).

How could the DEIS reach this conclusion without any study of the dangers to public health presented by the project? The answer seems to lie in the word "unmitigated." The DEIS seems to say that the public health effects, whatever they are, will be "mitigated" to some unstated extent by remedial plans – so therefore, no problem; the impacts, whatever they were, would not be "significant." The view of the City seems to be that it does not care what or how severe the effects of the project on the public health of the Chinatown community will be, and that SEQRA is satisfied by an assertion that those effects are to be in some degree mitigated.

Ironically, the mitigation, or remedial, measures on which the City relied so heavily were not described in the DEIS. Presumably because of the last-minute change in site, the plans to mitigate or remedy the health effects of constructing the Manhattan jail were not ready when the DEIS was issued: "Unlike the proposed sites in the Bronx, Brooklyn and Queens, a Phase II Investigation, and the resulting Remedial Action Plan (RAP), and Construction Health and Safety Plan (CHASP) have not yet been completed for the Manhattan Site." R10591. The RAP and CHASP would not be made public until the final EIS was issued – meaning that the public would have no meaningful opportunity to comment on them. But there

could hardly be a meaningful opportunity in any event; for how can anyone comment on a remedial plan without a clear understanding of what is being remedied?

3. The Final EIS

On August 23, 2019, the City issued the final EIS, including the Phase II environmental report and RAP and CHASP. R11196. The final EIS, however, still included no assessment of how the project's demolition, excavation, and construction would affect the public health of the Chinatown community. It still relied on the premise that remedial measures would resolve whatever the problems were. *See* R12229 ("Construction of the new facilities would require extensive excavation of the Manhattan Site. Impacts would be avoided by conducting subsurface work in accordance with . . . RAP and . . . CHASP"). The public health section of the final EIS consisted of one page and stated, without elaboration, the same conclusion as the DEIS: "the proposed project at the Manhattan Site would not result in unmitigated significant adverse impacts in any of the technical areas related to public health (hazardous materials, water quality, air quality, or noise)." R12313.

The RAP and CHASP were included in the final EIS.[4] They are long and detailed, but they are essentially boilerplate – apparently adapted versions of plans used on other construction projects. They are concerned only with construction, not demolition – as though the site were a vacant lot, not one occupied by two large buildings. The EIS acknowledges elsewhere that demolition will disturb such substances as asbestos-containing materials, lead paint and PCBs – but the RAP and CHASP offer no remedies for this menace. R10595. And even as to construction, the RAP and CHASP are not tailored to any of the specific public health problems presented at 124-125 White Street; t they could not be, because the City never bothered to investigate what those problems are.

In sum, to say that the City did not take a "hard look" at public health impacts in the EIS would be too kind. It did not take any look at all.

THE PROCEEDINGS BELOW

1. Supreme Court's Ruling

After the final EIS was released, the City obtained administrative approvals and petitioners brought the present litigation. In an opinion dated September 21,

[4] The RAP and CHASP were omitted from the Record on Appeal because of their bulk but can be found online as Part 14 of the final EIS. They are available at https://a002-ceqraccess.nyc.gov/ceqr/Details?data=MThET0MwMDFZ0&signature=e330cd9c78430a8d28b580b159a7183c6bd2b3d8.

2020, Justice Kelley granted the petition, ruling in petitioners' favor on the scoping and public health issues.

Supreme Court held that the City "violated the regulations implementing both SEQRA and CEQR by moving the project site to a different location without undertaking a site-appropriate scoping process." R31. The court explained:

> The scoping process is meant to define a particular project, thereupon to set forth the appropriate scope of review for *that* project, and thereafter to obtain relevant environmental information from involved agencies, interested agencies, and interested members of the public to aid in formulating a DEIS referable to the proposed project. *The entire purpose of the scoping process is defeated where, as here, a lead agency undertakes a scoping analysis for one project, and then proceeds to prepare the DEIS with respect to a completely different project* without the salutary governmental and public input concerning the project actually sought to be constructed.

R31-32 (emphasis added).

The court enjoined the City from taking any physical steps to construct a jail at 124-125 White Street pending, among other things, "the scheduling and convening of a new site-specific scoping session referable to 124-125 White Street." R42.

Supreme Court also held that the City violated SEQRA and CEQR by "fail[ing] to take a hard look at reasonably anticipated public health impacts of the

project" and by "fail[ing] to provide a reasoned elaboration for their conclusions with respect thereto." R11. The court said:

> Where, as here, the FEIS effectively ignores both the short- and long-term consequences of demolition, excavation, and construction activities on the health of the public in the neighborhood adjacent to the project, but has in a merely conclusory fashion determined that there will not likely be any impacts on public health, it has failed to take the necessary hard look at reasonably anticipated impacts. This is so even where, as here, the FEIS identifies proposed mitigation measures. For this reason, the . . . approvals were arbitrary and capricious and affected by an error of law, and must be annulled on this ground as well.

R34 (internal citations omitted).

2. The Appellate Division's Decision

The Appellate Division's Decision reversed the Supreme Court order and judgment and dismissed the proceeding. The court said:

> [The] change of location was reflected in the final scope of work and other documents, including the draft and final versions of the environmental impact statement. The applicable regulations allow significant post-scoping changes to a project (*see e.g.* 6 NYCRR 617.8[f], [g]; 62 RCNY § 5-07[e]). Under the particular circumstances of this case, the scoping process did not have to be redone; respondents had already "performed each of the required steps in the SEQRA review process," and a "de novo environmental review" would have been "redundant" (*Matter of King v Saratoga County Bd. of Supervisors*, 89 N.Y.2d 341, 349-350 [1996] [internal quotation marks omitted]).

Decision at 2.

The Court added:

> We are mindful that the SEQRA process requires strict, not substantial, compliance (*see King*, 89 N.Y.2d at 347 [1996]; *Matter of Jackson v New York State Urban Dev. Corp.,* 110 A.D.2d 304, 307 [1st Dept 1985], *affd* 67 N.Y.2d 400 [1986]). As earlier noted, this case involved a unique situation, in which two possible sites were known to the affected communities and the selection of the alternate site flowed from community participation in the underlying process. For this reason, we decline to hold, on this record, that a change in sites alone mandates that the scoping process begin anew. To be clear, our holding does not foreclose a situation where a change in site might require the scoping process to begin anew, however, this is not that case.

Id.

On the public health issue, the Decision is cursory, saying only that the City's "environmental review . . . took the requisite hard look at impacts on public health … and made a reasoned elaboration of the basis for its determination." *Id.* at 3 (citations and internal quotation marks omitted).

REASONS FOR GRANTING LEAVE TO APPEAL

I
LEAVE SHOULD BE GRANTED TO CONSIDER WHETHER A CHANGE IN SITE REQUIRES A NEW SCOPING UNDER SEQRA AND CEQR

The opinions below present diametrically opposite views on an important issue. The Appellate Division declined to hold "that a change in sites alone

mandates that the scoping process begin anew." Decision at 2. It thus rejected the conclusion of Justice Kelley at Supreme Court that "the entire purpose of the scoping process is defeated where … a lead agency undertakes a scoping analysis for one project, and then proceeds to prepare the DEIS with respect to a completely different project." R32. This Court should grant leave to consider which is the better rule.

A. The Issue is of Statewide Importance

The question of whether an agency that has done scoping for a project at a particular site may then choose another site without doing a new scoping is an important one. Scoping is a key element of SEQRA and CEQR compliance. It is the first step taken after an action is determined to be of environmental significance, and is, since January 1, 2019, required statewide in every case in which an EIS (other than a supplemental EIS) is prepared. DEC, Stepping Through the SEQR Process, https://www.dec.ny.gov/permits/6189.html (visited July 3, 2021); 62 NYCRR 617.8(a) ("Scoping is required for all EISs (except for supplemental EISs)"). Whether a new scoping must be done when the site of a project changes is a potential issue for every agency that considers changing the site of an environmentally significant project, and for every resident of the State

who wants to comment on the scope of environmental review after a project site is changed.

In its Decision, the Appellate Division tried to limit its holding to the "unique situation" presented by this case. Decision at 2. But it did not identify any facts that make the situation here "unique," or nearly so. The Appellate Division mentioned that: (1) "two possible sites were known to the affected communities"; and (2) "the selection of the alternate site flowed from community participation in the underlying process." *Id.* But there is no reason to think either of these facts is unique, or even unusual, in cases where an agency conducts scoping for one site and then chooses another.

In cases where a site is changed after the scoping process, it is perfectly normal, not unique, to change it to an alternative site "known to the affected communities." It is not easy to imagine a situation where the alternative site was previously unknown, or had never been considered by either supporters or opponents of the project. And a change resulting from "community participation in the underlying process" is also a natural and normal course of events. Sites, once chosen by an agency and subjected to a scoping process, are not changed without a reason, and no reason is more likely than objections raised by the community during the scoping process. It would be strange indeed if an agency conducted

scoping for a particular site, encountered no community objections, and decided to change sites anyway.

What the Appellate Division called a "unique" situation – an agency's choice between two known alternative sites, community objection to the initially chosen site, followed by a change of the agency's choice – is not "unique," but the paradigmatic case. The rule adopted by the Appellate Division will allow agencies to avoid scoping for a new site in virtually every case where an agency encounters community opposition during scoping and decides to move its project elsewhere.

B. The Appellate Division Adopted a Bad Rule

Supreme Court got it right, and the Appellate Division got it wrong. It does not make sense, in this or any other case, to assume that scoping done for one site is good enough for another site.

1. A Change in Location is a Material Change and Requires New Scoping

"The primary goals of scoping are to focus the EIS on potentially significant adverse impacts [on the environment] and to eliminate consideration of those impacts that are irrelevant or not significant." 62 NYCRR 617.8(a). The purpose of the scoping process is to collect and identify environmental impact information relevant to a particular site. Where, as in this case, scoping is not done for the site on which the project is to be built, there is no reliable way to know what adverse

impacts were not identified, or what an EIS prepared after an adequate scoping process would have looked like.

Environmental impacts differ materially from site to site. That is true even where, as here, the two sites are no more than a few blocks apart – at least in places as densely populated and complex as Manhattan. The DSOW in this case illustrates this. Several of the potential impacts discussed in that document are, by their nature, "hyperlocal," i.e., likely to vary considerably within a short distance: for example, open space (R6268), shadows (R6268-6269) and noise (R6283-6284). These are matters of the greatest concern to people who live or work very near to a project site; a project that blocks the sun or increases the noise level will often have much less, or no, impact on people a few blocks down the street.

This case shows how two alternative project locations, though not far apart, can differ dramatically in their impacts on surrounding residents, business owners, and buildings. 100 feet from the White Street location, at 87 Lafayette Street, is a 125-year-old landmarked building, home to petitioner Downtown Community Television Center ("DCTV"). R2106-2107, 2110. While the DCTV building would have been unaffected by a project at 80 Centre Street, construction at 124-125 White Street poses a significant risk to the building's foundation if construction dewatering is performed, as the City has said it must be. R2107, 2112.

Construction at White Street will also impede access to several businesses, including an immigration and human rights law office, owned by petitioner Edward Cuccia, that serves many elderly asylum seekers in the Chinatown community. R1852. These businesses would suffer no similar effect from construction at 80 Centre Street.

Similarly, the City's EIS admits that that there are potentially "undisturbed deeply buried precontact resources" that could be present at the project site, resources that are sacred to petitioner American Indian Community House. R1880, 1888. And the White Street construction, unlike construction at 80 Centre Street, will cast shadows and block airflow at an old 6-story apartment building on Baxter Street. R1846. One resident of that building, petitioner Betty Lee, 71 years old, fears that construction pollution and barriers at White Street will exacerbate her husband's lung cancer and make it harder to travel to doctors' appointments. R1847-1848.

The importance of letting the public know the exact site of a project before asking for comments on the scope of environmental review is also shown by the comments on the DSOW for the abortive Centre Street project – the only DSOW ever circulated for the proposed new Manhattan jail. Several commenters wasted their breath commenting on details unique to the 80 Centre Street location. Some

of these have already been quoted (*see* p. 9 above), but they are not the only ones. Other commenters asked for special attention to "the de-mapping [i.e., elimination] of Hogan Place" and "the proposed loading dock and sally port on Hogan Place and Worth Street" – issues that ceased to exist when the site was changed to White Street. R6521-6522.

The problem here is not that these comments went to waste; the problem is that there is no way to know all the equally location-sensitive problems that would have been brought out by comments made in a scoping process for 124-125 White Street. In the DSOW that provided the basis for the scoping that was done, the City expressly said that the White Street option was not being considered. There were undoubtedly people, in addition to those we have mentioned, who were living and working on White Street and adjacent Baxter and Lafayette Streets – the northern counterparts of the 80 Centre Street commenters – who had no reason to comment on that DSOW, but could have made meaningful comments on a DSOW for White Street, if one had ever existed.

2. The Decision Violates the Rule Requiring Strict Compliance

Thus, the City was simply wrong in saying, in defense of its refusal to re-set the scoping process, that "the issues in terms of what the environmental review should look at are not materially different between the two locations." R3275.

They are materially different, as we have just shown. But it would not matter if they were not. This Court has held, as the Appellate Division's Decision acknowledges, that "the SEQRA process requires strict, not substantial, compliance." Decision at 2, citing *Matter of King v Saratoga County Bd. of Supervisors*, 89 N.Y.2d 341, 349-350 (1996) and *Matter of Jackson v New York State Urban Dev. Corp.,* 110 A.D.2d 304, 307 (1st Dept 1985), *affd* 67 N.Y.2d 400 (1986). To say that a deviation from required procedure is "not material" is to make a "substantial compliance" argument – an argument that is legally barred under this Court's case law.

3. It Does Not Make Sense to Use Comments on a Rejected Site as a Reason Not to Seek Comments on a Newly-Chosen One

The City offered one other reason, apart from materiality, for refusing to do scoping for 124-125 White Street: "moving the location to 124/125 White Street was consistent with the comments we have received on 80 Centre Street." R3275. The Appellate Division similarly relied on the public's comments about 80 Centre Street, saying: "the proposed site was changed to White Street after further review, including consideration of public comments received during the [scoping] process." Decision at 2. This reasoning misses the point of scoping, which is to identify the principal environmental impacts to be studied – impacts that are dependent on the site. It is unsurprising that some commenters on 80 Centre Street

said, in substance: "the White Street site would be better"; and it would be equally unsurprising if a DSOW as to 124-125 White Street, had one been circulated, elicited comments singing the virtues of an 80 Centre Street project.

To simplify: suppose an agency, after considering both John's and Mary's back yards as possible locations for a project, announces that it has chosen John's back yard and ruled out Mary's, and asks for comments to help it identify environmental impacts. Mary, relieved that her back yard is out of the picture, says nothing, while John responds: "the environmental impacts in my back yard will be terrible. Mary's is a better spot." The agency then changes its mind, selects Mary's back yard, and goes ahead with the project – without asking for comments to identify environmental impacts *at the new site*. When Mary protests that she was never given a chance to point out the impacts on her back yard, the agency says: "Well, we asked for comments on John's back yard, and he said yours would be better."

That is essentially what the City has said here, and petitioners, who are in Mary's plight, should not be required to accept it. Undoubtedly a project on either site would have significant environmental impacts. By never doing scoping as to 124-125 White Street, the City deprived the public of a chance to tell it what the most important impacts of the White Street project would be, and thus frustrated

the purpose of scoping – to assure that all significant impacts are addressed in an EIS.

Of course it is true that petitioners were allowed to comment on the White Street site in response to the DEIS. But that does not excuse or make inconsequential the City's failure to do scoping for 124-125 White Street. Scoping requires public participation –an opportunity both to comment in writing and to address City officials face to face at an open meeting – *before* an agency prepares an FSOW or DEIS. 6 NYCRR 617.8(d); 62 RCNY § 5-07(e). This requirement is not met by welcoming comments *after* scoping has already been done.

4. The Decision Misapplies This Court's Holding in *King*

The First Department's Decision relies on this Court's decision in *King* for its conclusion that "the scoping process did not have to be redone," saying that "respondents had already 'performed each of the required steps in the SEQRA review process,' and a 'de novo environmental review' would have been 'redundant.'' Decision at 2, quoting *King*, 89 N.Y.2d at 349-350. This was a misapplication of *King*.

King involved no issue relating to scoping, and it did not involve a change in site. The agency in *King* selected one of three possible sites, and never altered that decision. *Id.* at 344-347. It then proceeded with a full environmental review, and

"actually performed each of the required steps in the SEQRA review process." *Id.* at 349. After a final EIS had been prepared, the Appellate Division held that the agency should not have "proceeded with the landfill site selection and authorized concrete action prior to SEQRA compliance." *Id.* at 346. The Court of Appeals declined to hold, on those facts, that the agency must return "to square one" and duplicate the steps it had already completed. *Id.* at 344. That would, the Court said, amount to "a redundant de novo environmental review." *Id.*

In *King*, the remedy sought by the petitioners would have been truly "redundant;" the agency would simply have been required to do again what it had already done. That is not true here, and will never be true when scoping for the actual project site has been omitted. The Decision is incorrect in saying that the City has already performed all the required steps. No scoping has ever been conducted for the 124-125 White Street location. A new DSOW relating to the White Street project would not be a duplicate of the DSOW relating to the now-abandoned Centre Street project. It would be "redundant" only if the new scoping failed to identify environmental impacts that the old one did not – and that is virtually impossible, for the reasons we have explained. A scoping process for 124-125 White Street would undoubtedly identify environmental impacts not identified

in the scoping process for 80 Centre Street – and the only way to find out how much difference that would make is to do the scoping.

II
LEAVE SHOULD BE GRANTED TO CONSIDER WHETHER THE EXISTENCE OF REMEDIAL PLANS FURNISHES AN EXCUSE FOR FAILURE TO TAKE A HARD LOOK AT PUBLIC HEALTH IMPACTS

A. The Issue is of Statewide Importance

The Appellate Division accepted, without discussion or analysis, the proposition that boilerplate plans to mitigate public health consequences can substitute for a hard look at those consequences themselves. This is a decision of statewide significance. It will open the door for agency evasion of the purposes of SEQRA and CEQR in the important area of public health – endangering especially minorities and elderly people, whose health is all too often neglected by their government.

B. The Appellate Division's Decision Impairs the Role of SEQRA in Protecting Public Health

The Appellate Division said that the City "took the requisite hard look at impacts on public health" (Decision at 3), but this statement is contradicted by the record. The EIS prepared by the City admits that no "public health analysis" was conducted, relying on the principle that "[w]here no significant unmitigated adverse impact is found in other CEQR analysis areas, such as air quality, water quality, hazardous materials, or noise, a public health analysis is not warranted."

R12313. The EIS goes on to say that, according to "the relevant analyses of this EIS" construction of the proposed Manhattan jail "would not result in *unmitigated* significant adverse impacts." *Id.* Therefore, on the City's theory, a public health analysis was unnecessary.

As explained above, the key word is "unmitigated." The EIS in fact showed a huge potential for public health impacts – including, but not limited to, impacts from hazardous materials that would be disturbed by demolition and construction. *See* pp. 14-15 above. Nowhere does the EIS describe or analyze those impacts, evidently because the City thinks they will be "mitigated" as long as remedial plans are in place.

Thus, for the conclusion that the public health risks of this project are nothing to worry about, the City relied on the RAP and CHASP – boilerplate mitigation plans untethered to the specific concerns of White Street. This is not a rational way to proceed. Without assessing the problem – the consequences of both demolition and construction for the public's health – it is impossible to be confident of an effective solution. As Justice Kelley explained, "[a]lthough the [City's] analysis constitutes an adequate description of proposed remediation measures, it does not include an analysis of the effects sought to be avoided in the first place or the effects that may nonetheless eventuate even with the suggested

preventative measures in place." R20. The City is effectively saying, "we know we didn't evaluate the problem, but just trust us on the solution."

The role of a court in cases subject to SEQRA is to "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 417 (1986). When taking a "hard look," "the environmental review cannot simply acknowledge that there might be an impact; it must consider the likelihood and significance of that impact" and it "cannot simply dismiss the likelihood of expected impacts occurring without reasoned elaboration." *CEQR Technical Manual* 600.

With respect to public health, CEQR's purpose is to "determine if the environmental changes resulting from a proposed project will result in significant adverse public health impacts and, if so, to identify measures to mitigate such impacts." *CEQR Technical Manual* 20. Where mitigation measures are proposed, the "lead agency's determination of the sufficiency of the proposed mitigation measures would of course be subject to a judicial examination of whether the lead agency took the requisite hard look." *Merson v. McNally*, 90 N.Y.2d 742, 754 (1997).

The approach taken by the City in this case undermines the hard look rule, and the purposes of SEQRA and CEQR, by permitting the existence of mitigation to substitute for a hard look, even though it is impossible to assess the effectiveness of mitigation without an understanding of the evils being mitigated.

The proper application of the hard look rule in a case involving public health risks and mitigation measures is exemplified by the case the Appellate Division relied on here, *Matter of Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416 (2017) ("*P.S. 163*"). That case is the opposite of this one, because in *P.S. 163*, the agency conducting an environmental review *did* take a hard look at areas of public health concern. The DEIS in *P.S. 163* "analyzed … the potential impact on public health of exposure to hazardous materials, including soil-based lead and airborne lead dust, as well as the effects of construction noise." 30 N.Y.3d at 426. Only *after* analyzing these impacts did the agency develop a RAP and CHASP that outlined "measures to protect workers and the surrounding community during the construction." *Id.* at 426. These were among the facts that led this Court to affirm the decision upholding the agency action in *P.S. 163*. No similar facts are present here.

In the EIS, the City relied on section 200 of the 2014 CEQR Technical Manual, which says: "Where no significant unmitigated adverse impact is found

… no public health analysis is warranted."[5] A common-sense reading of this language is that an analysis is not warranted where it is clear without analysis that the impact on public health either is insignificant in itself or has been rendered insignificant by mitigation. There is no basis for concluding that is true here; the potential impacts are obviously significant in themselves, and nothing in the EIS justifies the conclusion that the RAP and CHASP will reduce them to insignificance. The City seems to read the Technical Manual as meaning that any impact, once subjected to any kind of mitigation measure, automatically becomes "insignificant," thus eliminating the need for a public health analysis. This is a wholly unreasonable application of the Technical Manual, and of SEQRA and CEQR.

The City's approach, if sanctioned here, will license a similar evasion in almost any case. An agency that does not want to do a public health analysis can simply pull a one-size-fits-all RAP or CHASP or other mitigation plan off the shelf. This Court should grant leave to appeal to decide whether this means of avoiding in-depth consideration of public health impacts is valid under SEQRA.

[5] https://www1.nyc.gov/assets/oec/technical-manual/2014/Documents/20_Public_Health_2014.pdf (visited July 2, 2021). This version of the Technical Manual has now been superseded by the 2020 Technical Manual. Section 200 in the new manual does not contain the quoted language. https://www1.nyc.gov/assets/oec/technical-manual/20_Public_Health_2020.pdf

CONCLUSION

For the reasons stated above, petitioners respectfully request that this Court grant their motion for leave to appeal.

Dated: New York, New York
July 8, 2021

Respectfully Submitted,

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STATE OF NEW YORK
COURT OF APPEALS

In the Matter of NEIGHBORS UNITED BELOW CANAL, JAN LEE, DCTV, EDWARD J CUCCIA, BETTY LEE, AND AMERICAN INDIAN COMMUNITY HOUSE Petitioners-Respondents-Movants, - against - MAYOR BILL DEBLASIO, THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, MARISA LAGO, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY DEPARTMENT OF CORRECTION, CYNTHIA BRANN, NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE, ELIZABETH GLAZER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, AND NEW YORK CITY COUNCIL Respondents-Appellants-Respondents.	N.Y. County Clerk's Index No. 100250/2020 **PROOF OF SERVICE**

I hereby certify that I served a copy of the Notice of Appeal filed in the above action (100250/2020) on July 8, 2021 by regular mail, postage prepaid, on the following:

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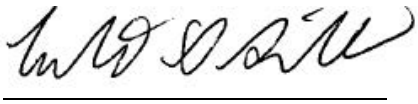

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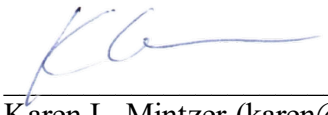

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COURT OF APPEALS

In the Matter of NEIGHBORS UNITED BELOW CANAL, JAN LEE, DCTV, EDWARD J. CUCCIA, BETTY LEE, AND AMERICAN INDIAN COMMUNITY HOUSE Petitioners-Respondents-Movants, - against - MAYOR BILL DEBLASIO, THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, MARISA LAGO, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY DEPARTMENT OF CORRECTION, CYNTHIA BRANN, NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE, ELIZABETH GLAZER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, AND NEW YORK CITY COUNCIL Respondents-Appellants-Respondents.	New York County Clerk Index No. 100250/2020 **AFFIRMATION OF ROBERT S. SMITH IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

ROBERT S. SMITH, an attorney admitted to practice in the courts of the State of New York who is not a party to this action, affirms under the penalties of perjury, pursuant to CPLR 2106, that the following facts are true:

1. I am a member of Friedman Kaplan Seiler and Adelman, LLP, attorneys for petitioners-respondents-movants, Neighbors United Below Canal, Jan Lee, DCTV, Edward J. Cuccia, Betty Lee, and American Indian Community House (collectively, "petitioners") in the above-captioned action.

2. I submit this affirmation in support of petitioners' motion for leave to appeal to the Court of Appeals.

3. A true and accurate copy of the Decision entered by the Supreme Court, New York County in this action, dated September 21, 2020, is annexed hereto as Exhibit 1.

4. A true and accurate copy of the Decision entered by the Appellate Division, First Department in this action, dated March 30, 2021, is annexed hereto as Exhibit 2.

5. A true and accurate copy of the Notice of Entry served by Respondents-Appellants-Respondents by mail, dated June 3, 2021 and received by petitioners on June 8, 2021, is annexed hereto as Exhibit 3.

Dated: New York, New York
July 8, 2021

ROBERT S. SMITH

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

----------X

INDEX NO. 100250/2020

MOTION DATE 09/03/2020

MOTION SEQ. NO. 001

In the Matter of

NEIGHBORS UNITED BELOW CANAL, JAN LEE, DOWNTOWN COMMUNITY TELEVISION CENTER, EDWARD J. CUCCIA, BETTY LEE, and AMERICAN INDIAN COMMUNITY HOUSE,

Petitioners,

- v -

MAYOR BILL DEBLASIO, THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, MARISA LAGO, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY DEPARTMENT OF CORRECTION, CYNTHIA BRANN, NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE, ELIZABETH GLAZER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, and NEW YORK CITY COUNCIL,

Respondents.

DECISION, ORDER and JUDGMENT

----------X

The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121,122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 264, 265, 266, 267, 268, and 269 (Motion 001)

were read on this motion to/for CPLR ARTICLE 78.

I. INTRODUCTION

In this CPLR article 78 proceeding, the petitioners seek judicial review of 13 New York City Council resolutions, numbered 1118 to 1130, all dated October 17, 2019, approving the rezoning of parcels of real property at 124-125 White Street in Manhattan (hereinafter the White Street site), and the concomitant construction of a new jail on that site as part of the New York

City Borough-Based Jail System (BBJS) intended to replace the Riker's Island jail. The petitioners also seek judicial review of numerous related prior approvals of the BBJS project that had been issued by several City agencies. The petitioners allege that the respondents violated the provisions of the State Environmental Quality Review Act (ECL §8-0101, *et seq.*; hereinafter SEQRA), SEQRA implementing regulations (6 NYCRR part 617), the City Environmental Quality Review (CEQR) provisions of the Rules of the City of New York (62 RCNY 5-01, *et seq.*), the Uniform Land Use Review Procedure (New York City Charter § 197-c; hereinafter ULURP), and the so-called neighborhood Fair Share Criteria for the siting of City-sponsored capital projects (New York City Charter § 203). The respondents answer the petition and file the voluminous administrative record. The petition is granted to the extent set forth below, and the challenged determinations are annulled.

The proposed project involves the demolition of two existing jail facilities on the White Street site and their replacement with one unified, bulkier, and taller jail facility that can accommodate more inmates. The petitioners allege that the respondents violated the SEQRA and CEQR provisions referable to defining of the scope of a project, inasmuch as they applied the scoping process to the construction of a jail at 80 Centre Street in Manhattan, a site that they subsequently rejected, rather than at the White Street site. They further assert that, although the New York City Department of Correction (DOC) designated itself as the lead agency for the purposes of coordinating environmental review, the respondents violated SEQRA and CEQR when the City Council, rather than the DOC, issued the requisite SEQRA findings statement. The petitioners also challenge the respondents' compliance with SEQRA and CEQR because several involved agencies issued approvals before any City entity issued the required findings statement. In addition, the petitioners contend that the DOC and the City Council failed to take the required "hard look" at all reasonably anticipated environmental impacts, failed to provide the necessary "reasoned elaboration" of their conclusions with respect thereto and, after

completing the scoping procedure for the rejected site, identified no other alternatives to the erection of the new jail on the site ultimately chosen, thus violating both SEQRA and CEQR.

The petitioners also argue that the respondents unlawfully administered the ULURP land-use review process by consolidating land-use review across the four boroughs slated to receive new jails, rather than conducting site-specific and borough-specific reviews, thus defeating the purpose of the ULURP law, which is to incorporate local community concerns into the decision-making process. Additionally, the petitioners assert that, inasmuch as a final design proposal for the new Manhattan jail has yet to be considered, let alone submitted, the entire environmental and land-use review processes set forth in SEQRA, CEQR, and ULURP have been curtailed prematurely, as the respondents have purported to review a project that has yet to be defined. The also allege that, as a consequence, the respondents' promises to undertake post-ULURP land-use review while the jail is being erected constitute an unlawful, ultra vires end-run around the law, which is meant to assure a proper review *before* a construction project undertaken by the City is erected. The petitioners allege that the respondents also failed to assess or ascertain whether the demolition of the existing jails on White Street, and their replacement with one new jail, unduly burdened the Chinatown and Civic Centre neighborhoods with more than their fair share of municipal projects, in violation of the City Charter.

The respondents contend that they did not violate SEQRA, CEQR, ULURP, or the Fair Share provisions of the Charter. Specifically, they allege that they took the requisite "hard look" at all reasonably anticipated environmental impacts, that the need for flexibility in site selection permitted them to change their initial choice for the site of the jail from 80 Centre Street to 124-125 White Street, only three blocks north, that the change in site selection after completion of the scoping process was not improper, that the site change was rectified by the full consideration of impacts in the Draft Environmental Impact Statement (DEIS), the review of public comments on the DEIS, and the response to those comments contained in the Final

Environmental Impact Statement (FEIS), and that, under the circumstances, the limitation on the number of alternative sites was reasonable. They also contend that it was permissible for the City Council, rather than the DOC, to issue the SEQRA findings statement, and that there was no irregularity in permitting certain agencies whose approval was required to issue those approvals prior to the issuance of the SEQRA findings statement. They also deny that they violated SEQRA, CEQR, or ULURP by reviewing the project before the finalization of design minutiae, and that post-ULURP review of de minimis revisions to the design will regularize the process. In addition, the respondents contend that they properly assessed whether the neighborhoods adjacent to the project site were not unduly burdened by an excess of municipal capital projects.

The court concludes that the petition must be granted. The City Council's approval resolutions, and all other involved agencies' approvals, must be annulled, inasmuch as

(a) the change in the site location of the jail project after the initial scoping sessions, in the absence of additional, site-specific public scoping sessions and public comment period, violates SEQRA and CEQR;

(b) the respondents, in violation of SEQRA and CEQR, failed to take a hard look at reasonably anticipated public health impacts of the project, and failed to provide a reasoned elaboration for their conclusions with respect thereto;

(c) the respondents purportedly completed environmental and land-use review for the project before the project had even been designed in its final form, thus failing to define the project and improperly deferring a full review of the anticipated vehicular traffic impacts of the actual project on traffic and congestion in the surrounding neighborhood;

(d) the respondents failed to consider any alternatives to the White Street site other than the "no action," or "no build," alternative, thus violating SEQRA and CEQR; and

(e) several of the respondents are involved agencies whose approvals were necessary to the construction of the project, but violated SEQRA's implementing regulations by issuing their approvals prior to the issuance of its SEQRA findings statement.

The resolutions and approvals thus were arbitrary and capricious, affected by an error of law, and rendered in the absence of proper procedure. Consequently, the respondents are enjoined from taking any physical steps to effectuate the construction of the project, pending (1) the

scheduling and convening of a new site-specific scoping session with adequate notice to the public, (2) the provision of an appropriate public comment period, (3) the preparation and circulation, after the details of the project design have been articulated, of an amended DEIS that properly addresses the anticipated public health impacts of the project, the vehicular traffic impacts premised on the actual design thereof, and reasonable alternatives to the proposed project site, (4) the provision of an appropriate public comment period with respect to the amended DEIS, (5) the preparation and circulation of an amended FEIS thereafter, and (6) the preparation and circulation of new SEQRA findings statement.

II. BACKGROUND

In 2016, the Speaker of the New York City Council convened a commission (the Commission), chaired by Jonathan Lippman, the former Chief Judge of the Court of Appeals, to make recommendations for the improvement, reform, or replacement of the primary City jail on Riker's Island in the Bronx. On March 31, 2017, Mayor Bill DeBlasio announced that the City intended to close the jail on Riker's Island. In April 2017, the Commission issued a report suggesting that any new jails be erected next to or near existing criminal court buildings or civic centers, rather than in residential neighborhoods. On February 14, 2018, Mayor DeBlasio announced that the City would seek to replace the detention facilities on Riker's Island with four new facilities---one each located in Manhattan, Brooklyn, Queens, and the Bronx---pursuant to a program designated as the BBJS. The City thereafter apparently limited its search in those four boroughs to sites that it already owned.

On August 2, 2018, the City conducted a public informational hearing at the Chung Pak Senior Center on the corner of White Street and Baxter Street in Manhattan's Chinatown neighborhood. The attendees were informed that the City was considering only two sites for the new jail in Manhattan, 80 Centre Street and 124-125 White Street, and that relevant City agencies would begin the SEQRA/CEQR public scoping process within two weeks. Before the

scoping sessions began, however, the City made an initial determination to select 80 Centre Street as the project site.

On August 14, 2018, the DOC designated itself as lead agency for the purpose of coordinating the efforts of all other agencies in conducting the required environmental review of the BBJS project pursuant to SEQRA and CEQR (*see* 6 NYCRR 617.6). The DOC identified 80 Centre Street as the proposed site of the new Manhattan jail. That same date, the DOC issued an Environmental Assessment Form (EAF), also known as an Environmental Assessment Statement (EAS), containing a positive declaration that the proposed project would have significant effects on the environment, thus triggering and necessitating the preparation of a full Environmental Impact Statement (EIS).

On August 15, 2018, the DOC issued a document, entitled "Draft Scope of Work to Prepare a Draft Environmental Impact Statement, CEQR No. 18DOC001Y," with respect to all of the proposed jails in the four boroughs that had been selected for new detention facilities. The purpose of this document was to define the scope of the DEIS that it subsequently was required to prepare and circulate, and to elicit comments from the public, involved agencies, and interested agencies so that those comments and concerns could considered and addressed before the preparation and circulation of the FEIS.

The document explained the policy rationale for closing the Riker's Island facilities, and assessed the existing jail space throughout the City. In connection with the current jail facilities in Manhattan, the document explained that:

> "The Manhattan Detention Complex is located at 124 White Street and 125 White Street and consists of a North Tower and a South Tower with a total of approximately 387,800 g[ross] s[quare] f[eet] of court and detention center uses and approximately 1,000 existing beds for people in detention. An aerial walkway above White Street connects the North Tower to the South Tower of the detention complex. The North Tower was opened in 1990. The South Tower, formerly the Manhattan House of Detention, was opened in 1983, after a complete remodeling. The complex houses men in detention, most of them undergoing the intake process or facing trial in Manhattan.

> "These existing facilities cannot be expanded to meet the needs of the contemporary facilities envisioned. The existing facilities are limited with regard to capacity and inefficient in design. Many of the existing facilities date back to the 1960s, 1970s, and 1980s and have not been renovated since the early 1990s. Facility layouts are outdated and do not provide for the quality of life sought in more modern detention facilities, with regard to space needs, sunlight, and social spaces."

The document thus identified only 80 Centre Street as a potential site of the proposed new jail in Manhattan. As the DOC explained it,

> "The Manhattan Site is located at 80 Centre Street (Block 166, Lot 27) in the Civic Center neighborhood of Manhattan Community District 1 . . . The site is the entire block bounded by Centre Street, Hogan Place (the extension of Leonard Street), Baxter Street, and Worth Street. The site would also involve the demapping of Hogan Place between Centre Street and Baxter Street to facilitate the construction of pedestrian bridges connecting the proposed detention facility to existing court facilities to the north (pedestrian access along Hogan Place would be maintained). The site is within a C6-4 zoning district.
>
> "The site contains the nine-story, approximately 640,000-gsf Louis J. Lefkowitz State Office Building, which houses the Manhattan District Attorney ("Manhattan DA"), Office of the City Clerk, Manhattan Marriage Bureau, courtrooms, other court-related offices, and other city agency offices. It is expected the Manhattan DA's office would be relocated to new office space in the South Tower of the Manhattan Detention Complex at 125 White Street. During construction of the proposed facility at 80 Centre Street, the existing courtrooms may be temporarily relocated to the North Tower of the Manhattan Detention Complex at 124 White Street if necessary. Court related facilities would be included in the proposed facility at 80 Centre Street. The remaining existing office uses would be relocated to a nearby office site(s) to be determined.
>
> "The proposed project would redevelop the existing office building with a new detention facility containing approximately 1,560,000 gsf, including approximately 1,510 beds for people in detention; support space; community facility space; possible court/court-related facilities; and approximately 125 accessory parking spaces. The potential court facilities at this site would consist primarily of court-related uses that are currently located on the site and would be retained in the proposed detention facility. The community facility space would be located along Worth Street and Baxter Street. Loading functions and a sallyport would be located along Hogan Place . . . Court facilities would be accessed from Centre Street. The proposed detention facility would include pedestrian bridges over Hogan Place to provide access to the existing court facilities to the north. The maximum zoning height for the purposes of analysis would be approximately 432.5 feet tall . . .
>
> "The redevelopment of 80 Centre Street as part of the proposed project would allow for the potential closure and reuse or redevelopment of the North Tower of the Manhattan Detention Complex in the future. The future use of the North Tower has not been determined. Any proposal to redevelop the North Tower of

> the Manhattan Detention Complex, should it move forward, would be subject to future planning and public review processes, including a separate approval and environmental review."

The Draft Scope of Work document explained that, as part of the procedure for drafting a DEIS, the DOC would consider and analyze existing conditions at the project site, the "no action" alternative, and would include

> "• A description of the proposed project, the related actions, and the environmental settings;
>
> "• An analysis of the potential for adverse environmental impacts to result from the proposed project;
>
> "• A description of mitigation measures to eliminate or minimize any adverse environmental impacts disclosed in the EIS;
>
> "• An identification of any adverse environmental effects that cannot be avoided if the proposed project and the related mitigation is implemented;
>
> "• A discussion of alternatives to the proposed project; and
>
> "• A discussion of any irreversible and irretrievable commitments of resources related to the proposed project."

The document included a "project description" describing, in general terms, the basic configuration of the proposed facility on the White Street site. The specific categories of environmental concern that the Draft Scope of Work promised to analyze in the DEIS included land use, zoning, and public policy, and socioeconomic impacts, including the effects of the project on residential and business displacements. The document also asserted that the DEIS would analyze the project's impacts upon community facilities, open space, light and air, historic, architectural, and cultural resources, urban design and visual resources, water and sewerage infrastructure, air quality, climate change/greenhouse gases, transportation, parking, vehicular and pedestrian traffic and safety, noise, public health, and neighborhood characteristics, as well as potential impacts arising from the use or release of hazardous materials during demolition and construction, along with other construction impacts. The document indicated that the DEIS would consider and analyze alternatives to the project and

the proposed site, and would discuss reasonable mitigation measures in connection with the impacts that were revealed, including unavoidable impacts.

On September 27, 2018, the DOC conducted a public meeting on the Draft Scope of Work at the Municipal Building at 1 Centre Street in Manhattan, and fixed October 29, 2018 as the final date for the public comment period. According to the petitioners, many residents of the Chinatown, Lower East Side, and Civic Center communities were shut out of the meeting due to the insufficient size of the meeting room. Nonetheless, numerous residents, including some of the petitioners, made public comments in opposition to the siting of the jail at 80 Centre Street, noting the need for more community input, and requesting that the environmental review process address several alternatives to the plan, including alternative sites, the appropriate use of the site, traffic and pedestrian congestion, cumulative impacts of the jail when considered with other nearby municipal projects, impacts of demolition and construction on public health and airborne pollution, the impacts of the use and storage of cranes on narrow Chinatown and Civic Center streets, the impacts of the project upon nearby Columbus Park, and the impacts of the project upon the unique nature of the Chinatown and nearby Little Italy historic districts.

In a letter from the Mayor's Office of Criminal Justice (MOCJ), the involved mayoral agency that was coordinating the closure of Riker's Island with the DOC, to City Council Member Margaret Chin, the MOCJ explained that

> "80 Centre Street was selected by the Administration because it was closer to the civic core and comparably scaled buildings; the 125 White Street location would have been a taller building, and 80 Centre Street opened up a community development opportunity for the neighborhood [at 125 White Street]."

The MOCJ further stated that

> "[t]he land area of the facility at 125 White Street did not have adequate space for our programming goals. A proposed jail on that site would have been taller, and would have been closer to the residential areas of Chinatown. 80 Centre Street is closer to the civic center of Downtown Manhattan and is closer to the taller buildings of that area, and also opens up the opportunity to return the North Building of 125 White Street to the community for development into another community need such as housing."

Nonetheless, at the end of November 2018, after the public comment period on the Draft Scope of Work document had expired, and despite both the descriptions in that document of the shortcomings of the White Street site and the reservations expressed in the MOCJ letter, the DOC and other involved City agencies abandoned their plans to erect a jail at 80 Centre Street, and elected to move the project three blocks uptown to 124-125 White Street, between Centre Street and Baxter Street. The petitioners requested a new scoping meeting based on the change in location, noting that the new site was situated immediately adjacent to the Chung Pak senior citizen's residential facility, retail space in the current White Street jail that was leased to a private retailer would be displaced, the portion of White Street between Centre and Baxter Streets would be remapped to remove it as a public thoroughfare, and erection of a new jail on White Street would preclude further community development. After announcing the change of location, however, neither the DOC, the MOCJ, nor any other City agency issued a revised or amended Draft Scope of Work document to reflect the change. None of those agencies scheduled, convened, or conducted a public scoping session to address issues unique to the newly chosen site, and none of them provided a comment period to permit the public to submit relevant concerns. Rather, the DOC and other involved agencies, without addressing the serious issues that they had already raised in connection with siting the new jail at 124-125 White Street, proceeded directly to the next phase of the environmental and land-use review processes.

In December 2018, the City Council's advisory Commission issued its final report, recommending the White Street site as the appropriate location for the new Manhattan jail.

Between January 16, 2019 and April 6, 2019, the DOC convened six invitation-only "neighborhood advisory council" meetings, and confirmed the relocation of the proposed jail from 80 Centre Street to 124-125 White Street; on March 22, 2019, the DOC issued the final Scope of Work document and the DEIS for the construction of all of the new jails that were to constitute elements of the BBJS. Those documents were addressed, insofar as they related to

the new Manhattan jail, solely to the White Street site. The DOC revealed that it would be employing a "design-build" process, rather than a "design-bid-build" process for design and construction. Under the "design-build" method, a municipality contracts with a single designer/ builder entity to undertake both design and construction pursuant to a single contract. Under the more traditional "design-bid-build" method, a municipality contracts separately with a design/architecture/engineering firm and a construction firm, with the designer responsible for delivery of 100% complete design documents before a construction firm is retained. Although the "design-build" method is clearly more expeditious, and might ultimately save a municipality some money given the unified nature of the work, in this instance, it meant that the design of the jail was not finalized during the environmental and land-use review processes. Rather, the specifics of the design would not be finalized until construction had commenced; in other words, the design would be improvised to a certain extent during construction itself. Hence, in connection with the White Street location, the DOC could only speculate where vehicular ingress to and egress from the site would be placed, where parking would be located, and where various sally-ports for DOC shuttle buses, delivery vehicles, DOC personnel vehicles, and law-enforcement personnel vehicles would be situated.

The public comment period for the Manhattan portion of the DEIS was scheduled to run from March 22, 2019 until September 27, 2019. Thereafter, the comment period was shortened until July 22, 2019, with a public hearing scheduled for July 10, 2019. On July 22, 2019, the petitioners submitted comments on the DEIS. They pointed out that the incorrect site had been the subject of the mandatory scoping process. They further asserted that the DEIS contained no public health assessment in connection with demolition and construction, it failed to consider possible impacts upon the adjacent narrow Baxter Street corridor, which contains residences, restaurants, bars, and businesses, and failed to consider impacts upon the adjacent Chung Pak Senior Center. The petitioners asserted that there were no detailed descriptions of any anticipated physical impacts from demolition and construction. In addition, they noted that,

inasmuch as no detailed design plans had yet been revealed, the DOC had no method for assessing actual vehicular traffic and parking impacts and no ability to do so. The petitioners also contended that the DEIS did not address the "Fair Share Criteria" of New York City Charter § 203, which requires an assessment of whether the City was unfairly siting undesirable municipal projects in poor or minority neighborhoods that may already contain an abundance of such projects. The petitioners also alleged that the DEIS contained no discussion of alternative sites for the project, addressing only the "no action" alternative.

Despite the absence of a final design for the new White Street jail, on March 22, 2019, the DOC, MOCJ, the New York City Planning Commission (CPC), the New York City Department of Design and Construction (DDC), the New York City Department of City Planning (DCP), and the New York City Department of Citywide Administrative Services (DCAS) commenced the ULURP process to consider land-use issues referable to the four sites chosen for the BBJS, including the approval of necessary zoning text amendments, special use permits, the City's acquisition of the private leasehold held by Chung Pak Senior Center in the current White Street jail, and the demapping of White Street between Centre and Baxter Streets. Rather than undertaking individual ULURP procedures for the site in each affected borough, the respondents engaged in one omnibus, comprehensive ULURP for the BBJS.

On August 23, 2019, the DOC circulated the FEIS and issued a notice that the FEIS was complete. The FEIS noted an increase in the number of proposed inmate beds to 1,150, and a concomitant increase in the number of DOC and other public employees likely to be at the new jail on a daily basis. The FEIS addressed, in detail, the petitioners' comments on the DEIS with respect to open-space issues, the demapping of White Street, impacts upon the Baxter Street corridor, impacts upon the adjacent Chung Pak Senior Center, impacts upon the retail space currently leased out in the existing jail, the physical impacts of demolition and construction, the Fair Share siting criteria, impacts on light and shade, impacts on nearby parks, architectural resources, and historical resources, and impacts on neighborhood socioeconomics. The FEIS

also included detailed analyses of the presence of solid and hazardous waste on and adjacent to the project site, and the anticipated dispersal of such material during demolition and construction (*see* FEIS, 4.1-21-22, 4.7-1).

Nonetheless, with respect to the public health impacts of demolition, excavation, and construction arising from the dispersal of hazardous materials, the FEIS did not assess the anticipated effects upon the adjacent Chinatown community, which had already suffered significant public health impacts from fallout generated by the 9/11 terrorist attacks. Rather, the FEIS speaks only of preventative measures meant to avoid future public health impacts. Although the analysis constitutes an adequate description of proposed remediation measures, it does not include an analysis of the effects sought to be avoided in the first place or the effects that may nonetheless eventuate even with the suggested preventative measures in place. In this regard, the FEIS provides, in total, as follows:

> "Policy 7: Minimize environmental degradation and negative impacts on public health from solid waste, toxic pollutants, hazardous materials, and industrial materials that may pose risks to the environment and public health and safety.
>
> "Policy 7.1: Manage solid waste material, hazardous wastes, toxic pollutants, substances hazardous to the environment, and the unenclosed storage of industrial materials to protect public health, control pollution, and prevent degradation of coastal ecosystems.
>
> "Policy 7.2: Prevent and remediate discharge of petroleum products.
>
> "Policy 7.3: Transport solid waste and hazardous materials and site solid and hazardous waste facilities in a manner that minimizes potential degradation of coastal resources
>
> "Construction of the new facility would require extensive excavation of the Manhattan site. Although this could increase pathways for human exposure, the potential for impacts would be avoided by incorporating the following into the project:
>
> "Based upon the results documented in the Phase II Environmental Site Assessment (ESA), a June 2019 Remedial Action Plan (RAP) and associated Construction Health and Safety Plan (CHASP) have been prepared for implementation during the subsurface disturbance associated with construction at the project site. The RAP and CHASP set out procedures to be followed to avoid the potential for adverse impacts related to hazardous materials identified by the investigation as well as other hazardous materials that could be

(unexpectedly) encountered. The RAP addresses requirements for items such as: field oversight of soil disturbance by an environmental professional, soil management (including stockpiling, handling, transportation and disposal), dust control and air monitoring, criteria for chemical testing of any imported soil needed for landscaping, and contingency measures should underground storage tanks (USTs) or soil contamination be encountered. Although the results of the soil vapor testing did not indicate a significant potential for soil vapor intrusion, as a conservative measure the RAP includes requirements for vapor controls (a vapor barrier around the foundation elements, and, if the foundations do not extend below the groundwater table, a sub-slab depressurization system) to avoid the potential for soil vapor intrusion into new structures. The RAP sets out criteria for imported soil in any new landscaped areas. The CHASP presents a hazard assessment for the construction workers and sets out the requirements for real-time air monitoring (for respirable dust and VOCs) during subsurface disturbance, to protect both the construction workers and the community. Following construction, occupancy permits would only be issued once the New York City Department of Environmental Protection (DEP) receives and approves a Remedial Closure Report, certified by a New York licensed Professional Engineer, that documents the RAP and CHASP were properly implemented.

"•Removal of all known USTs, aboveground storage tanks (ASTs), and any unforeseen petroleum tanks would be performed in accordance with applicable regulatory requirements including New York State Department of Environmental Conservation requirements relating to spill reporting and tank registration.

"•If dewatering were to be necessary for the proposed construction (groundwater was encountered at approximately 18 to 23 feet below grade during investigations for the Phase II ESA of the Manhattan Site), water would be discharged to sewers in accordance with DEP requirements.

"With the implementation of the regulatory requirements relating both to the demolition/renovation of the existing facilities and the measures required by the RAP/CHASP and other applicable regulatory requirements, the potential for significant adverse hazardous materials impacts from construction at the Manhattan Site would be avoided. Following construction, there would be no potential for significant adverse impacts relating to hazardous materials."

The FEIS includes a fairly detailed analysis of the "no action" alternative, and compares that alternative to most of the impacts anticipated to arise from the proposed project. However, a review of the document reveals that it does not identify any other site in Manhattan, regardless of whether it is publicly or privately owned, as an alternative site. Nor does the FEIS identify or describe any alternative size or general design of the project on the White street site.

The FEIS concluded that a Level II Screening analysis for vehicular traffic impacts was warranted, and provided a detailed traffic study, including anticipated trips per hour and per day,

along with the likely effects on nearby roadways and intersections. The traffic study, however, *presumed* that staff parking would be sited along the easterly Baxter Street frontage, and that trucks, shuttle buses, and other delivery vehicles would access the site through a sally-port entrance/exit on Centre Street. The FEIS made this presumption because the final design of the project, including the location and placement of underground and street-level parking facilities, curb cuts, sally-ports, and delivery docks and ports in the structure itself, has not been defined, articulated, or approved. As noted in the FEIS, because the DOC elected to employ the "design-build" method of contracting, rather than the traditional "design-bid-build" method, the final design and layout of the project would be improvised as the construction proceeded.

On September 3, 2019, and thus before the lead agency's approval of the FEIS and its issuance of a SEQRA findings statement, the CPC issued necessary approvals concerning site selection, zoning text amendments, special use permits, the City's acquisition of the Chung Pak leasehold, and the demapping of the relevant portion of White Street.

In connection with the ULURP process, the respondents only included Manhattan Community Board 1 in connection with the process, even though a portion of the affected area identified in the DEIS is located in the catchment area of Community Board 3. On September 5, 2019, the respondents conducted the one unified public ULURP hearing to consider all of the proposed new jails. The respondents declared the ULURP process completed, but nonetheless indicated that, inasmuch as the design of the new Manhattan jail had yet to be finalized, they would undertake ad hoc post-ULURP review, in the course of construction, in order to assess those aspects of the project that they could not yet address during the actual ULURP process.

On October 17, 2019, the City Council approved 13 resolutions applicable to the BBJS, including zoning revisions, demapping White Street between Centre and Baxter Streets, site plan approval, extinguishment of the commercial leasehold in the current White Street jail, approval of the ULURP process, approval of the FEIS, and issuance of several SEQRA findings statements asserting 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" (Council of the City of New York, Resolution Nos. 1118-1130, Oct. 17, 2019).

On February 14, 2020, the petitioners commenced the instant proceeding, challenging all of the approvals issued by the respondents. The first cause of action alleges that the respondents violated SEQRA and CEQR by conducting scoping procedures for one project, then abandoning that project, replacing it with a project on a different site, and proceeding with the next phase of the environmental review process in the absence of scoping for the project site that was actually selected. The second cause of action asserts that the respondents violated SEQRA and CEQR because the City Council, rather than the lead agency, issued the required SEQRA findings statement, and because involved agencies prematurely issued their approvals prior to the issuance of the findings statement in any event. The third cause of action alleges that the DOC and the City Council violated SEQRA and CEQR by failing to take the requisite hard look at numerous areas of environmental concern, failing to provide a reasoned elaboration for their conclusions with respect to those environmental issues, and failing to identify any alternatives to the proposed project other than the "no action" alternative. The fourth cause of action asserts that the respondents violated the ULURP law by improperly consolidating the consideration of all four proposed jails in one procedure. The fifth cause of action alleges that the DOC and the City Council violated SEQRA and CEQR by failing to define the contours of the particular design of the project before undertaking any environmental review, thus preventing them from adequately or appropriately assessing the actual anticipated impacts of the project. The sixth cause of action asserts that, for the same reason, the post-ULURP, design-specific, land-use review proposed by the respondents constituted an ultra vires act, as all land-use issues must be resolved during the ULURP process, and cannot be deferred to the construction phase of a project. The seventh cause of action alleges that the respondents

violated the Fair Share Criteria of the City Charter by siting a project in a minority neighborhood that is already saturated with what many consider to be undesirable municipal facilities.

On March 11, 2020, the DOC issued its own version of the SEQRA findings statement, and certified that

> "Having considered the relevant environmental impacts, facts, and conclusions disclosed in the DEIS, including comments on the DEIS and responses thereto, the FEIS and subsequent technical memoranda weighed and balanced relevant environmental impacts with social, economic, and other essential considerations as required in 6 NYCRR 617.11, the DOC finds and certifies that:
>
> "• the requirements of Article 8 of the New York State Environmental Conservation Law (SEQRA) and its implementing regulations found at 6 NYCRR Part 617 and the requirements of City Environmental Quality Review (CEQR) found at Title 62, Chapter 5, of the Rules of the City of New York and as set forth in Executive Order 91 of 1977, as amended, have been met; and
>
> "• consistent with social, economic, and other essential considerations of state and city policy, from among the reasonable alternatives available, the proposed project is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that significant adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigation measures that the FEIS and TM001 have identified as practicable."

The petition is granted as to the first cause of action. The petition is granted as to the second cause of action, but only to the extent that it alleges that involved agencies rendered premature approvals. The petition is granted as to the third cause of action, but only to the extent that it alleges that the DOC and City Council failed to take a hard look at the project's public health impacts and failed to identify any alternatives to the proposed project, let alone analyze the anticipated impacts of those alternatives. The petition is granted as to the fifth cause of action, but only to the extent that it alleges that traffic and vehicular congestion impacts were not properly assessed because the parking, vehicular ingress and egress, and delivery facilities of the project have yet to be situated. The petition is granted as to the sixth cause of action. The court rejects the other grounds for relief asserted by the petition.

The City Council's October 17, 2019 resolutions and the CPC's September 3, 2019 approvals are thus annulled, and the respondents are enjoined from proceeding with any

physical construction activities in connection with the project, unless they implement proper scoping for the chosen project site, with appropriate public input, circulate appropriate amended draft and final EISs that take account of the actual design of the proposed new jail, complete the ULURP process for the Manhattan site that also takes account of the actual design, and issue a new SEQRA/CEQR findings statement after the completion of the amended FEIS.

III. DISCUSSION

A. SEQRA/CEQR

"In New York State, SEQRA makes environmental protection a concern of every agency. Any construction project that requires . . . agency approval . . . which [sic] may have a significant effect on the environment, must go through a full SEQRA assessment to make sure that it is undertaken in a way that minimizes damage to the environment and public health. To that end, the agency must prepare an environmental impact statement (EIS) that complies with both the substantive and procedural requirements of SEQRA and all other applicable regulations. This insures that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices

"After the agency initially determines that it must prepare an EIS, SEQRA review proceeds through several steps. First, the project sponsor or the lead state agency on the project may conduct an optional 'scoping session,' exploring the method to be used in assessing the project's environmental impact. Next, the lead agency must prepare or cause to be prepared a draft environmental impact statement (DEIS), to be filed with the Department of Environmental Conservation, which surveys the relevant environmental risks posed by the proposed project. After the DEIS has been finished and publicly reviewed, the agency prepares and files a final environmental impact statement (FEIS). The DEIS and FEIS must analyze the environmental impact and any unavoidable adverse environmental effects of the project under review, as well as alternatives to the proposed action . . . , including a 'no-action alternative' . . . and mitigation measures. Finally, before approving the project, the agency must make an explicit finding that the requirements of [SEQRA] have been met and that [,] consistent with social, economic [,] and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided. By administrative regulation, such finding must be contained in a written findings statement, which considers the conclusions reached in the FEIS, weighs and balances the relevant environmental impacts, and provide[s] a rationale for the agency's decision"

> "Opportunity for public participation and engagement is an essential and mandatory part of the SEQRA process. At each step, the agency must provide for public comment, usually through a written public comment period (*see* 6 NYCRR 617.8 [e]; 617.9 [a][2]-[5]; 617.11 [a], [b]; *see generally* Matter of Jackson, 67 NY2d at 415-416 [summarizing SEQRA process, including public comment requirements]). The agency is further authorized to hold optional public hearings at its discretion (*see* ECL 8-0109 [5]; 6 NYCRR 617.8 [e]; 617.9[a][4]".

(*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 424-425 [2017] [internal quotation marks and some citations omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414 [1986], ECL 8-0103[8], 8-0109[2], [6], [8]; 6 NYCRR 617.1[b][1], [2]; 617.8; 617.11[c], [d]; 617.12[b][6]).

"CEQR, adopted by Local Law of the City, provides procedures for the compliance with SEQRA by City agencies . . . [T]he requirements of CEQR generally follow the provisions of SEQRA" (*Matter of Nash Metalware Co. v Council of City of N.Y.*, 14 Misc 3d 1211[A], 2006 NY Slip Op 52485[U], *9 [Sup Ct, N.Y. County, Dec. 21, 2006]; *see Matter of Save the Audubon Coalition v City of New York*, 180 AD2d 348, 351 [1st Dept 1992]).

A court must "'review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination'" (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d at 430, quoting *Akpan v Koch*, 75 NY2d 561, 570 [1990] [citations omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 417).

1. SEQRA/CEQR---STANDARD OF REVIEW---CPLR 7803(3)

Judicial review of a SEQRA or CEQR determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924 [2012]; *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]; *Akpan v Koch*, 75 NY2d at 570; *Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 619 [2d

Dept 2002]). "[T]he courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" (*Akpan v Koch*, 75 NY2d at 570, quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 416; *see Matter of Community United to Protect Theodore Roosevelt Park v City of New York*, 171 AD3d 567 [1st Dept 2019]; *Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 6-7 [1st Dept 2006]; *Matter of Fisher v Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]).

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624 [1st Dept 2015]), i.e., it "is without basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). A determination is also arbitrary and capricious where the decision-making agency failed to consider all of the factors it is required by statute to consider and weigh, or considered inappropriate factors (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604 [2d Dept 2008]; *Matter of Pantelidis v New York City Bd. of Standards & Appeals,* 43 AD3d 314, 314 [1st Dept 2007]; *Matter of Fusco v Russell*, 283 AD2d 936, 936 [4th Dept 2001]).

An administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]). "While agency interpretations of their own regulations are generally afforded considerable deference, courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654-655 [2013] [citations and internal quotation marks omitted]; *see Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]; *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359 [1999]; *Matter of Gaines v New York State Div. of Hous. & Community Renewal,* 90 NY2d 545, 548-549 [1997]). "While as a general

rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted]; *see Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]; *Matter of American Tel. & Tel. Co. v State Tax Comm.*, 61 NY2d 393, 400 [1984]).

"[W]here the . . . issue presented is whether an agency complied with its own internal procedures, the appropriate standard of review is whether the determination was 'made in violation of lawful procedure'" (*Matter of Blaize v Klein*, 68 AD3d 759, 761 [2d Dept 2009], quoting CPLR 7803[3]). It is a "fundamental administrative law principle that an agency's rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation" (*Matter of Lehman v Board of Educ. of City School Dist. of City of N.Y.*, 82 AD2d 832, 834 [2d Dept 1981]; *see also Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 535-536 [1992]). An adverse agency determination must be reversed where the relevant agency does not comply with either a mandatory provision, or one that was "intended to be strictly enforced" (*Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d at 536). Consequently, a determination must be set aside on the ground that it was made violation of lawful procedure where the agency fails to follow the procedures articulated in its implementing regulations or in a procedural guidebook that it promulgated, and the failure is more than merely technical, but deprives a petitioner of substantive rights and "undermined the integrity and fairness" of the process (*Matter of Kolmel v City of New York*, 88 AD3d 527, 528-529 [1st Dept 2011]).

2. SEQRA/CEQR---THE SCOPING PROCESS

After the lead agency has prepared an EAF/EAS containing a positive declaration that a proposed action will have a significant effect on the environment, the lead agency frequently

continues its SEQRA environmental review with what is known as the scoping process. As set forth in 6 NYCRR 617.8(a),

> "[t]he primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or not significant. Scoping is required for all EISs (except for supplemental EISs), and may be initiated by the lead agency or the project sponsor."

The lead agency thereafter must provide a copy of the draft scoping document to all involved agencies, that is, governmental agencies with discretionary jurisdiction "to fund, approve or directly undertake" (6 NYCRR 617.2[t]) some aspect of the project. The lead agency must also make the scoping document available to any individual or interested agency that has expressed an interest in writing to the lead agency (*see* 6 NYCRRR 617.8[b]). Crucially,

> "[s]coping must include an opportunity for public participation. The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means"

(6 NYCRR 617.8[d]). The lead agency must provide a final written scope to all involved agencies and any individual who has expressed an interest in writing to the lead agency within 60 days of its receipt of a draft scope (*see* 6 NYCRR 617.8[e]).

The applicable SEQRA regulations provide that the final written Scope of Work document should include a brief description of the proposed act, the potentially significant adverse impacts previously identified by the lead agency and involved agencies, the extent and quality of information needed for the preparer to adequately address each impact, including an identification of relevant existing information, and required new information, including the required methodologies for obtaining new information. The document should also include an initial identification of mitigation measures, the reasonable alternatives to be considered, an identification of the information or data that should be included in an appendix rather than the body of the draft EIS; and a brief description of the prominent issues that were considered in the review of the EAF/EAS or raised during scoping, or both, and determined to be neither relevant

nor environmentally significant or that have been adequately addressed in a prior environmental review, along with the reasons why those issues were not included in the final scope (*see id.*). The scoping process also permits interested parties to raise issues in a timely manner, and, under certain circumstances, a means of raising issues even after the final written Scope of Work document has been prepared (*see* 6 NYCRR 617.8[f]).

"The scoping procedure that is permissible under SEQRA is mandatory under CEQR. The City rules require a draft scope, a public comment period, and a final scope" (*Matter of Ordonez v City of New York*, 2018 NY Slip Op 51093[U], *2, 60 Misc 3d 1213[A] [Sup Ct, N.Y. County, Jul. 30, 2018]; *see* 62 RCNY 5-07). The CEQR scoping rules provide as follows:

> "After a notice of determination (positive declaration) is issued, the lead agency shall coordinate the scoping process, which shall ensure that all interested and involved agencies (including the City Council where it is interested or involved), the applicant, the O[ffice of] E[nvironmental] C[oordination], community and borough boards, borough presidents and the public are able to participate. The scoping process shall include a public scoping meeting and take place in accordance with the following procedure:
>
> "(a) Draft Scope. Within fifteen days after a notice of determination (positive declaration) is issued, the lead agency shall issue a draft scope, which may be prepared by the applicant but must be approved by the lead agency. The lead agency may consult with the OEC and other agencies prior to issuance of the draft scope.
>
> "(b) Public Notice and Comment. Upon issuance of the draft scope and not less than thirty nor more than forty-five days prior to the holding of the public scoping meeting, the lead agency shall publish in the City Record a notice indicating that a draft environmental impact statement will be prepared for the proposed action and requesting public comment with respect to the identification of issues to be addressed in the draft environmental impact statement. Such notice shall be in a format provided by the OEC and shall state that the draft scope and the environmental assessment statement may be obtained by any member of the public from the lead agency and/or the OEC. Such notice shall also contain the date, time and place of the public scoping meeting, shall provide that written comments will be accepted by the lead agency through the tenth day following such meeting, and shall set forth guidelines for public participation in such meeting.
>
> "(c) Agency Notice and Comment. Upon issuance of the draft scope and not less than thirty nor more than forty-five days prior to the holding of the public scoping meeting, the lead agency shall transmit the draft scope and the environmental assessment statement to all interested and involved agencies (including the City Council where it is interested or involved), to the applicant, to the OEC and to

> agencies entitled to send representatives to the public scoping meeting pursuant to §197-c(d) or 668(a)(7) of the Charter. Together with the draft scope and the environmental assessment statement, a letter shall be transmitted indicating the date, time and place of the public scoping meeting, and stating that comments will be accepted by the lead agency through the tenth day following such meeting. The lead agency may consult with other agencies regarding their comments, and shall forward any written comments received pursuant to this subdivision to the OEC.
>
> "(d) Public Scoping Meeting. The lead agency shall chair the public scoping meeting. In addition to the lead agency, all other interested and involved agencies that choose to send representatives (including the City Council where it is interested or involved), the applicant, the OEC, and agencies entitled to send representatives pursuant to §197-c(d) or 668(a)(7) of the Charter may participate. The meeting shall include an opportunity for the public to observe discussion among interested and involved agencies, agencies entitled to send representatives, the applicant and the OEC. Reasonable time shall be provided for the public to comment with respect to the identification of issues to be addressed in the draft environmental impact statement. The OEC shall assist the lead agency in ensuring that the public scoping meeting is conducted in an effective manner.
>
> "(e) Final Scope. Within thirty days after the public scoping meeting, the lead agency shall issue a final scope, which may be prepared by the applicant and approved by the lead agency. The lead agency may consult further with the OEC and other agencies prior to issuance of the final scope. Where a lead agency receives substantial new information after issuance of a final scope, it may amend the final scope to reflect such information.
>
> "(f) Scoping of City Agency Actions. For actions which do not involve private applications, nothing contained in these rules shall be construed to prevent a lead agency, where deemed necessary for complex actions, from extending the time frames for scoping set forth in this section, or from adding additional elements to the scoping process"

(62 RCNY 5-07).

In the instant matter, the petitioners correctly contend that the respondents undertook a scoping process for the construction of a jail at 80 Centre Street, and violated the regulations implementing both SEQRA and CEQR by moving the project site to a different location without undertaking a site-appropriate scoping process.

The scoping process is meant to define a particular project, thereupon to set forth the appropriate scope of review for *that* project, and thereafter to obtain relevant environmental information from involved agencies, interested agencies, and interested members of the public

to aid in formulating a DEIS referable to the proposed project. The entire purpose of the scoping process is defeated where, as here, a lead agency undertakes a scoping analysis for one project, and then proceeds to prepare the DEIS with respect to a completely different project without the salutary governmental and public input concerning the project actually sought to be constructed. The effect is particularly egregious here, where the Draft Scope of Work for the initially proposed 80 Centre Street project sets forth numerous cogent reasons, including socioeconomic, historical, land-use, and cultural reasons, for why the White Street site was singularly inappropriate, yet the DOC and other City agencies, without proper notice to the public, and without any scoping whatsoever, relocated the proposed project to that purportedly less-favorable site, and essentially proceeded to prepare a DEIS in the absence of any scoping referable to the actual project.

Thus, the preparation, issuance, and circulation of the DEIS, FEIS, and SEQRA findings statement were all made in violation of lawful procedure, and the City Council and CPC approvals must be annulled on that ground.

3. SEQRA/CEQR---CITY COUNCIL ISSUANCE OF FINDINGS STATEMENT

There is no merit to the petitioners' contention that the respondents violated SEQRA and CEQR because the City Council, rather than the DOC, as lead agency, issued the required SEQRA/CEQR findings statement (*see Matter of Northern Manhattan Is Not for Sale v City of New York*, 185 AD3d 515, 520 [1st Dept 2020]). In any event, the DOC ultimately issued its own SEQRA/CEQR findings statement.

4. SEQRA/CEQR-PREMATURE APPROVALS BY INVOLVED AGENCIES

As set forth in the New York State Department of Environment Conservation (NYS DEC) regulations implementing SEQRA with respect to all State and municipal agencies,

> "Prior to the lead agency's decision on an action that has been the subject of a final EIS, it shall afford agencies and the public a reasonable time period (not less than 10 calendar days) in which to consider the final EIS before issuing its written findings statement. If a project modification or change of circumstance related to the project requires a lead or involved agency to substantively modify its decision, findings may be amended and filed in accordance with subdivision 617.12(b) of this Part.
>
> "No involved agency may make a final decision to undertake, fund, approve or disapprove an action that has been the subject of a final EIS, until the time period provided in subdivision (a) of this section has passed and the agency has made a written findings statement. Findings and a decision may be made simultaneously."

(6 NYCRR 617.11[a], [c]). As far as can be gleaned from the administrative record, the CPC issued several approvals necessary to the White Street jail project on September 3, 2019, without issuing its own SEQRA findings statement and prior to the City Council's issuance of the findings statement on October 17, 2019.

Hence, the CPC's approval was made in violation of proper procedure, and must be annulled on that additional ground.

5. SEQRA/CEQR---HARD LOOK AT IMPACTS

The court agrees with the respondents that the FEIS took the requisite hard look at the anticipated impacts of the project in connection with almost all areas of environmental concern, including most of the areas identified by the petitioners.

Nonetheless, the court agrees with the petitioners that the respondents failed to take a hard look at the anticipated public health impacts of the project, and failed to provide a reasoned elaboration of their conclusion that, in essence, the demolition, excavation, and construction activities required for the project will present no public health impacts because the proposed mitigation measures are sufficient to assure such an outcome.

Human health is considered an aspect of the environment under SEQRA (*see* 6 NYCRR 617.2). Both the Mayor's OEC CEQR Technical Manual and the NYS DEC SEQRA Handbook provide that the public health implications of a proposed action must be considered. As noted,

the Chinatown and Civic Center neighborhoods adjacent to the White Street site were significantly affected by fallout from the September 11, 2001 terrorist attacks; even though that event occurred 19 years ago, health officials continue to discover that substantial traces of fallout remain unremediated in several downtown locations, and that both residents and first responders are still developing symptoms from exposure. A large excavation, demolition, and construction project such as the new White Street jail is almost certain to disturb fallout that has been precipitated on the ground in Chinatown and the Civic Centre, as well as release other toxic or hazardous materials employed in the initial construction and renovation of the existing White Street jail facilities.

Where, as here, the FEIS effectively ignores both the short- and long-term consequences of demolition, excavation, and construction activities on the health of the public in the neighborhood adjacent to the project, but has, in a merely conclusory fashion (*see Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1314 [4th Dept 2005]), determined that there will not likely be any impacts on public health, it has failed to take the necessary hard look at reasonably anticipated impacts (*see Matter of Bronx Comm. for Toxic Free Schools v New York City Sch. Constr. Auth.,* 20 NY3d 148, 156-157 [2012]). This is so even where, as here, the FEIS identifies proposed mitigation measures (*see id*). For this reason, the City Council and CPC approvals were arbitrary and capricious and affected by an error of law, and must be annulled on this ground as well.

The court notes that, while the FEIS's consideration of anticipated vehicular traffic impacts of the project would have been deemed to constitute a sufficient hard look had the final design and orientation of the project been the subject of that evaluation, for the reasons explained below, the analysis of that issue---based as it was on a mere presumption as to the design, layout, and orientation of parking facilities, ingress, and egress, is insufficient to satisfy SEQRA or CEQR.

6. SEQRA/CEQR---ALTERNATIVES

Although CEQR, in implementing SEQRA, requires that each FEIS include an analysis of a "no action" alternative as though the project were not being constructed, and existing conditions on the project would remain unchanged, an FEIS is not required to consider the petitioners' preferred alternative scenario of development at the project site where such a scenario would not have met the objectives and capabilities of the respondents (*see Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d at 5; 6 NYCRR 617.9[b][5][v]; *see also Matter of Residents for Reasonable Dev. v City of New York*, 128 AD3d 609, 610-611 [1st Dept 2015]). Consequently, where an FEIS identifies feasible alternatives to a proposed project, analyzes the impacts associated with those alternatives in comparison to the initial proposal, and incorporates aspects of the alternatives in mitigation of the impacts associated with the initial proposal, the lead agency has satisfied its obligations under SEQRA (*see* ECL 8-0109[2][d]; 6 NYCRR 617.9 [b][5][v]). The alternatives section of an FEIS need not identify or discuss every conceivable alternative, including the particular alternatives propounded by the petitioners, and need not be exhaustive, particularly where the various options lie along a continuum of possibilities (*see Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 777 [2005]). A rule of reason is applicable to the discussion of alternatives in an FEIS (*see Akpan v Koch*, 75 NY2d at 570). Nonetheless, compared to land-use applications submitted by a private developer,

> "[w]hen a governmental agency is an applicant a broader consideration of alternatives is appropriate for several reasons. Government agencies have greater financial resources, engage in projects of larger magnitude to which there are a larger range of feasible alternatives and, given their inherent power of condemnation, have a broader potential range of alternative locations for their projects"

(*Matter of Webster Assocs. v Town of Webster*, 112 Misc 2d 396, 410 (Sup Ct, Monroe County 1981]). Where there has been a reasonable consideration of such alternatives, the judicial inquiry is at an end (*see Matter of Town of Dryden v Tompkins County Bd. of Representatives*, 78 NY2d 331, 333-334 [1991]; *Matter of Halperin v City of New Rochelle*, 24 AD3d at 777; *see*

also Matter of Committee to Stop Airport Expansion v Wilkinson, 126 AD3d 788, 789 [2d Dept 2015]; *Matter of Save Open Space v Planning Bd. of the Town of Newburgh*, 74 AD3d 1350, 1352 [2d Dept 2010]; *Matter of County of Orange v Village of Kiryas Joel*, 44 AD3d 765, 769 [2d Dept 2007]).

Conversely, where, as here, an FEIS does not address any substantive alternatives whatsoever to a proposed agency action, any governmental approvals premised thereon, as well as the SEQRA/CEQR findings statement, must be annulled as arbitrary and capricious and affected by an error of law (*see Matter of County of Orange v. Village of Kiryas Joel,* 11 Misc 3d 1056[A] [Sup Ct, Orange County, Oct. 20, 2005], *mod other grounds* 44 AD3d 765 [2d Dept 2007]; *cf. Balsam Lake Anglers Club v. Department of Envtl. Conservation*, 153 Misc 2d 606, 612 [Sup Ct, Ulster County [1991]; [annulling negative declaration in EAF where no alternatives to the proposed action were identified]; *Ginsburg Dev. Corp. v Town Bd. of Cortlandt*, 150 Misc 2d 24 [Sup Ct, Westchester County 1990] [same]).

7. SEQRA/CEQR---DEFINITION OF THE PROJECT—DEFERRAL OF REVIEW OF IMPACTS

Where, as here, a lead agency determines that a proposed action may have a significant impact upon the environment, and thus requires the preparation of an EIS, that document must set forth "a description of the proposed action," including its environmental impact and any unavoidable adverse environmental effects (ECL 8-0109[2][a]-[c]; 6 NYCRR 617.9[b]), alternatives to the proposed action (ECL 8-0109 [2] [d]), as well as mitigation measures to minimize the environmental impact (ECL 8-0109[2][f]; 6 NYCRR 617.9[b][5][iv]). Where an agency improperly defers or delays a full and complete consideration of relevant areas of environmental concern, the SEQRA findings statement approving the FEIS must be vacated as arbitrary and irrational (*see Matter of County of Orange v Village of Kiryas Joel*, 44 AD3d at 768;

see generally Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd., 253 AD2d 342 [4th Dept 1999]).

The respondents deferred and delayed a full and complete consideration of vehicular traffic and congestion-related impacts inasmuch as those impacts are design-specific. The FEIS made an assumption as to where on-street and underground parking would be situated, and that sally-ports for ingress and egress of shuttle buses, trucks, delivery vehicles, and visitors' vehicles would be situated on Centre Street, rather than Baxter Street. Since the respondents elected to employ the "design-build" method of contracting, neither they nor the public will know whether the traffic analysis contained in the FEIS truly applies to the project unless and until a final design is submitted and approved. The deferral of a traffic analysis until the unveiling of the actual design, layout, placement, configuration, capacity, and size of parking facilities, sally-ports, and receiving docks at the proposed jail is improper, violates SEQRA and CEQR, and constitutes an additional ground for the annulment of the City Council and CPC approvals (*see Matter of Corrini v Village of Scarsdale*, 2003 NY Slip Op 51553[U], 1 Misc 3d 907[A], n 11 [Sup Ct, Westchester County, Dec. 23, 2003]; *cf. Matter of Coppola v Good Samaritan Hosp. Med. Ctr.*, 309 AD2d 862 [2d Dept 2003] [annulling negative declaration contained in EAF where lead agency deferred consideration of likely significant vehicular traffic impacts]).

B. ULURP

ULURP creates a complex procedural process for the approval by the City or a City agency of "changes approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to city regulation" in twelve specified circumstances (*Matter of Neighborhood in the Nineties v City of New York*, 24 Misc 3d 1239[A], 2009 NY Slip Op 51812[U], *11 [Sup Ct, N.Y. County, Aug. 13, 2009]). The ULURP process is triggered where, as here, a "site selection for capital projects" is made by a City

agency, such as the DOC, or a disposition of City-owned property is involved (*see* New York City Charter § 197-c[a][5], [10]).

ULURP requires that, upon the filing of proposals for land-use activity of specified types with the DCP, the proposal must be forwarded to the appropriate Community Board (*see* New York City Charter § 197-c[c]). A Community Board is composed of not more than 50 persons who reside or have a business, professional, or other significant interest in the particular Community District (*see* New York City Charter § 2800). Community Districts coincide as far as possible with the historic communities from which the city has developed (*see* New York City Charter § 270 [b][1]). The Community Board is authorized to hold hearings, prepare plans for the improvement and development of its district and cooperate with and advise city agencies and officials (*see* New York City Charter § 2800[d]).

Upon receipt of a land use proposal, a Community Board has 60 days within which to conduct a public hearing and submit its written recommendations to the CPC. Not later than 60 days thereafter, the CPC must reach its own conclusion on the proposal and its determination, if it modifies or disapproves a Community Board recommendation, "shall be accompanied by a written explanation of its reason for such action" (New York City Charter § 197-c[e]). The CPC's decision is submitted, in turn, to the City Council for final action (*see* New York City Charter § 197-d[b][1]; 62 RCNY 2-02[a][5], [b][5]). "The Community Board, although it acts in a purely advisory capacity, is, therefore, the means whereby those who live or work in an area affected by a proposal land use are advised of pending proposals and given the opportunity to make known their views" (*Matter of Waybro Corp. v Board of Estimate of City of N.Y.*, 67 NY2d 349, 355 [1986]; *see Akpan v Koch*, 75 NY2d 561 [1990]).

1. ULURP---CONSOLIDATION OF BBJS PROJECT

The court rejects the petitioners' contention that, while SEQRA and CEQR permit the consolidation of several sites of an overall project for the purposes of environmental review in a

Generic or Programmatic EIS, ULRUP prohibits such consolidation. Although the salutary purpose of the ULURP process is to encourage local community involvement and input in connection with a project proposed to be sited in a particular Community District, the petitioners have cited, and research has revealed, no authority for their contention that ULURP prohibits programmatic or multi-site consideration of land-use effects of a city-wide project.

2. ULURP---DEFERRAL OF DESIGN-SPECIFIC CONSIDERATIONS

For the same reason that the court concludes that the respondents violated SEQRA and CEQR in deferring site- and design-specific analysis of traffic impacts, the court also concludes that evaluation of all land-use impacts must be considered *during* the ULURP process, and cannot be deferred for ad hoc, post-ULURP consideration.

In this regard, the City Council and CPC approvals were made in the absence of proper procedure and are affected by an error of law. These approvals must thus be annulled on these grounds as well.

C. FAIR SHARE CRITERIA

New York City Charter § 203 provides that:

> "a. Not later than the first day of July, nineteen hundred ninety, the mayor, after consulting with each of the borough presidents, shall file with the city planning commission proposed rules establishing criteria for (1) the location of new city facilities and (2) the significant expansion, closing or significant reduction in size or capacity for service delivery of existing facilities. The criteria shall be 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. Not later than thirty days after the filing of such proposed rules, the city planning commission shall publish a notice of proposed rule making under section one thousand forty-three with regard to such rules, as proposed by the mayor or as proposed to be modified by the commission. Promptly thereafter, the commission shall approve or approve with modifications the rules and shall file the rules as approved with the council.

> "b. At any time after the adoption of such criteria, the mayor, after consulting with the borough presidents, may submit to the city planning commission proposed amendments to the rules. Not later than thirty days after the filing of such proposed amendments, the city planning commission shall publish a notice of proposed rule making under section one thousand forty-three with regard to such amendments, as proposed by the mayor or as proposed to be modified by the commission. Promptly thereafter, the commission shall approve, approve with modifications or determine not to approve the amendments and shall file any approved amended rules with the council.
>
> "c. For purposes of this chapter, 'city facility' shall mean a facility used or occupied or to be used or occupied to meet city needs that is located on real property owned or leased by the city or is operated by the city or pursuant to a written agreement on behalf of the city."

These criteria "come into force only where the City locates a new facility, significantly expands, closes or significantly reduces the size or capacity for service delivery of existing facilities" *(Matter of West 97th-West 98th Sts. Block Ass'n v Volunteers of Am.*, 190 A.D.2d 303, 308 [1st Dept 1993]). Although, as noted above, the respondents failed to conduct a proper analysis of proposed alternatives to the project (*see Matter of Silver v Dinkins*, 158 Mis. 2d 550 [Sup Ct, N.Y. County 1993]), the petitioners failed to establish that the demolition of two existing jail facilities and their replacement with one larger jail facility on the same site would unduly burden Chinatown or the Civic Centre will undesirable City facilities, or that the FEIS itself did not adequately consider the burden imposed by the presence of numerous such facilities upon those neighborhoods.

IV. REMEDY

The October 17, 2019 City Council resolutions and the September 3, 2019 CPC approvals must be annulled as arbitrary and capricious, affected by error of law, and rendered in the absence of proper procedure.

Contrary to the petitioners' suggestion, however, the matter should not be remitted to the DOC or City Council for the preparation of supplemental environmental impact statement (hereinafter SEIS), as the preparation and circulation of an SEIS is not the proper vehicle in

which to consider the environmental issues that have not fully or properly been considered. An agency may require an SEIS where inadequacies in the FEIS "arise from . . . (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project" (6 NYCRR 617.9[a][7][i]; *see Matter of Jackson v New York State Urban Development Corp.*, 67 NY2d at 429-430; *see also Matter of Riverkeeper, Inc. v Planning Board of Town of Southeast*, 9 NY3d 219 [2007]). Since the inadequacies here did not "arise from" those factors, but rather from deficiencies in the initial FEIS, the FEIS must be amended, rather than supplemented, to address the issues of environmental concern that were insufficiently analyzed (*see Matter of Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 AD3d 1539, 1540 [3d Dept 2012]; s*ee generally Matter of County of Orange v Village of Kiryas Joel*, 44 AD3d at 769).

An injunction prohibiting physical alteration and construction on the White Street site is an appropriate remedy *(see generally Matter of Stop BHOD v City of New York*, 2009 NY Slip Op 50461[U], 22 Misc 3d 1136[A] [Sup Ct, Kings County, Mar. 13, 2009]).

Accordingly, it is

ADJUDGED that the petition is granted, as set forth above, and New York City Council Resolutions 1118-1130, dated October 17, 2019, New York City Planning Commission approvals dated September 3, 2019, and any relevant approvals issued by the New York City Department of Correction, the New York City Department of City Planning, and the New York City Department of Citywide Administrative Services, are annulled to the extent that they apply to the proposed construction of a new jail at 124-125 White Street, New York, New York; and it is,

ORDERED that the respondents be and hereby are enjoined from taking any physical steps to effectuate the construction of a new jail at 124-125 White Street, New York, New York, including, but not limited to, any grading, alteration, demolition, sub-surface drilling, erection and

placement of temporary structures, storage of construction vehicles and equipment, and permanent construction at that location, pending

(1) the scheduling and convening of a new site-specific scoping session referable to 124-125 White Street, New York, New York, with preparation and circulation of an appropriate amended Draft Scope of Work document and the provision of adequate notice to the public,

(2) the provision of an appropriate public comment period on the amended the Draft Scope of Work document, which shall be combined with ULURP hearings addressing design-specific vehicular traffic impacts,

(3) the preparation and circulation, after the details of the project design have been articulated, of an amended DEIS referable to 124-125 White Street, New York, New York, that properly addresses the anticipated public health impacts of the project, the vehicular traffic impacts that are anticipated to arise from the actual, specific design thereof, and reasonable alternatives to the proposed project site,

(4) the provision of an appropriate public comment period with respect to the amended DEIS,

(5) the preparation and circulation thereafter of an amended FEIS referable to 124-125 White Street, New York, New York, and

(6) the preparation and circulation of new SEQRA findings statements referable to 124-125 White Street, New York, New York.

This constitutes the Decision, Order, and Judgment of the court.

9/21/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

EXHIBIT 2

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., González, Mendez, Shulman, JJ.

13358 In the Matter of NEIGHBORS UNITED BELOW CANAL, et al.,
Petitioners-Respondents,

-against-

MAYOR BILL DEBLASIO et al.,
Respondents-Appellants.

Index No. 100250/20
Case No. 2020-03916

James E. Johnson, Corporation Counsel, New York (Amy McCamphill of counsel), for appellants.

Mintzer Mauch PLLC, New York (Helen Mauch of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (John J. Kelley, J.), entered September 22, 2020, which, to the extent appealed from as limited by the briefs, granted the petition to the extent of annulling the approvals issued by respondent New York City Planning Commission, dated September 3, 2019, the resolutions of respondent New York City Council, dated October 17, 2019, and any relevant approvals issued by respondents New York City Department of Correction, Department of City Planning, and Department of Citywide Administrative Services insofar as applicable to the proposed construction of a new jail at 124-125 White Street, New York, New York, and enjoined respondents from taking any physical steps to effectuate such construction, pending certain administrative procedures directed by the court, unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

The scoping process in this case was not arbitrary and capricious, affected by an error of law, or in violation of lawful procedure. Initially, two nearby locations for the proposed jail were considered: 124-125 White Street and 80 Centre Street. The Centre Street site was identified during the scoping process, but the proposed site was changed to White Street after further review, including consideration of public comments received during the process. This change of location was reflected in the final scope of work and other documents, including the draft and final versions of the environmental impact statement. The applicable regulations allow significant post-scoping changes to a project (*see e.g.* 6 NYCRR 617.8[f], [g]; 62 RCNY 5-07[e]). Under the particular circumstances of this case, the scoping process did not have to be redone; respondents had already "performed each of the required steps in the SEQRA review process," and a "de novo environmental review" would have been "redundant" (*Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 349-350 [1996] [internal quotation marks omitted]).

We are mindful that the SEQRA process requires strict, not substantial, compliance (*see King*, 89 NY2d at 347 [1996]; *Matter of Jackson v New York State Urban Dev. Corp.,* 110 AD2d 304, 307 [1st Dept 1985], *affd* 67 NY2d 400 [1986]). As earlier noted, this case involved a unique situation, in which two possible sites were known to the affected communities and the selection of the alternate site flowed from community participation in the underlying process. For this reason, we decline to hold, on this record, that a change in sites alone mandates that the scoping process begin anew. To be clear, our holding does not foreclose a situation where a change in site might require the scoping process to begin anew, however, this is not that case.

We find that the environmental review considered a reasonable range of alternatives (*see e.g. Matter of Town of Dryden v Tompkins County Bd. of Representatives*, 78 NY2d 331, 334 [1991]; *Matter of Williamsburg Community Coalition v Council of the City of N.Y.*, 100 AD3d 521, 522 [1st Dept 2012]), took the requisite hard look at impacts on public health (*see e.g. Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416 [2017]), traffic, and parking, and "made a reasoned elaboration of the basis for its determination" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006] [internal quotation marks omitted]). The Uniform Land Use Review Procedure also properly considered traffic and parking matters.

Contrary to the article 78 court's finding, the City Planning Commission complied with the requirement to issue written findings statements in support of its September 2019 project approvals (6 NYCRR 617.11[c]).

M-4182 ***In the Matter of Neighbors United Below Canal v Mayor Bill de Blasio***

Motion for leave to file amici brief granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 30, 2021

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 3

PLEASE TAKE NOTICE that the attached order was entered in the office of the Clerk of the Appellate Division, First Department, on June 3, 2021.

Dated: June 3, 2021

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of the City of New York
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Case No. 2020-03916

New York Supreme Court
Appellate Division: First Department

In the Matter of the Application of

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

Petitioners-Respondents,

against

MAYOR BILL DEBLASIO, THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, MARISA LAGO, NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY DEPARTMENT OF CORRECTION, CYNTHIA BRANN, NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE, ELIZABETH GLAZER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, and NEW YORK CITY COUNCIL,

Respondents-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

JAMES E. JOHNSON
Corporation Counsel of the City of New York
Attorney for Respondents-Appellants
100 Church Street
New York, New York 10007

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Sallie Manzanet-Daniels, Justice Presiding,
Lizbeth González
Manuel J. Mendez
Martin Shulman, Justices.

In the Matter of Neighbors United Below Canal, et al., Petitioners-Respondents,	Motion No.	2021-01543
	Index No.	100250/20
	Case No.	2020-03916

-against-

Mayor Bill DeBlasio, et al.,
Respondents-Appellants.

Petitioners-respondents having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on March 30, 2021 (Appeal No. 13358),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED: June 03, 2021

Susanna Molina Rojas
Clerk of the Court