To Be Argued By:
Helen C. Mauch
Time Requested: 10 Minutes

New York County Clerk's Index No. 100250/20

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2020-03916

In the Matter of

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

Petitioners-Respondents,

For a Judgment pursuant to Article 78 of the CPLR

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.

BRIEF FOR PETITIONERS-RESPONDENTS

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Petitioners-Respondents, Neighbors United Below Canal, Jan Lee, DCTV, Edward J. Cuccia, Betty Lee, and American Indian Community House (collectively, "Respondents") by their attorneys, Mintzer Mauch PLLC, submit this brief in opposition to the Appeal of Respondents-Appellants, Mayor Bill DeBlasio, The City of New York, New York City Planning Commission ("CPC"), Marissa Lago, New York City Department of City Planning ("DCP"), New York City Department of Correction ("DOC"), Cynthia Brann, New York City Mayor's Office of Criminal Justice ("MOCJ"), Elizabeth Glazer, New York City Department of Citywide Administrative Services, Lisette Camilo, and New York City Council (collectively, "Appellants" or "the City").

Appellants appeal from the Decision, Order and Judgment of Judge John J. Kelley, dated September 21, 2020, and entered on same date (the "Decision," Index No. 100250/2020).

PRELIMINARY STATEMENT

The core issue on this Appeal is whether a project sponsor should be held bound to comply with the clear requirements of existing laws. Appellants offer post hoc justifications to rescue the City from its own botched pursuit of the Borough Based Jail System ("BBJS") project with respect to a jail in Manhattan, which made a mockery of the State Environmental Quality Review Act

("SEQRA")[1] and the Uniform Land Use Review Procedure ("ULURP"). If the City's arguments are accepted, this Court would be creating new standards and previously unimaginable exceptions that are antithetical to decades of jurisprudence and would change the legal landscape for both public and private developers. No matter the merits of the City's plan to close Rikers Island, the City was required to follow the law.

The City's mantra on this Appeal is that the lower Court "misread" the "voluminous" Record (App. Br. 22, 23, 28) and misapplied the law.[2] But this Court does not need to dig deep into the Record to find that the City's errors and shortcuts on the way to approving the White Street jail were obvious, numerous and momentous, as they thwarted meaningful and required public participation as well as deliberation and meaningful input by the City's own expert agencies.

There is no dispute that the City conducted public scoping for a jail at 80 Centre Street, but failed to conduct public scoping for a new jail at 124-125 White Street. This procedural violation resulted in an illegal environmental review process that cannot be deemed cured by subsequent opportunities for public

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[1] Except as specifically stated otherwise herein, all references to SEQRA shall be deemed to also refer to CEQR. *See Akpan v Koch*, 75 N.Y.2d 561, 567 (1990) (noting that CEQR "implements SEQRA in the City of New York"); *N.Y.C. Coal. to End Lead Poisoning v Vallone*, 100 N.Y.2d 337, 347 (2003) ("As relevant here, the challenges made under CEQR are indistinguishable from the state law [i.e., SEQRA] claims.").

[2] References herein to "R. __" are to the pages of the Record on Appeal filed by Appellants (Volumes 1 through 32).

comment on the Draft Environmental Impact Statement ("DEIS"), or on the basis that the jail sites were so "close" to one another that the location change was immaterial and harmless. The lower Court properly applied Court of Appeals SEQRA precedent mandating strict procedural compliance and annulled the City's approval of the White Street jail because of this consequential procedural error.

The Record also shows that the process was so rushed and lacking basic information that required impact analyses were deferred or absent altogether, and the CPC was compelled to craft an *ultra vires post*-ULURP approval review process in order to provide "meaningful input" on the project that the CPC itself concluded it was unable to provide *prior to* ULURP approval.

"[H]ard cases, make bad law," *Northern Securities Co. v United States*, 193 U.S. 197, 363 (1904) (Holmes, J., dissenting), and "botched cases make even worse law." *People v Perez*, 35 N.Y.3d 85, 99-100 (2020) (Williams, J., dissenting). Respectfully, this Court should not bend well-settled principles of the law so that the City can proceed with the White Street jail despite its violations of SEQRA and ULURP. For the reasons set forth herein, this Court is urged to affirm the Decision and dismiss the instant Appeal in its entirety.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is it a violation of SEQRA if the lead agency fails to undertake the mandatory procedural step of public scoping for a proposed project?

The Court below correctly answered this question "yes."

2. Is it a violation of SEQRA if the lead agency fails to consider any alternative sites for and ignores substantive alternatives to a proposed project that involves site selection for a City facility?

The Court below correctly answered this question "yes."

3. Is it a violation of SEQRA if the lead agency fails to undertake any assessment of a proposed project's reasonably anticipated public health impacts and, instead, asserts that any potential public health impacts will be mitigated by boilerplate construction safety measures that are disclosed for the first time in the FEIS?

The Court below correctly answered this question "yes."

4. Is it a violation of SEQRA if the lead agency defers consideration of potential traffic impacts from a proposed project?

The Court below correctly answered this question "yes."

5. Where a proposed project's design is not advanced enough to enable the DCP or the CPC to meaningfully review the project prior to ULURP approval,

is it lawful to establish a multi-pronged post-ULURP approval process to provide for such required review?

The Court below correctly answered this question "no."

COUNTERSTATEMENT OF FACTS

Following is a summary of the facts relevant to this Appeal.

1. The White Street Jail Location

The proposed Manhattan jail would be located on a site on White Street between Centre and Baxter Streets that is currently occupied by two jail buildings, a South Tower at 125 White Street (opened in 1983) and a North Tower at 124 White Street (opened in 1990). R. 13. These buildings are connected by a skyway above an open-air pedestrian plaza on White Street. *Id.*; s*ee also* R. 454-55 (diagram of the North Tower (building "B") and the South Tower (building "A")), and R. 12183 (showing the open-air White Street pedestrian plaza).

In 1982, before the South Tower was even finished, the City proposed constructing two additional jail structures on the block immediately north of White Street and the South Tower. R. 29. The Chinatown community opposed the construction of additional jail space in the neighborhood and expressed the dire need for housing and local retail space. R. 54. Despite the community opposition, the City went ahead and constructed an additional jail in a North Tower across White Street. *Id.*

To address some of Chinatown's concerns regarding the impacts of this second jail in Chinatown and the need for affordable housing and local retail space, the City took several actions. It entered into leases with a Chinatown local development corporation (Walter Street – Chung Pak Local Development Corporation ("Chung Pak LDC")) for the land immediately to the north of the North Tower, fronting Walker, Centre and Baxter Streets. R. 54. One lease allowed Chung Pak LDC to construct an 88 unit building for the elderly at 96 Baxter Street (known as Chung Pak or Everlasting Pines) with an open roofed terrace for tenants to recreate outside. *Id*.; R. 55; R. 455 (Chung Pak indicated as building "C", with open rooftop space show as "E"). The other lease allowed Chung Pak to develop a low-rise commercial building at the corner of Walker and Centre Streets, and also granted Chung Pak 5,950 square feet of commercial space within the North Tower along both Centre and Baxter Streets. R. 54-55.

As an additional "community give-back" for construction of the North Tower, the City promised that White Street between Centre and Baxter Streets would be a pedestrian only public plaza space (R. 55; R. 438-39), and commissioned artwork for the public space, including decorative paving elements for the surface of the plaza, and friezes and sculptures on the aerial walkway that connects the North and South Towers. These installations were designed by DOC and approved by the Art Commission of the City of New York as part of the New

York City "Percent for Art" Program, Local Law 65, where 1% of the capital budget for new buildings is spent on art to make art accessible and visible throughout the City and to create permanent public art in City-owned buildings. *See* R. 56. These designs show an entirely car free plaza with landscaping, decorative paving elements intended to show pictograms of Chinese elements, wire mesh columns, and a wire mesh throne atop the aerial bridge. R. 2139-2142.

Despite the promise of permanent public plaza space to the community as a concession for the additional jail, DOC commandeered the plaza for parking its vehicles sometime after September 11, 2001, and painted lines over the decorative pavement to create parking spaces. *See* R. 438-39; R. 1925. Thereafter, pavers on the plaza were replaced without regard to the pictogram of Chinese elements. R. 12183.

White Street is 50 feet wide and extends approximately 230 feet between Baxter and Centre Streets. Although the City now uses the sides of the plaza for parking, it is still a main pedestrian artery that connects the eastern heart of Chinatown and its small-scale local shops and institutions with the neighborhoods located west of Centre Street. Its existence allows light and air to permeate the neighborhood, despite the height of the North and South Towers. Moreover, because the blocks between Hogan and White Street are fully occupied by large government buildings, White Street provides the only direct means of pedestrian

and bike through access from Baxter Street to Centre Street, from Hogan Place all the way up to Walker Street. R. 57.

2. Environmental Review and CPC and City Council Approval of the BBJS Project

A stated goal of the BBJS project is to construct four separate jails, one each in Manhattan, Brooklyn, Queens, and the Bronx, to replace the centralized jails on Rikers Island. On August 14, 2018, DOC identified itself as lead agency for purposes of conducting the environmental review of the BBJS project (R. 6220) and issued an environmental assessment statement (R. 6287), a Positive Declaration (R. 6224), and a Draft Scope of Work for preparation of the DEIS ("Draft Scope"). R. 6231. Each of these documents stated that the Manhattan jail would be located on 80 Centre Street, a site that currently houses the Manhattan District Attorney's Office, the Office of the City Clerk, and other court-related and City offices. R. 6220, 6224, 6231, 6237, 6244.[3] The Positive Declaration announced that one public scoping meeting would be held in each of the four boroughs and that the date for the Manhattan public scoping meeting would be September 27, 2018, with comments accepted until October 15, 2018. R. 6228.

[3] On one page of the Decision, the lower court states that the Draft Scope included "the basic configuration of the proposed facility on the White Street site." R. 15. This is a typo; the lower court clearly comprehended that the site of the Manhattan jail identified in the Draft Scope was 80 Centre Street. R. 14, 16.

At some point prior to commencing the environmental review for the BBJS project, the Mayor's Office considered placing a new (or perhaps merely renovated) jail in Manhattan within or on the site of the South Tower at 125 White Street. *See* R. 6621 (referencing "initial conversations" regarding repurposing or rebuilding the Manhattan Detention Center at 125 White Street). It is beyond dispute, however, that when the City commenced the environmental review for the BBJS project, 80 Centre Street had become the City's chosen location for a new jail in Manhattan (R. 6244), and the North Tower at 124 White Street was anticipated to be available for future community use. *See* R. 1118; 6244.

On September 27, 2018, the day of the public scoping meeting for the 80 Centre Street jail, MOCJ was still fully committed to a jail on 80 Centre Street, and defended the choice of 80 Centre Street for the new Manhattan jail over a potential White Street location. MOCJ sent a letter to the City Councilwoman for Chinatown, explaining that although the administration had considered the South Tower on 125 White Street as a potential jail location,

> 80 Centre Street was selected by the Administration because it was closer to the civic core and comparably scaled buildings … the 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

> [124] White Street to the community for development into another community need such as housing.

R. 1118.

The public scoping meeting for the 80 Centre Street was held in a location that could not accommodate all who wanted to attend. Members of the public waited for hours outside, and many were ultimately turned away from the meeting. R. 62. Written comments on the Draft Scope for a jail on 80 Centre Street were accepted until October 29, 2018. R. 1117.

In late November, however, it was reported in the press that the City was abandoning its plan to construct a jail on Centre Street and, instead, would pursue a new jail on White Street. By letter to the Manhattan Borough President dated November 30, 2018, MOCJ, in a complete turnaround, confirmed that in fact the City had decided to locate a new jail at 124-125 White Street, stated that it would "push back [ULURP] certification approximately three months for all sites" to "accommodate" this change "without negatively impacting the 10 year Close Rikers timeline," and stated that, MOCJ was "committed to providing more substantive opportunities for community engagement throughout and beyond the [ULURP] and building design process." R. 3272.

The Manhattan Borough President responded to MOCJ's letter immediately, stating that:

> *There have been calls for the entire environmental review process to be restarted given the significant change to the project, and these requests have merit.* At a minimum, 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. I understand this may add a few months to this process but *we must ensure that we fulfill the intent of SEQRA, which is to allow for public comment on what is actually being proposed*.

R. 3270 (emphasis added). By letter dated January 7, 2019, the City responded to the Borough President and explained that it did not intend to conduct scoping for the new White Street jail because "there is a lot of overlap between the impacted area and impacted community" and "there is a lot of process still left and there will be numerous opportunities for meaningful public engagement, including commenting on the Draft Environmental impact Statement (DEIS) and engagement throughout [ULURP]." R. 3276.

On March 22, 2019, DOC simultaneously issued the Final Scope of Work for the DEIS ("FSOW") (R. 6379), the Notice of Completion of the DEIS, and the DEIS itself covering the four jails. R. 9584. This was the first time that the details regarding a new jail on White Street became available to the public. Both the FSOW and the DEIS revealed that the new jail would be constructed on the location of both the North and South Towers at 124-125 White Street, directly adjacent to the Chug Pak Senior Living Center. R. 6380, 6395, 6399-6402. These documents also showed, for the first time, that the City was proposing a permanent

closure of the White Street open-air pedestrian plaza connecting Chinatown to the Tribeca neighborhood to the west (R. 6402), as well as the acquisition of the local retail leasehold interests along Baxter and Centre Streets. R. 6409, 6421. Thus, the very features that were promised to the Chinatown community when the City constructed the North Tower, would be extinguished by a new White Street jail. These documents also showed that the City was proposing to locate the jail's parking garage for DOC employees on the narrow Baxter Street, right next to the lobby entrance of Chung Pak on Baxter Street. R. 6401.

The FSOW contained a response to comments on the Draft Scope. However, all the comments on the Draft Scope for the jail in Manhattan were addressed to a jail located on 80 Centre Street, because that had been the subject of the Draft Scope. *See, e.g.,* R. 6492 (comment 77), 6494 (comments 80-81), 6518 (comment 117), 6521 (comment 122), 6522 (comments 123-124), 6523 (comment 128), 6527 (comment 139), 6550 (comment 185).

While the DEIS was being prepared, the City had begun to pursue a single ULURP covering all four jail buildings, even though each jail was in a different borough. The ULURP process for the four jails was also unique because the BBJS project represented the first time that the City was pursuing a design-build model for buildings that were subject to ULURP. R. 4318 (noting that the BBJS project is the first Design-Build project to go through ULURP). Thus, instead of

designing the jails to a certain extent, seeking the requisite ULURP approvals, and then procuring construction services for the designed and approved jails, the City decided to proceed through ULURP with "only very preliminary massing designs" for each jail. R. 4387. Under the design-build scenario, the City would procure a contractor to both design and construct the jails *after* it obtained the ULURP approvals. *Id*.

When the DEIS was issued, the single ULURP application for site selection for all four jails (R. 2805, 2814) was certified as complete. *See* R. 3138. On July 10, 2019, there was one public hearing on the DEIS for all four jails, which was combined with the required hearing on the ULURP application for all four jails. Because people from all over the City attended the hearing, many people who wanted to attend or speak at the hearing were denied the opportunity to do so. R. 76.

Due to the late change in project location, the DEIS for the Manhattan jail omitted certain information that was included for the other three jails. The DEIS admitted, for example, that "[u]nlike 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." R. 10591. The DEIS also did not contain critical data on existing, no action and with action traffic conditions for the White Street jail that

was included for each of the other borough jails (R. 11016-20 (Bronx), R. 11021-25 (Brooklyn), R. 11027-31 (Queens), thus deviating from the City's own stated methodology for the analysis of traffic impacts.

Comments on the DEIS noted that public scoping had been conducted for a jail on 80 Centre Street and not for a jail at 124-125 White Street. *See, e.g.,* R. 13216, 13298, 1366-67. The comments also noted the absence in the DEIS of any public health assessment whatsoever and any details regarding construction impacts, and that the traffic impact analysis was flawed in numerous ways. *See, e.g.,* R. 463-500.

On August 23, 2019, DOC issued a Notice of Completion of the FEIS. R. 14782. The City added several documents to Appendix E of the FEIS[4] that were missing from the DEIS for the Manhattan jail, including a Phase II environmental report, as well as a RAP and CHASP. R. 11196.

Ten days later, on September 3, 2019, the CPC voted to approve the BBJS project and issued a series of reports. The lead CPC report (R. 4311) noted the unique nature of the BBJS project in that the City was proposing a "Design-Build" process rather than the typical "Design – Bid – Build development process, in which an Applicant hires one team to design the project and then, following

[4] References herein to Appendix E are to the page numbers in Appendix E to the FEIS, which was omitted from the Record but is available at 18DOC001Y_FEIS_08232019_Part_14.

approval, another team to build the project." R. 4387. The CPC further stated that it was "keenly aware of the challenges faced by the public, elected officials, DCP and the Commission itself in reviewing and commenting during the ULURP process, since only very preliminary massing diagrams for the proposed borough-based jail facilities are available." R 4387. CPC observed that projects typically come before the Commission where "the conceptual design of the project achieves approximately 30 percent completion" but that because of the design-build approach for the jails, "the level of design available for ULURP is less than available for a traditional project … [and] the reality is that the design will not be set until the Design-Build teams have been selected, which will occur after the ULURP process has been completed." *Id.*

To address the reality that the White Street jail was insufficiently designed to enable the usual and appropriate level of review by the DCP, CPC or the public during the ULURP process, the CPC included in its lead resolution approving the BBJS project an elaborate "multi-pronged post-ULURP process." R. 4388. This post-ULURP process required the Department of Design and Construction ("DDC"), a City agency that was not the ULURP applicant, to brief the CPC after the ULURP process so that the CPC would have information that was up to the "same completion threshold where the Commission typically reviews a project, and will enable the Commission to provide meaningful feedback as the Design-

Build teams make revisions to the designs." R. 4388. The CPC further resolved that "[t]he Commission believes that it is critical that DCP's urban design and technical experts also remain involved … [and DDC] has agreed that, at a minimum, DCP will be involved during the development of the RFQ (Request for Qualifications) and RFPs [Request for Proposals], after each RFP is issued as a member of the technical and design evaluation teams, after award of contracts and finally, after completion of the final design to gather any additional feedback." R. 4388.

After approval by the CPC, the BBJS project was referred to the City Council for review and approval and the City Council held its sole public hearing on the project on September 5, 2019. R. 4710. On October 17, 2019, the City Council passed several resolutions approving the BBJS project. The next day, MOCJ sent a letter to the City Council that memorialized "a comprehensive list of the City's commitments" related to the borough-based jails. R. 6122. This letter attached a 24-page list of "Borough-Based Jail Plan Points of Agreement" (R. 6124–6147, "BBJS Points of Agreement") that specifically includes, with respect to the White Street jail, a commitment to "[m]oving the vehicular entrance from Baxter Street to Centre Street." R. 6138. The letter further states that in connection with this change, "[t]he City will submit a follow-up action, subject to the required land use approvals, and environmental review as appropriate, to

relocate the vehicular entrance of DOC authorized vehicles from Baxter Street to Centre Street." R. 6138.

For reasons unknown, the lead agency did not complete the SEQRA process by issuing SEQRA Findings until March 11, 2020 (R. 14912), six months after the CPC approved the BBJS project, and almost five months after the City Council approved the BBJS project.

On October 14, 2020, the City issued a Technical Memorandum for the New York City Borough-Based Jail System 002, CEQR No. 18DOC001Y, https://a002-ceqraccess.nyc.gov/Handlers/ProjectFile.ashx?file=MjAxOFwxOERPQzAwMVlcdGVjaF9tZW1vXDE4RE9DMDAxWV9UZWNobmljYWxfTWVtb3JhbmR1bV9fMTAxNDIwMjAucGRm0&signature=d87e1de4a61e624459622fbcbf97a21f9be85c8f (the "2020 Technical Memorandum"), which also disclosed that the vehicular entrance for the White Street jail would be moved from Baxter Street, as studied in the EIS, to Centre Street. 2020 Technical Memorandum at p. 3.

ARGUMENT

POINT I.

THE CITY VIOLATED THE MANDATORY PROCEDURAL REQUIREMENTS OF SEQRA/CEQR BECAUSE IT FAILED TO CONDUCT PUBLIC SCOPING FOR A JAIL ON WHITE STREET

The lower Court correctly held that "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." R. 31. Appellants argue that moving the project from Centre Street to White Street without further public scoping did not violate SEQRA because doing so was a harmless, mere "project change" that was disclosed in the FSOW and DEIS, there were opportunities to comment on the DEIS for the White Street jail, the White Street jail is "close" to 80 Centre Street, and some people opposed to a jail on 80 Centre Street were happy about the change. These arguments are contrary to longstanding precedent that strict compliance with SEQRA's procedural mandates is required, and if accepted, would create new bad law.

A. The Record Shows that the City Did Not Strictly Comply With CEQR's Mandatory Scoping Procedures

It has long been held that strict, not substantial, compliance with SEQRA's procedural requirements is required. *King v. Saratoga County Bd. Of Supervisors*, 89 N.Y.2d 341, 347 (1996) ("the substance of SEQRA cannot be achieved without

its procedure, and departures from SEQRA's procedural mechanisms thwart the purposes of the statute"); *Merson v. McNally*, 90 N.Y.2d 742, 750 (1997) (SEQRA's policy of "inject[ing] environmental considerations directly into governmental decision making . . . is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations"); *Jackson v. New York State Urban Dev. Corp*. 110 A.D. 2d 304, 307 (1st Dep't 1985), *aff'd* , 67 N.Y.2d 400 (1986) ("To effectuate the statute's language of administering the State's policies 'to the fullest extent possible', the courts of this State have required literal compliance with the procedural requirements of SEQRA") (citation omitted). Further, "strict compliance with SEQRA [is not] a meaningless hurdle," and anything less than strict compliance "offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment." *King*, 89 N.Y.2d at 348. When strict compliance is not achieved, the remedy is the annulment of the underlying approvals. *See Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 369 (1986).

Scoping is mandatory in New York City under CEQR. *See* 62 RCNY § 5-07 (dictating that the lead agency shall coordinate the scoping process, which shall ensure that interested and involved agencies and the public are able to participate, and specifying that the scoping process shall include a public scoping meeting).

Thus, in NYC, public scoping is a mandatory part of the "elaborate procedural framework requiring parties to consider the environmental ramifications of their actions '[a]s early as possible' and 'to the fullest extent possible.'" *King*, 89 N.Y.2d at 347 (citations omitted).

The lower Court correctly found that the City's failure to conduct scoping for a jail on White Street was a violation of lawful procedure "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 and public input concerning the project actually sought to be constructed … without proper notice to the public, and without any scoping whatsoever[.]" R. 30, 32. As recognized by the lower Court, "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 in formulating a DEIS referable to the proposed project." R. 31-32 (emphasis in original).

CEQR's procedural requirement to conduct public scoping for a project cannot be met by public scoping for a different project in a different location. The City's scope for a jail project on 80 Centre Street did not describe the proposed action – a new jail on White Street – or its surroundings. It also did not identify potentially significant adverse impacts of, identify reasonable alternatives to, or

make an initial identification of mitigation measures associated with a jail on White Street.

This is not a situation involving a lead agency's discretion about which particular matters require investigation in an EIS, to be reviewed under a "rule of reason" and for which deference must be afforded to the lead agency. At issue is the Appellants' abject failure to conduct public scoping for the White Street jail as strictly required under CEQR.

Since it is undisputed that the City failed to conduct public scoping for a jail on White Street, CEQR's procedural requirements have not been strictly complied with and, accordingly, the approvals of the jail must be annulled.

B. There is No Cure for City's Failure to Adhere to the Mandatory Procedural Requirements of CEQR

The City contends that even though it did not conduct scoping on the White Street jail, the City nevertheless satisfied SEQRA because: 1) the FSOW and the DEIS identified a proposed jail on White Street, 2) opportunities for the public to comment on the White Street jail were "plentiful, both during the preparation of the environmental impact statement" and during ULURP, and 3) the "scope of review" of the White Street jail in the DEIS was not "materially different" from the scope of review for a jail on 80 Centre Street. App. Br at 14-15, 29-30. Boiled down, the City basically argues that the failure to conduct mandatory public scoping on a jail on White Street was harmless error and "cured" by the FSOW,

DEIS and subsequent opportunity for comment on the DEIS. These arguments contravene case law holding that the cure of a SEQRA violation has "no support in the carefully drafted procedures of the statute." *Chinese Staff*, 68 N.Y.2d at 369.[5] The City's position is also antithetical to one of the core recommendations in the Lippman Report (R. 806-955), which emphasized that the communities within each borough should be integrally involved in the site-selection process. R. 824, 899. Indeed, a subsequent report by the Lippman Commission rebuked the City, finding that "the City has not been transparent enough about its decision-making process for siting and designing new facilities." R. 1126.

Appellants argue that because the SEQRA regulations don't require scoping for Supplemental EISs, 6 NYCRR 617.8(a), it was acceptable to not conduct scoping for a jail on White Street. App. Br. at 31. Appellants also cite the SEQRA regulations specifying that "any agency or person" raising issues after a FSOW has been issued must provide "to the lead agency" a written statement establishing that the late arriving information is important and there was a valid excuse for the

[5] Such a holding also would be contrary to other precedent regarding administrative agency compliance with mandatory rules. *See Syquia v.Bd. of Educ. of Harpursville Cent. School Dist.*, 80 N.Y.2d 531, 535-537 (1992) (agency determination must be reversed where the relevant agency does not comply with a mandatory statutory provision, and in such cases "to employ a substantial evidence test … would be to give validity to a record clouded by the unlawful act" of the agency); *Kolmel v. City of New York*, 88 A.D.3d 527, 528-29 (1st Dep't 2011) (City's failure to follow its own rules required reversal of determination, despite evidence in the record that could rationally support the determination because such failures "undermined the integrity and fairness of the process").

tardiness, in which case the project sponsor must incorporate the issue into the DEIS. 6 NYCRR 617.8(f), (g). Appellants' reliance on these regulations is misplaced, as they neither contemplate nor condone the "bait and switch" on the public that occurred in this case. Here, the lead agency conducted scoping for one project on a particular site and then, without public notice, decided to pursue a different project on a different site, and proceeded to the preparation of a DEIS without scoping the newly identified project. This kind of change *by the lead agency itself* is not akin to "any agency or person" raising an issue *to the lead agency* after the FSOW so that the issue can be included in the DEIS. As the lower Court found, by "undertak[ing] a scoping analysis for one project, and then proceed[ing]to prepare the DEIS with respect to a completely different project," the City defeated the entire scoping process. R. 32.

Similarly, the opportunity to comment on the White Street jail during review of the DEIS and under ULURP does not excuse the City's failure to scope the jail on White Street. The mandatory opportunities for public comment on a DEIS are distinct from and in addition to the mandatory opportunities for public comment on a Draft Scope. *See* 62 RCNY 5-07 (Scoping) and 43 RCNY§§ 6-10(c)(1), (2) and (3). Accepting the City's contention that opportunity to comment on a DEIS is sufficient to satisfy CEQR would render the mandatory scoping procedures under CEQR meaningless.

The absence of a draft scope for a jail at 124-125 White Street deprived the public and interested and involved agencies of a mandatory opportunity to understand and comment on the environmental issues associated with a new jail on White Street at the beginning of the environmental review process. Moreover, when the City had proposed 80 Centre Street as the Manhattan jail location, the individuals most affected by a proposed jail on White Street were preemptively purged from the remainder of the review. It is the lead agency's burden to ensure public participation in the environmental review process by providing notice and opportunity to comment at every stage. The lead agency's actions here, if condoned by this Court, would inappropriately and unfairly shift this burden. Under the scenario envisioned by Appellants, potentially affected individuals who were not following the environmental review on a day-to-day basis, would become obligated to learn about a post-scoping change in location so that they could then comment on the DEIS.

The Court of Appeals and this Court have expressly rejected the Appellants' contention that alternative public review opportunities or subsequent agency actions can cure or be substituted for the procedural requirements set forth under SEQRA. *See N.Y.C. Coal. to End Lead Poisoning Inc.,* 100 N.Y.2d at 349 (legislative process, including hearings, written submissions, and the record of the City Council's deliberations, arguably showing exhaustive consideration of all of

the issues identified by the petitioners in challenge to a local law, was not an appropriate substitute for the failure to follow SEQRA's stringent requirements); *Williamsburg Around the Bridge Block Assn. v. Giuliani*, 223 A.D.2d 64, 73-74, (1st Dep't 1996) (rejecting City's use of a "Task Force" to develop a protocol for measures to contain lead dust from bridge project, and characterizing this process as "something of an ersatz EIS" that "only allowed limited public participation and scrutiny") (inner quotes and citation omitted). *See also Dawley v. Whitetail 414, LLC*, 130 A.D.3d 1570, 1571 (4th Dep't 2015) ("[a] record evincing an extensive legislative process . . . is neither a substitute for strict compliance with SEQRA . . . nor sufficient to prevent annulment.")

The City's further argument that the "scope of review contemplated" for a jail on White Street is not materially different than for a jail on Centre Street is spurious and also does not excuse the failure to scope the White Street jail. The CEQR Manual guides the City's review of proposed projects with respect to categories of impacts and methodologies to be applied to any project. Accordingly, if the City is following its own guidance, the environmental review conducted for any project will have similarities to the environmental review for any other project, in that the "scope of review" will cover such topics as transportation, open space, historic resources, hazardous materials, public health, alternatives and construction impacts. However, the similarities between the

format of an environmental review to be conducted for a jail on Centre Street versus a jail on White Street do not excuse the failure to conduct scoping for a jail on White Street.

The failure to conduct public scoping on a White Street jail violated the City's own guidance that a Draft Scope "describes the proposed project with sufficient detail about the proposal and its surroundings to allow the public and interested and involved agencies to understand the environmental issues." *See* CEQR Technical Manual https://www1.nyc.gov/site/oec/environmental-quality-review/technical-manual.page ("CEQR Manual") at 1-11. There was no draft scope disclosing any details, let alone sufficient detail, about a new jail located at 124-125 White Street and its surroundings, such as the blocks and lots affected, or the specific approvals being sought and required, including the closure of the open-air White Street pedestrian plaza, which was a benefit secured by the Chinatown community when the North Tower was constructed at 124 White Street in 1990. The Draft Scope also did not disclose the City's acquisition of leaseholds on Baxter and Centre Streets, or the potential impacts to the DCTV building, resulting from the disturbance of Native American archeological artifacts, or to the open rooftop terrace at Chung Pak. *See* R. 64-65, 69, 70, 1882-83.

The Record establishes that a jail on Centre Street and a jail on White Street are, in fact, materially different based on their specific locations and surroundings,

and the completely different approvals needed. *Compare* Draft Scope at R. 6244, 6257 with FSOW at R. 6402, 6409, 6421. Indeed, the City's assertion in the lower Court that jails at 80 Centre and 124-125 White Street "required substantially similar considerations during scoping" and "many of the comments on the draft scope discussed issues… relevant to both sites" (R. 2347-48) implicitly acknowledged that there are distinct potential significant adverse impacts associated with a jail at 124-125 White Street location that were not included in the DSOW. *See* R. 1924-25.

The City also argues that it did not need to conduct scoping for a jail at 124-125 White Street because it was merely moving the jail from the scoped location at 80 Centre Street "back to" White Street. This "reversion" argument is completely disingenuous. The Record shows that the City had not previously considered a new jail at 124-125 White Street, but rather that at some point prior to the commencement of environmental review, the City had considered the South Tower alone as a potential location for a new jail. R. 1118. The lower Court correctly recognized that the City had itself set forth "numerous cogent reasons" as to why "the White Street site was singularly inappropriate," including its close proximity to the residential areas of Chinatown. R. 32, 1118. The City's equivocation between 80 Centre Street and the South Tower on White Street as potential jail

locations does not establish compliance with CEQR's public scoping requirement for a new jail at 124-125 White Street.

It is also ridiculous for the City to suggest that it is excused from scoping a new jail on 124-125 White Street because some people voiced opposition to the 80 Centre Street jail. This argument is yet another example of the City's suggestion in this case that procedural requirements of SEQRA that have heretofore been accepted as inviolable – *i.e.*, that public scoping of a project in its actual location is required -- are now somehow unclear and in doubt. It is not surprising that there was opposition to a new jail proposed for 80 Centre street. It would be a rare for any large public or private development project in New York City to be uniformly positively received. The City should not be excused from following the law with respect to a new jail on White Street because it abandoned plans to build a jail on Centre Street after some people complained about it.

The City's procedural noncompliance has caused it to fail to fulfill its fundamental CEQR obligation to conduct scoping on the site that is the subject of the DEIS and FEIS, and thwarted public participation in the identification of the relevant areas of environmental concern to the fullest extent possible as early as possible. Accordingly, the lower Court's annulment of the approvals for the White Street jail should be upheld.

C. Upholding the Lower Court's Decision Will Not Have a Chilling Effect on the Conduct of Environmental Reviews by the City or Any Other Developer

Grasping at straws, the City argues that requiring it to conduct scoping for a project on the actual site on which it intends to construct the project would have a chilling effect on future environmental reviews. This argument is a non-credible red herring. The lower Court's Decision simply requires project sponsors to conduct scoping for a project in its proposed location in accordance with the law; it will have zero effect on how project changes are already handled under SEQRA.

As is the case now, project modifications during the course of an environmental review that that do not result in new or previously unstudied environmental impacts will continue to require no further environmental review. *See Coal. Against Lincoln W. v City of New York*, 94 A.D.2d 483, 489, 492 (1st Dep't), *aff'd,* 60 N.Y.2d 805 (1983) (no further environmental review required where SEQRA's "review procedure actually resulted in a smaller number of residential units" than initially proposed); *Coal. for Responsible Planning, Inc. v. Koch*, 148 A.D.2d 230, 235-236 (1st Dep't 1989), *appeal denied*, 75 N.Y.2d 704 (1990) (no additional environmental review required where "the 750-unit residential complex approved by the Board is merely a smaller version of the original [1001 unit] proposal and the environmental impact considerations are virtually identical to those raised during the public review of the DEIS").

Similarly, if project modifications have the potential for new significant adverse impacts that have not been addressed or have been inadequately addressed in the EIS, those modifications will continue to have to be analyzed to determine whether supplemental study is required per existing regulations. *See* 6 NYCRR 617.9(a)(7).

On the other hand, reversal of the lower Court would create new and dangerous precedent by allowing public or private project sponsors to forego public scoping when a project that has already undergone public scoping is abandoned and, thereafter, proposed at another site that is purported to be "very close." Respondents are not aware of a single instance in which a public or private project sponsor has advocated for, or a court has approved, a waiver of CEQR's clear public scoping requirement. This explains why there are no cases that can be cited in support of the Appellants' position and why the lower court might be the only court that has had to expressly hold that the change in the site location of a project "after the initial scoping sessions, in the absence of additional, site-specific public scoping sessions and public comment period, violates SEQRA and CEQR." R. 11. The fact that no cases have previously dealt with this issue is only a reflection of the fact that no other project sponsor has dared to take a position that is so obviously at odds with the plain language of CEQR.

Requiring the City to conduct required scoping on the White Street jail will not have any chilling effect on how future environmental reviews are conducted or create new hurdles for project alterations. It will simply reinforce the existing requirement that any proposed project that needs an EIS must undergo public scoping for the project in its actual location.

POINT II.

THE LOWER COURT CORRECTLY HELD THAT THE CITY FAILED TO SATISFY SEQRA'S REQUIREMENT TO CONSIDER ALTERNATIVES

Appellants contend that their consideration of a total of two alternatives, neither of which involved a site other than 124-125 White Street, was reasonable because SEQRA does not require consideration of alternatives that are "not feasible." App. Br. at 41-2, 44-5. While the concept of feasibility in SEQRA alternatives analyses is plain (6 NYCRR § 617.9(b)(5)(v)), Appellants used the project's objectives and design standards in a manner that arbitrarily excluded reasonable alternatives on the grounds of "infeasibility." Appellants also improperly limited their alternatives analysis as if they were a private developer of a particular owned development site.

A. The City Used Arbitrarily Restrictive Site Criteria to Preclude Analysis of Alternative Sites

The disclosure of reasonable alternatives and the ensuing analysis has been described as the "heart of SEQRA." *Shawangunk Mountain Envtl. Ass'n v.*

Planning Bd. of Town of Gardiner, 157 A.D.2d 273, 276 (3d Dep't 1990). Alternatives to a project derive from the statement of purpose and need required in an EIS. *See* 6 NYCRR § 617.9(b)(5)(v). The broader the project's purpose and the greater the potential impacts, the wider the range of alternatives. *See* SEQRA Handbook at 117 (noting that "[t]he greater the impacts, the greater the need to discuss alternatives."). If an agency arbitrarily constricts the definition of the project's objectives and thereby excludes what truly are reasonable alternatives, the EIS cannot satisfy SEQRA. *See* ECL 8-0109(2)(d); 6 NYCRR 617.9(b)(5)(v).

The project purpose and need in this case were derived from the Lippman Report, which recommended jails in all five (not four) boroughs; ideally (but not necessarily) on City-owned land; and close to (but not necessarily adjacent or directly connected to) the courthouses. R. 883. Appellants narrowed the Lippman Report criteria from the start and then proceeded to apply additional restrictive criteria arbitrarily.

While it was within the City's discretion to establish basic criteria for jails, it went too far, and arbitrarily used the siting criteria to serve its own preordained site selection and to disregard alternative locations. R. 1240-41; 13109. This meant rejecting as "infeasible" sites that had no "direct connection to" or were "non-contiguous to" the Criminal Court Building in Manhattan (R. 12664, 13118),

disregarding adjacency in favor of a location that was over a mile from the courthouse in the Bronx, and proposing no jail whatsoever in Staten Island. R. 11239.

The City's "program standards" and "design criteria" were used arbitrarily to avoid evaluation of reasonable alternative sites. R. 13109-111. For example, one of the reasons why Appellants disregarded 125 Worth Street as a potentially viable alternative site for a Manhattan jail was the need to relocate tenants that occupy the building, which obviously also applies to the White Street jail location. R. 13118. In addition, even though the City had initially chosen 80 Centre Street as the location for the jail and had vigorously defended its choice throughout the scoping process, the City thereafter avoided any evaluation of 80 Centre Street as a reasonable alternative due to "public comments provided on the Draft Scope of Work" because of the supposed "complexity and cost of moving 80 Centre's multiple occupants and disruption to court operations." *Id*.

To the extent that the purported complexities associated with 80 Centre Street are noted, however briefly, in the EIS, these would apply equally, or even more strongly, to the White Street location. For example, detainees and other tenants in the North and South Towers on White Street have to be moved to demolish the existing buildings and construct the new jail; the City must extinguish leases held by private tenants at White Street that were granted as a

concession to the Chinatown community when the North Tower was built; and the City is funding construction of an enclosure of the open air terrace on the roof of Chung Pak to "preserve a comfortable outdoor place" for the senior residents given that the terrace will be much closer to the new jail than it is to existing North Tower. R. 6140. For unstated reasons, these complexities were not given the same weight as the purported complexities associated with the 80 Centre Street location. R. 13118.

This defining away of alternatives for vague reasons and without support in the Record is arbitrary and irrational. There is no evidence in the Record regarding the cost or "complexities" associated with 125 Worth or 80 Centre Street, let alone a weighing of them against challenges associated with building a new jail at 124-125 White Street. This is not an adequate alternatives analysis under SEQRA.[6]

B. It Was Unreasonable For the City To Limit The Alternatives Analysis for Site Selection for the Manhattan Jail to the 124-125 White Street Site Only

It is well-settled that the "degree of detail with which each alternative must be discussed will, of course, vary with the circumstances and nature of each proposal." *Webster Assocs. v. Town of Webster*, 59 N.Y.2d 220, 227–29 (1983).

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[6] The proposed *amici* brief (Doc. No. 39) merely repeats the City's assertions that it appropriately disregarded alternative sites as "infeasible." But the sparse Record in this case speaks for itself. The bald conclusions of infeasibility in the Record lack rational support and do not establish that the City undertook a reasonable alternatives analysis.

The courts of this State have consistently recognized, however, that governmental entities cannot "put [themselves] in the in the position of a private developer and consider only 1 or 2 readily available sites." *Dryden v. Tompkins Cnty. Bd. of Representatives*, 144 Misc. 2d 873, 880 (Sup. Ct. Tomkins Cnty. 1989), *aff'd*, 157 A.D.2d 316 (3d Dep't 1990), *aff'd*, 78 N.Y.2d 331 (1991). *See also Molinari v. City of New York*, 146 Misc. 2d 713 (Sup. Ct. Richmond Cnty. 1990) (record of environmental review demonstrated proper evaluation of alternative locations where 23 other sites were shown to have been considered); CEQR Manual at 23-2 and 2 Environmental Impact Review in New York § 8A.04[v] (2020) (noting that the CEQR Manual enumerates some types of alternatives that are typically included, in addition to the mandated no-action alternative, and that consideration of alternative sites is required where the action involves NYC site selection).

Appellants' principal authority for their proclamation that they "satisfied the City's obligation to consider a reasonable range of alternatives" is *Williamsburg Community Coalition v. Council of the City of New York*, 100 A.D.3d 521 (1st Dep't 2012).[7] That case does not support Appellants' broad assertion because it involved the residential redevelopment of a particular site owned by a private

[7] From the outset, DOC did not consider any sites outside of the Chinatown community, which already bears more than its fair share of City facilities. *See Silver v. Dinkins*, 158 Misc. 2d 550, 554 (Sup. Ct. N.Y. Cnty.), *aff'd*, 196 A.D.2d 757 (1st Dep't), *appeal denied*, 82 N.Y.2d 659 (1993) (noting that the Lower East Side and Chinatown were overburdened with City facilities and holding that DSNY's analysis of alternative sites to locate a new garage and fueling facility was inadequate because it was limited to City-owned sites).

developer. The Court's holding that the FEIS's alternatives analysis was reasonable made sense there because it would have been unreasonable to require the private site owner to consider alternatives on other sites that it did not own or control.

Appellants' reliance on *Residents for Reasonable Development v City of New York*, 128 A.D.3d 609 (1st Dep't 2015), fails for the same reason. *Residents for Reasonable Development* involved expansion of a New York City hospital on a site previously occupied by a City sanitation garage. Site selection was not an issue as the City was selling the property and solicited proposals from private developers specifically for "the expansion or creation of a health care, education, or scientific facility that would finance and build a new sanitation garage at minimal or no cost to the City." Given these objectives, this Court rejected the petitioners' argument that the FEIS should have considered a scenario of residential development on the former garage site and ruled that the "no action" and no unmitigated impact alternatives were sufficient. Thus, the holdings of *Residents for Reasonable Development* and *Williamsburg County* do not support the City's position that they considered reasonable alternatives to the White Street jail or that the lower Court Decision should be reversed.

C. The Record is Devoid of Any Support that Adaptive Reuse of the Existing Jail on White Street Was Infeasible

Appellants contend that they also rationally rejected the alternative of adaptive reuse of the existing jail buildings on White Street as infeasible. In support, they rely on three pages found in the FEIS, which contain conclusory statements without any specifics (App. Br. at 43, *citing* R. 12665, 13116-17), and the case, *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, 31 N.Y.3d 929 (2018).

In *Friends of P.S. 163,* this Court was confronted with the question of whether the lead agency took a "hard look" at noise mitigation measures. The Court scrutinized the record and found that it was rational for the lead agency to reject particular noise mitigation measure as "expensive and time consuming." However, the record in *Friends of P.S. 163* included evidence of the agency's consultation with the construction authority and a rough cost estimate prior to rejecting the mitigation measures as infeasible.

The Record in this case contains no evidence to support the City's conclusion that adaptive reuse of the existing buildings is infeasible, or that the buildings "cannot be renovated to meet the needs of contemporary facilities envisioned." R. 13116. There are no engineering, construction or other expert reports, studies, or consultations in the Record. By rendering their conclusion without considering adaptive reuse as an alternative or testing their presumption

that adaptive reuse would be infeasible, Appellants have acted irrationally and without careful consideration.

The reduction in size of the jail to 880 beds (18 beds fewer than the existing condition) (R. 13115) during the approval process further discredits the City's determination that adaptive reuse was infeasible. Appellants unsupported conclusion that "existing facilities at the Manhattan Site cannot be renovated to meet the needs of the contemporary facilities envisioned" was based upon accommodating 1,150 beds — not 880 beds. R. 11202. Additionally, the City claimed that it could not move administrative uses to off-site locations to generate sufficient floor area. But again, this statement was made before the reduction from 1,150 beds to 880 beds.

If SEQRA mandates anything, it mandates this: an agency cannot ram through a project without weighing the pros and cons of reasonable alternatives. The lower Court correctly found after review of the Record and the particular facts of this case that Appellants' alternatives analysis was insufficient, uninformed, irrational and must be vacated as arbitrary and capricious.

POINT III.

THE LOWER COURT CORRECTLY HELD THAT THE CITY FAILED TO TAKE A HARD LOOK AND PROVIDE A REASONED ELABORATION FOR ITS CONCLUSIONS REGARDING PUBLIC HEALTH IMPACTS

Appellants contend that the lower Court misread the Record and argue that they took a "hard look" at public health impacts because they determined that "mitigation measures were sufficient to preclude significant adverse public health impacts." App. Br. at 53. According to Appellants, this is so even if the FEIS does not actually assess either the impacts at issue or the sufficiency of mitigation measures. The lower Court correctly rejected Appellants contentions and found that the City's determination that "there will not likely be any impacts on public health" was conclusory and arbitrary. R. 34.

Appellants claim that their proposed mitigation measures in the form of a Remedial Action Plan ("RAP") and Construction Health and Safety Plan ("CHASP") definitively obviated any hazardous material and air quality impacts, and with that, any need for a public health assessment. App. Br. at 49. As the lower Court correctly found, the City's argument is flawed because it skips the critical initial step of actually assessing the consequences of demolition and construction activities on public health in the adjoining neighborhood, and then concludes, without analysis, that the RAP and CHASP will likely mitigate any potential impacts. If such analyses are not undertaken, there is no way to gauge

whether the lead agency took a hard look at the potential impacts themselves or whether the mitigation measures are sufficient to assure no adverse public health impacts. Appellants' position, if accepted, would overrule a basic tenet of SEQRA jurisprudence that a "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*, 90 N.Y.2d at 754.

A. Mitigation Measures Proposed for the First Time in the FEIS Evaded Public Review

Appellants contend that the RAP and CHASP contain "planned protective measures" and thus support their conclusion that "construction at the Manhattan site would not result in potential for significant adverse hazardous material impacts or air quality impacts." App. Br. 49-51. Unlike the other borough jails, the RAP and CHASP for the Manhattan jail were not part of the DEIS and thus were not subject to public review and comment.[8] These documents, which purportedly set forth the mitigation measures that the City relied upon in determining that no public health assessment was warranted in the first place, were added to the FEIS on August 23, 2019, merely ten days before the CPC approved the project. R. 11196; App. Br. at 50, fn. 7.

[8] It is undisputed that the City did not conduct the same level of study of potential hazardous materials impacts for the Manhattan site as was completed in the DEISs for the other boroughs because the location of the Manhattan jail was changed after scoping was completed. *See* R. 12228, stricken language.

The City cannot evade evaluation or public review of potential environmental impacts required under SEQRA by inserting voluminous missing materials into a FEIS. The "omission of required information from a draft EIS cannot be cured by simply including the required data in the final EIS since the abbreviated comment period for the final EIS 'is not a substitute for the extended period and comprehensive procedures for public and agency scrutiny of and comment on the draft EIS.'" *Horn v. Int'l Bus. Machines Corp.*, 110 A.D.2d 87, 97 (2d Dep't 1985), *appeal denied*, 67 N.Y.2d 602 (1986), *quoting Webster Assoc.*, 59 N.Y.2d at 228.

Appellants' attempt to distinguish controlling Court of Appeals precedent relied upon by the lower Court is unpersuasive. App. Br. at 52-3. The Court of Appeals in *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, 20 N.Y.3d 148, 156 (2012), unambiguously held that "mitigation measures of undisputed importance" and other analyses that are "essential to an understanding of the environmental impact" of a project cannot escape public comment and agency review under SEQRA. Appellants "slipping in" of the RAP and CHASP to the FEIS in this case is completely analogous to the respondents' attempt to substitute a site management plan for a proper EIS and is

just as much "short-circuiting SEQRA review" as was struck down in *Bronx Committee*. *See also Merson*, 90 N.Y.2d at 750.[9]

B. The FEIS Arbitrarily Failed to Assess the Public Health Effects of Demolition and Construction on the Adjoining Community

As recognized by the Court below, there is precious little in the Record to support Appellants' argument that they have taken a hard look at the potential significant adverse health impacts from construction, which includes demolishing two existing buildings with unremediated fallout from the 9/11 terrorist attacks. R. 13546; 13561-580. The City arbitrarily ignored unrebutted evidence documenting the negative impacts of construction on the adjacent neighborhood, including the elderly residing in the Chung Pak Senior Living Center next door to the White Street jail site; on food security for the Chinatown community; and increased exposure to air contaminants due to the disturbance of particulate matter previously emitted from the World Trade Center collapse. *See, e.g.*, R. 462, 464, 474-75, 491; 549-72; 633-35; 644-48; 650-53; 2077-84; 2093-2101; 13546; 13561-580. The City violated SEQRA by summarily dismissing the public health threats to the

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[9] The tentative nature of mitigation that Appellants claim distinguish the case of *Pyramid Co. of Watertown v. Planning Board of Town of Watertown,* 24 A.D.3d 1312, 1315 (4th Dep't 2005), is also unconvincing (App. Br, at 53), particularly since the lower Court relied upon *Pyramid* for the fundamental undisputed principle that ignoring key environmental issues and undertaking a mere "cursory examination" of environmental impacts does not satisfy the "hard look" requirement of SEQRA. R. 34.

people living and working in Chinatown by responding, without any analysis or empirical basis, that a public health assessment was unnecessary based on its assessment of other categories of impacts, namely hazardous materials, air quality, noise, and construction.[10] App. Br. at 48; R. 12313;12802-03.

There is nothing in the FEIS that evaluates the potential impact of demolition and construction of the project on air quality, or the extent of the purported emission reducing measures that would supposedly effectively mitigate the potential significant adverse air quality impacts to the community from demolition and construction of the White Street jail. The City's "analysis" of the impacts of a massive and lengthy demolition project consists of one meager sentence: "There are a variety of federal, state and local regulatory requirements that would be followed prior to and during demolition to address disturbance and disposal of these materials." R. 12229.[11]

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[10] That the City actually took a hard look at these other impact areas is belied, for example, by the FEIS's clear misapprehension of the site's environmental condition as evidenced by the Phase II sampling report. While the FEIS states that "the subsurface testing, while finding signs of historical fill material, did not indicate evidence of a petroleum spill or other release" (R. 12229), the Phase II sampling report actually revealed many contaminants in soil and groundwater that are typically associated with petroleum spills above cleanup standards established by the New York State Department of Environmental Conservation. Appendix E at p. 8922, 8940-43. In addition, the Phase II identified data gaps suggesting that there may be further unknown contamination of the site. Appendix E at p. 8937.

[11] The OSHA regulation referenced in the FEIS, 29 CFR 1926.62, concerns occupational exposure to lead and is designed solely to protect construction workers. The regulation does not protect or mitigate harm to the *community* from lead dust or particulate matter generated during 19 months of building demolition or subsequent jail construction.

Furthermore, the FEIS acknowledges that "[e]missions from non-road construction equipment and on-road vehicles have the potential to affect air quality" and that "emissions from dust-generating construction activities (*i.e.*, truck loading and unloading operations) also have the potential to affect air quality." R. 12337. Yet, without any analysis, empirical basis or specifics, the City summarily concludes that unspecified "measures" would be taken to reduce these known air pollutant emission impacts during construction, and "[o]verall, this emissions control program that is above and beyond local law requirements is expected to substantially reduce air pollutant emissions during construction of the proposed project." R. 12338. As the Court below properly found, SEQRA requires more than unsupported conclusions. R. 34.

C. The Lower Court Correctly Found that the FEIS Lacks Support for the Determination that the RAP and CHASP Will Sufficiently Mitigate Public Health Impacts from Demolition and Construction

The FEIS reveals that it will take 19 months to demolish existing buildings on the site. R. 12338. On their face, and as Appellants admit, the RAP and CHASP are limited to activities involving *post-demolition* ground disturbance. App. Br. at 49. *See also* Appendix E at p. 10364-84, 10411. Thus, demolition would occur for more than a year and a half *before* excavation or other soil disturbance activities triggering the RAP and CHASP protocols even begin.

The FEIS contains no evaluation of public health impacts or potential mitigation of the public health risks relating to a 19-month demolition of two large buildings which, in addition to asbestos, lead paint and other hazardous materials, are covered in particulate matter from the World Trade Center collapse. Appendix E at 10369; R. 2077-84; 2093-2101; 12229. The RAP and CHASP do not contain any measures to protect Chinatown area residents, including the directly adjacent seniors and Chinatown's unique outdoor food markets, from exposure to hazardous levels of particulate matter during demolition and construction of the massive new jail. There is no assessment or evaluation of the risks from demolition, only an unsupported conclusion that "with the implementation of applicable regulatory requirements for ACM, LBP, etc., related to the demolition of the existing buildings and the measures required by the RAP/CHASP, the potential for significant adverse hazardous materials impacts from construction at the project sites would be avoided." R. 12229; *see also* R. 11977-78, 12234, 12356.

Although the City claims that the RAP includes dust control and air monitoring (*see* App. Br. at 50), review of the RAP reveals that none of these measures relate to the lengthy demolition period required to remove the two large existing buildings on the site. The dust control measures are limited to *soil disturbance activities*, only, and the air monitoring plan is similarly only for "ground intrusive activities and during the handling of contaminated or potentially

contaminated media," specifically defined as soil excavation and handling, test pit excavation or trenching and installation of soil boring or monitoring wells. Appendix E at 10377-78.

The CHASP, dated June 2019, one month *before* the Phase II report which recommended its preparation, and one month *before* the July 2019 RAP (*see* App. E at 10408), only applies to workers and visitors in the work area and covers "construction related field activities that have potential to disturb and/or displace contaminated soils and groundwater." Appendix E at p. 10411. The RAP and CHASP are obviously boilerplate and certainly do not support the conclusion that the measures therein obviate the need for an assessment of impacts to public health of the project *on the surrounding community*.

D. Controlling Precedent Supports Affirmance of the Lower Court's Decision Where an Analysis Pertaining to Public Health is Absent from the FEIS

Contrary to Appellants' argument, *Friends of P.S. 163* supports affirmance of the lower Court's decision. App. Br. at 49. The proposed project in *Friends of P.S. 163* involved construction of a nursing home on a vacant site. Demolition was not part of the project and, further, the RAP and CHASP in *Friends of P.S. 163* were included in the DEIS and subject to public review prior to approval of the project.

Friends of P.S. 163 stands for the proposition that to uphold a lead agency's conclusion that construction mitigation measures are sufficient as reasonable, a lead agency must actually acknowledge and evaluate the risks associated with construction of a project in the DEIS and FEIS. Appellants here did not acknowledge or assess the public health risks of demolition and construction in either the DEIS or FEIS, and the Record lacks support for their conclusion that mitigation measures, which are not even applicable until after 19 months of demolition, were sufficient to mitigate such risks.

POINT IV.

THE LOWER COURT PROPERLY HELD THAT THE CITY'S ANALYSIS OF TRAFFIC IMPACTS FROM THE WHITE STREET JAIL DID NOT SATISFY SEQRA

The lower court was correct in holding that the City violated SEQRA by "improperly deferring a full review of the anticipated vehicular impacts of the actual project on traffic and congestion in the surrounding neighborhood." R. 11. The Court's holding that the City's traffic study was insufficient is fully supported by the Record, which clearly shows that (a) the White Street jail traffic-related features that the City argues were settled, such as the location of the parking garage for the jail, were still in flux when the jail was approved and not studied in the EIS, and (b) the traffic study is missing critical information and does not comply with

the City's own stated methodology set forth in the FSOW for analysis of traffic impacts.

A. The Record Shows that the Locations of Project Features Relevant to the Traffic Analysis Were Still Not Settled When the Project Was Approved

The City contends that the EIS's traffic analysis was properly conducted because the precise locations of the parking entrances, curb cuts and sally ports and the location and dimensions of these planned traffic features remained the same throughout the environmental review. App. Br. at 57. This is false. The White Street jail traffic-related features and their locations were not identified when the environmental review of the BBJS project began with issuance of the EAS, Positive Declaration and Draft Scope of Work for the EIS on August 14, 2018. *See* R. 6223, 6230, 6287. The traffic-related features shown in those documents pertain to a jail on 80 Centre Street. R. 6250. The location of the parking entrance and curb cut and sally port on Baxter Street for the White Street jail were first revealed seven months after the environmental review began, when the FSOW and DEIS were issued on March 22, 2019. R. 6401.

The City's further contention that the precise features that the lower Court held to be insufficiently defined, *i.e*., parking entrances, curb cuts and sally ports, "became binding upon project approval" (App. Br. at 55), is disingenuous and contradicted by the Record.

On the contrary, one day after the BBJS project was approved by the City Council, the BBJS Points of Agreement specifically included a commitment to "[m]oving the vehicular entrance from Baxter Street to Centre Street." R. 6138. The BBJS Points of Agreement also states that in connection with this change, "[t]he City will submit a follow-up action, subject to the required land use approvals, and environmental review as appropriate, to relocate the vehicular entrance of DOC authorized vehicles from Baxter Street to Centre Street". *Id*. Thus, the lower court fully comprehended the Record showing that that at time of approval, the City had already committed to moving the jail's parking entrance and associated curb cut from Baxter Street, as depicted in the EIS, to a new and completely unstudied location on Centre Street, and that the City had acknowledged that further environmental review would be required based upon the new previously unstudied location.

Since the BBJS project was approved, the City has taken additional action confirming that the City is pursuing modification of the supposedly binding vehicular entrance and curb cut for the White Street jail. The 2020 Technical Memorandum again disclosed that the vehicular entrance and curb cut would be moved from Baxter Street to Centre Street. 2020 Technical Memorandum at p. 3.[12]

[12] Despite the City's "commitment" in the BBJS Points of Agreement that in connection with the change of the vehicular entrance from Baxter to Centre Street "the City will submit a

There is no rational way to reconcile the Record and subsequent publicly available documents with the City's erroneous contention on this Appeal that the traffic related features for the White Street jail were fixed and binding. The lower Court properly recognized that these critical design features were unsettled upon project approval and that the City's traffic analysis failed to satisfy SEQRA because it "deferred and delayed a full and complete consideration of vehicular traffic and congestion-related impacts inasmuch as these impacts are design specific" (R. 37) and, consequently, "neither they nor the public will know whether the traffic analysis contained in the FEIS truly applies to the project." R. 36.

Appellants try to avoid the reality that they deferred analysis of the actual location of the jail's traffic-related features by making a policy argument regarding design-build, suggesting that affirmance of the lower court's decision would "cast[s] inappropriate doubt" on design-build procurement "that was specifically approved for this project by the State Legislature." App. Br. At 54.

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follow-up action, subject to the required land use approvals" (R. 6138), the 2020 Technical Memorandum discloses that City is pursuing this change through a "Mayoral Override" of several sections of the Zoning Resolution that would otherwise prohibit this change. 2020 Technical Memorandum at 3. Neither the New York City Charter nor Rules of the City of New York provide for a "Mayoral Override," but such overrides seem to occur frequently in the current administration for City projects. These Mayoral Overrides are done entirely behind closed doors and, therefore, it is possible that the zoning overrides discussed in the 2020 Technical Memorandum have already occurred without any public notice or involvement. This would appear to be contrary to *In re County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 343 (1988), establishing various factors that must be weighed in considering whether the public interest is served by a zoning override. The lack of public review and input associated with these necessary waivers compounds the public disenfranchisement that has already occurred in connection with the White Street jail.

While the New York City Rikers Island Jail Complex Replacement Act, 2018 Laws of New York Ch. 59, Pt. KKK (the "Act"), authorized the City to proceed with design-build procurement for the project, it certainly did not require the City to pursue design-build. The Act required the project to be bid out within two years of enactment, a completely unrealistic timeframe since the project required both an EIS and review under ULURP that , per the City Charter, cannot commence until the DEIS is completed. 62 RCNY 2-02(a)(5).[13] Nevertheless, the City decided to try to meet this impractical timeframe and rushed to proceed with the project at all costs.

Respondents do not contend that design-build should never be used by the City and the lower Court did not hold as such. Rather, the lower Court correctly held that the traffic analysis for the White Street jail did not satisfy SEQRA because the FEIS assumptions regarding the traffic-related features of the White Street jail were inaccurate. R. 37.

[13] The subsequent New York City Public Works Investment Act, 2019 Laws of New York, Ch. 749, regarding the City's use of design-build, has a three-year timeframe (see § 14), rather than the two-year timeframe authorized in the Act. Accordingly, the 2019 statute is more compatible with projects that are both subject to ULURP and require an EIS.

B. The Record Shows that the City's Traffic Analysis for the White Street Jail is Insufficient Because it is Missing Critical Information and Did Not Follow the City's Stated Methodology

The City's traffic study is flawed even with respect to the analysis of traffic related features that were identified in the EIS, which include a proposed parking garage and curb cut on Baxter Street, rather than on Centre Street as ultimately agreed to by the City after completion of the EIS. The City failed to adhere to its stated methodology and, thus, the traffic study lacked critical information that the City itself identified as necessary to determine such impacts for all the borough-based jails.

In both the Draft Scope and the FSOW, the City stated that the traffic analysis for each of the proposed jails would first "determine existing traffic conditions at each analyzed intersection including capacities, volume-to-capacity (v/c) rations, average control delays per vehicle and levels of service (LOS) for each lane group and intersection approach, and for the intersection overall," then determine v/c ratios and levels of service for the No Action in the build year 2027, and then the v/c ratios, delays and levels of service for the future With Action condition. R. 6274-6279 (Draft Scope); R. 6435-6440 (FSOW).[14]

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[14] V/C or volume to capacity ratio is the ratio of traffic volume on an approach to an intersection compared to the approach's carrying capacity. Capacity analyses consider the number of vehicles on each approach per hour, turning movements, percentage of trucks and buses, and how many pedestrians are in the crosswalks. The LOS or level of service expresses the amount of a delay that a driver typically experiences at an intersection, whether signalized or

The Record shows that the City's stated methodology for the analysis of potential traffic impacts was followed for the Bronx, Brooklyn, and Queens jails. For the proposed jails in these boroughs, the City assessed existing traffic conditions at each analyzed intersection, then layered onto the existing conditions data the projected traffic in the future No Action condition, and then finally layered on projected traffic from the jail to establish the projected With Action condition. For the Bronx, Brooklyn and Queens jails, the actual backup data for what is described in the narrative of the transportation chapters is provided in FEIS Appendix F. *See* R.11538, 11543, 11548, 12978-80 (Bronx); R. 11820, 11824, 11827, 12984-86 (Brooklyn); R. 12517, 12521, 12523, 12526, 12992-94 (Queens).

In stark contrast, the FEIS transportation chapter for the Manhattan jail is not supported by any backup data in Appendix F. The FEIS is completely devoid of data showing the existing traffic conditions in the traffic network surrounding the White Street jail, or the With Action or No Action conditions. Without this data, there is nothing in the record to support the conclusions regarding potential traffic impacts in the narrative of the transportation chapter for the Manhattan jail.[15]

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unsignalized. LOS's range from A, representing a minimal delay, to F, representing a longer delay. *See* R. 11528-29.

[15] Respondents thus disagree with the dicta of the lower Court that the FEIS's consideration of anticipated vehicular traffic impacts of the project would have been deemed to constitute a sufficient hard look but for the fact that traffic-related features were unsettled. *See* R. 34.

This conspicuous omission of traffic data with respect to the White Street jail only was raised in the lower Court (R.1919, 1946), but the City provided no expert or other testimony to rebut or explain the absence of this critical information. *See* R. 2384. The fact that the change in location for the jail from Centre Street to White Street occurred in late November 2018 may explain the absence of traffic data for the traffic network for a jail at 124-125 White Street. The EIS states that the counts to establish the existing conditions in the traffic networks for each jail were conducted in June 2018. R.12267 (Manhattan); R. 12517 (Queens); R. 11538 (Bronx); R. 11820 (Brooklyn). At that time, however, the City was proposing a jail on Centre Street, and thus it follows that the June 2018 traffic data collection program would have focused on the Centre Street jail location and not on a White Street location. By the time the City proposed a jail on White Street, it was too late in the calendar year to gather traffic data on existing conditions surrounding the White Street location upon which future No Action and With Action projected traffic could be layered. *See* CEQR Manual at 16-23.

Whatever the reason for the City's failure to provide support in the Record for the existing, No Action or With Action traffic conditions for the White Street jail, it was not rational for the City to depart from its own methodology and present no data to support the traffic conclusions for the White Street jail that are set forth in the transportation chapter of the FEIS. *See In re Charles A. Field Delivery Serv.*

(Roberts), 66 N.Y.2d 516, 520 (1985) (agency must explain its reasons for departing from its prior stated course and the absence of such an explanation "require[s] reversal on the law as arbitrary"); *Blaize v. Klein*, 68 A.D.3d 759, 761 (2d Dep't 2009) (agency determination that does not comply with the agency's own rules must be set aside).

POINT V.

THE CITY VIOLATED ULURP BY APPROVING THE JAIL PROJECT BEFORE IT WAS SUFFICIENTLY DESIGNED

The CPC included in its resolution approving the White Street jail that an entire post-ULURP approval process would be required because the jail design had not yet been advanced to a degree that enabled the usual and appropriate level of review by the DCP or the CPC *during* the ULURP process. Thus, in its resolution approving the project, the CPC required the DDC to return to the CPC *after* the ULURP process to provide the CPC with information equal to "the same completion threshold where the Commission typically reviews a project, and will enable the Commission to provide meaningful feedback as the Design-Build teams makes revisions to the designs." R. 4388. The CPC further resolved that "The Commission believes that it is critical that DCP's urban design and technical experts also remain involved … [and DDC] has agreed that, at a minimum, DCP will be involved during the development of the RFQ (Request for Qualifications) and RFPs, after each RFP is issued as a member of the technical and design

evaluation teams, after award of contracts and finally, after completion of the final design to gather any additional feedback." R. 4388.

The lower Court correctly held that the CPC approvals were affected by an error of law, because evaluation of design-specific impacts must be considered during the ULURP process and "cannot be deferred for ad hoc, post ULURP evaluation." R. 39. This holding does not preclude design-build, nor does it mandate that a project be 100% designed before undergoing ULURP review. Rather, the holding requires a project to be designed at least to a point that "enable[s] the Commission to provide meaningful feedback" during ULURP rather than afterwards.

POINT VI.

THE LOWER COURT'S FINDING THAT THE CITY PLANNING COMMISSION FAILED TO ISSUE SEQRA FINDINGS DOES NOT WARRANT REVERSAL

The lower Court's finding that the CPC issued land use approvals without issuing its own SEQRA findings was an "additional ground" for annulling the CPC approvals. R. 33. Even without that additional basis for its ruling, there is ample support for the five independent reasons for annulling the CPC approvals, each of which are supported by the Record and applicable law. *See* Points I-V, *supra*.

Although not addressed in the Decision, Appellants incorrectly noted in their brief that DOC "properly issued SEQRA findings statements [ ] prior to the

agency's project approval." App. Br. at 58-9. To the contrary, the City violated SEQRA by carrying out the BBJS project before DOC issued its Findings. The City, for example, awarded a $107 million construction contract, issued requests for qualifications, transferred Brooklyn detainees, and transferred funds in furtherance of the BBJS project before DOC made its March 11, 2020 SEQRA Findings.[16] In so doing, the City violated the most fundamental mandate of SEQRA that "[n]o final decision to carry out or approve any action which may have a significant effect on the environment shall be made by any agency until there has been full compliance with the provisions of this chapter." 43 RCNY § 6-01; ECL 8-0109(8); 6 NYCRR § 617.3(a).

[16] *See* NYC DDC Awards Program Management Contract for Borough-Based Jails (April 22, 2019), https://www1.nyc.gov/site/ddc/about/press-releases/2019/pr-042219-Jails-PMC-Contract.page; Brooklyn Eagle Staff, Brooklyn Daily Eagle, Brooklyn jail officially closed, setting stage for demolition (Jan. 2, 2020), https://brooklyneagle.com/articles/2020/01/02/brooklyn-jail-officially-closed-setting-stage-for-demolition/; NYC DDC, City Issues Request for Qualifications for Design and Construction of Four New Borough-Based Jails (Feb. 4, 2020), https://www1.nyc.gov/site/ddc/about/press-releases/2020/pr-020520-RFQ-Issued-Jails.page; Report of the Finance Division on the Fiscal 2021 Preliminary Plan and the Fiscal 2020 Preliminary Mayor's Management Report for the Department of Correction (March 16, 2020), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/03/072-DOC.pdf.

CONCLUSION

Based upon the foregoing, Respondents respectfully request an Order affirming the Decision of the lower Court, dismissing Appellants' Appeal of the Decision, and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 6, 2020

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j) the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is 13,782.