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

IN THE MATTER OF NEIGHBORS UNITED BELOW CANAL, JAN LEE, DCTV, EDWARD J. CUCCIA, BETTY LEE, and AMERICAN INDIAN COMMUNITY HOUSE, Petitioners, For a Judgment pursuant to Article 78 of the CPLR -against- MAYOR BILL DE BLASIO, et al., Respondents.	Index No. 100250/2020 **Oral Argument Requested**

REPLY MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

Respondents' opposition papers do not point to anything in the Record that refutes or justifies the procedural failures at issue here. There is no question that the location of the Manhattan jail was changed after public scoping on the initial location was completed, and that the lead agency refused to conduct scoping on the new location.[1] This is a per se violation of the strict procedural requirements of SEQRA, and one that cannot be justified by an erroneous assertion of no harm, no foul. Indeed, among other things, the failure to scope the correct location for the Manhattan jail disenfranchised members of the public, did not bring timely light to critical aspects of the project – such as the permanent closure of the open air plaza on White Street – and caused the lead agency to depart from its stated scope of the EIS. The City claims that the late in the day switch in locations was necessary to avoid the inconvenience associated with relocating government offices at 80 Centre Street. Yet there is absolutely no consideration of how the permanent closure of the White Street open air plaza, which was promised to Chinatown when the existing jail was constructed, and is a main artery connecting Chinatown to points west, would impact the Chinatown for generations.

There is also no question that DOC, the lead agency, did not issue SEQRA Findings completing the SEQRA process until more than 6 months after the entire BBJS project was approved, and well after it had begun implementing the BBJS project. It is an utter mystery as to why, after completing a voluminous FEIS, the lead agency could not be bothered to issue what

[1] Unless otherwise indicated, the abbreviations and references that are used in this Reply Memorandum of Law are the same as those that were used in Petitioners' prior Memorandum of Law. Citations to "Pet. MOL" refer to the opening Memorandum of Law for Petitioners (Doc. No. 49), citations to "Resp. MOL" refer to the Memorandum of Law of Respondents in opposition to the Verified Petition (Doc. No. 77). Unless other indicated, all citations in this Memorandum of Law are to the Document Number ("Doc. No.") as shown in the Court's electronic docket.

wound up to be a mere six-page Findings Statement before the City Council had to consider whether to approve the $8.7 billion BBJS project. The City's position that it would have been a waste of time for the SEQRA lead agency to issue findings within the required 30 day time period, or more reasonably, contemporaneous with issuing the notice of completion of the FEIS and before the other involved agencies acted, is an irrational interpretation of SEQRA, and shows a fundamental disregard for the substantive requirements of SEQRA. A Findings Statement is required to show "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." ECL § 8-0109(8). To argue that the lead agency's SEQRA Findings are essentially irrelevant is to turn the substantive requirements of SEQRA on their head.

The City also fails to justify its use of one ULURP for four different jails in four different boroughs. The unlawful combining of what should have been four different ULURP applications not only resulted in the City's failure to adequately consider the impacts of the Manhattan jail on the affected communities, but also deprived the public and the involved agencies adequate and meaningful opportunity to comprehend and comment on such project.

Additionally, the City has not refuted Petitioners' claim that the use of design build was arbitrary and capricious in this case, where the project required both an EIS and various land use approvals subject to ULURP. The attempt to pursue design build in these particular circumstances resulted in an incomplete environmental review and premature certification of the BBJS project into ULURP, again depriving the public and the involved agencies, respectively, of a full record upon which to comment and base their decisions.

The City's desire to get all of the approvals in place for the Manhattan jail before the design build authorization expired also led to the City's other failures: for example, the failure to adhere to its own scope of work for the EIS for the Manhattan jail; the failure to conduct a proper transportation analysis; the failure to consider alternatives; and the failure to give honest consideration to the applicable fair share criteria.

Thus, in this case, the City's expedient process for getting the BBJS project approved was in fact illegal. While the impetus for the BBJS project may be laudable, it is irrelevant to this proceeding and cannot shield the City from the procedural and substantive violations that have occurred. It also cannot hide the blatant disregard for the Chinatown and Native American communities that was exhibited during the approval process and is, unfortunately, consistent with the City's historic treatment of these communities.

REPLY STATEMENT OF FACTS

Petitioners respectfully refer the Court to the facts as previously set forth in their initial Memorandum of Law, Affidavits and Verified Petition, which are incorporated herein as set forth in full and made part of this record by reference.[2] For the sake of judicial economy, Petitioners do not restate the facts in detail and instead respond to recent developments and new interpretations of the facts raised by Respondents, including those presented in the Administrative Record (the "Record").

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[2] These documents include the Verified Petition, dated February 13, 2020 (Doc. No. 6); the affidavit of Edward J. Cuccia, sworn to February 4, 2020 ("Cuccia Aff.") (Doc. No. 51); affidavit of George Janes, AIPC, sworn to February 11, 2020 ("Janes Aff.") (Doc. No. 52); affidavit of Judith Zelikoff, PhD, sworn to February 7, 2020 ("Zelikoff Aff.") (Doc. No. 64); affidavit of Jan Lee, sworn to February 12, 2020 ("J. Lee Aff.") (Doc. No. 55); affidavit of Keiko Tsuno, sworn to February 12, 2020 ("Tsuno Aff.") (Doc. No. 66); affidavit of Betty Lee, sworn to February 3, 2020 ("B. Lee Aff.") (Doc. No. 50); affidavit of Iakowi:He'Ne', sworn to February 9, 2020 "Iakowi:He'Ne' Aff.") (Doc. No. 53); affidavit of Kerri Culhane, sworn to February 3, 2020 ("Culhane Aff.") (Doc. No. 68), and the exhibits to the foregoing documents.

Respondents paint a false picture that the public had "ample opportunity" to participate in the BBJS project and that the City conducted an "extensive land use and environmental review" for the four proposed jails, including the Manhattan jail. *See* Doc. No 77 (Resp. MOL) at 3. The Record here reveals that the City's truncated environmental and land use review consisted of only two public hearings held by the agencies with decision-making authority over an $8.7 billion project to build four enormous jails, and was predetermined to result in project approvals so that DOC could issue a request for qualifications for a design-build contractor before April 2020, when legislation authorizing, but certainly not requiring, design-build procurement was set to expire. *Id.* at 47-48.

From the project's inception, the City was racing against an ersatz clock. Over the course of only two days on August 14 and 15, 2018, DOC: (1) issued a letter to CPC Chair, Marissa Lago, notifying Lago of DOC's intent to serve as lead agency under SEQRA (Doc. No. 165); (2) declared its intent to serve as lead agency; (3) issued an Environmental Assessment Statement (Doc. No. 168); (4) made a positive declaration of environmental significance (Doc. No. 166); *and* (5) issued a draft scope of work ("DSOW") for four massive jails, including a jail located at 80 Centre Street in Manhattan (Doc. No. 167). DOC's lead agency letter, dated August 14, 2018, is characteristic of the City's hurried approach and shows that from the very outset, the City conducted its environmental review in haste. Doc. No. 165. The letter provides that if DOC does not hear from CPC *that day*, DOC will assume that the Commission has no objection to DOC serving as lead agency. *Id.*

In its Memorandum of Law in Opposition to the Verified Petition, the City emphasizes the number of comments received during scoping held in September and October 2018. Doc. No. 77 at 10. Given the size of the BBJS project, a total of four scoping meetings – one for each

jail - with "oral and written comments by 564 individuals, entities, and organizations" is very limited and not "extensive," community engagement. Moreover, with respect to the Manhattan jail, the limited community engagement that actually did occur was not at all meaningful, because the City admittedly changed the location of the Manhattan jail after the end of the public comment period on the DSOW. *See* Doc. No. 76 at ¶ 83; Doc. No. 77 at 8.

The City admits that it conducted scoping on the wrong location for the Manhattan jail and, further, that it excluded members of the public from attending the only scoping meeting held in Manhattan. *See* Doc. No. 76 at ¶ 70. *See also* Doc. No. 78 ¶ 9. DOC also concedes that it refused to hold another scoping meeting on the actual Manhattan jail location despite several requests from the community to do so. *Id.* at ¶ 82. These facts belie any suggestion that there was extensive outreach, and on their face establish that SEQRA was not satisfied.

The City further portrays a false picture by citing to Neighborhood Advisory Committee ("NAC") Guidelines and meeting records, claiming that they "incorporated extensive feedback from community organizations and local elected officials into its plan for the new Manhattan borough jail." Doc. No. 49 (Pet. MOL) at 7. To the contrary, the so-called neighborhood advisory committees were carefully curated, by invitation only and excluded many of the true community stakeholders, including members of the Native American community, despite the fact it was known that there was the potential for Native American remains to be disturbed by the Manhattan jail project. *See* Doc. No. 55 (Jan Lee Aff.) ¶¶ 31-44; Doc. No. 53 (Iakowi:He'Ne' Aff.) at ¶ 19.

The first of only two public hearings held by the agencies with decision-making authority over approvals required for the four jail/four borough $8.7 billion BBJS project occurred on July 10, 2019. Doc. No. 180-181. The City's emphasis on the length of this joint hearing, which

was required by law and covered both the ULURP application and DEIS, and the number of comments is intended to falsely portray the City as somehow going beyond its legal duty when that is not at all the case. On the contrary, the City ended the hearing at 5:00 p.m., depriving many people who were waiting outside but could not access the hearing room by the time the hearing ended of the opportunity to make statements, and also precluding testimony from others who could not take off from work or leave early in order to attend the hearing. *See* Doc. Nos. 6 and 76 ¶ 132.

The City also blatantly misrepresents post- public hearing CPC work sessions as "follow-up hearings." None of these three work sessions allowed for public comment. Doc. Nos. 111 – 113; *see also* CPC Review Session and Special Presentation (July 29, 2019), https://youtu.be/owUzHg92cB0?t=5534; CPC Review Session and Special Presentation (Aug. 12, 2019), https://youtu.be/elRRVdoM7Ko?t=12852; CPC Review Session and Special Presentation (Aug. 26, 2019), https://youtu.be/rfCDCZmcqQM?t=8887. The City's rush is evident in the CPC work sessions as well. At the August 12, 2019 work session, for example, many members of the CPC voiced their concern that they had not even been provided with the documents being discussed at the meeting. *See* CPC Review Session and Special Presentation (Aug. 12, 2019), https://youtu.be/elRRVdoM7Ko?t=12852.

On September 3, 2019, one week after the last CPC work session and one day after Labor Day, the CPC voted to approve the project. *See* Doc. No. 123. The City again mischaracterizes the special meeting as "another public hearing." Doc. No. 77 at 15. Although the public was admitted into the gallery to observe the vote, no public comments were taken at the September 3, 2019 CPC meeting. *See* CPC Special Public Meeting (Sept. 3, 2019), https://www.youtube.com/watch?v=jFbZufYB220.

Two days later, on September 5, 2019, the first day of school for all of New York City's public schools[3], the City Council held its sole public hearing on the BBJS project. Doc. No. 136. While this hearing may have appeared to be "well attended," as characterized by the City, many stakeholders interested in the BBJS project could not attend the hearing either because of its conflict with the first day of school, or because there was not enough capacity in the hearing room to accommodate everyone who showed up and waited outside for the entire hearing. *See* Doc. No. 137. The following month, on October 17, 2019, the Council adopted a series of resolutions approving the project. Doc. Nos. 152 - 164.

In November 2019, Requests for Qualifications ("RFQ") were issued on behalf of DOC with respect to the BBJS project.[4] In January 2020, DOC transferred all of the detainees in the Brooklyn Detention facility to other facilities in order to begin to facilitate implementation of the BBJS project.[5] In February 2020, an RFQ for design-build teams was issued on behalf of DOC.[6] *See* Doc. Nos. 47, 48. Yet it was not until March 11, 2020 that DOC, the SEQRA lead agency,

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[3] https://patch.com/new-york/new-york-city/nyc-2019-20-school-year-calendar-first-day-school-vacations

[4] NYC DDC, Borough Based Jails Program Notice of Intent, https://www1.nyc.gov/assets/ddc/downloads/press-releases/Borough-Based-Jails-Program-Notice-of-Intent.pdf (last visited July 7, 2020); Jason Rogovich, City Land, New York Law School, Borough Based Jails Set to Take First Steps in 2020 (Dec. 4, 2019), https://www.citylandnyc.org/borough-based-jails-set-to-take-first-steps-in-2020/ (last visited July 7, 2020); *see also* 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, (Mar. 16, 2020), at 12, https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/03/072-DOC.pdf (noting that "[t]he first RFQs were released on November 18 for demolishing the current Brooklyn Detention Center and the Queens Garage project.").

[5] 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/ (last visited July 7, 2020).

[6] Ian Michaels, 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 (last visited July 7, 2020).

issued SEQRA Findings, thus completing SEQRA for the project. *See* Doc. No. 194; Doc. No. 77 at 18.

ARGUMENT

POINT I.

THE LAND USE APPROVALS MUST BE ANNULLED BECAUSE RESPONDENTS FAILED TO STRICTLY COMPLY WITH THE PROCEDURAL REQUIREMENTS OF SEQRA

The City acknowledges that it set out on August 14, 2018 to complete environmental review of the BBJS project in haste because it wanted to secure the necessary land use approvals in time for the City to publish a RFQ for a design-build contractor by April 2020. *See* Doc. No. 77 at 48. In its rush to approval, DOC, as lead agency, failed to strictly comply with SEQRA's procedural requirements by refusing to take the time to conduct required public scoping on the site actually selected for the Manhattan jail, and by failing to complete SEQRA before taking several steps toward implementing the BBJS project. DOC's adoption of SEQRA Findings after the commencement of this proceeding and Respondents' efforts to persuade this Court that its blunders are not substantial does not absolve the City from the consequences of its statutory non-compliance. The law is manifest that with respect to SEQRA's procedural mechanisms, "strict, not substantial, compliance is required." *In re King v. Saratoga Cty. Bd. of Supervisors*, 89 N.Y.2d 341, 347 (1996).

A. Public Scoping for The Actual Location of the Manhattan Jail Was Required Under SEQRA

Petitioners showed in their Memorandum of Law and accompanying affidavits that the City violated SEQRA by failing to conduct mandatory scoping on the correct location for the Manhattan jail -- 124-125 White Street. The City makes two arguments in response. First, the City contends that SEQRA allows new information to be incorporated into a final scope of work

("FSOW") and that it achieved SEQRA compliance by identifying 124-125 White Street in the FSOW. Doc. No. 77 at 20-21; *see also* Doc. No. 78 (Affidavit of Linh Do in opposition to the Petition) ¶ 25. Next, the City contends that the public had "ample opportunity" to comment on the 124-125 White Street location during the comment period on the DEIS. Neither argument has merit nor excuses strict compliance with SEQRA.

The City's principal support for its contention that it satisfied SEQRA by including 124-125 White Street in the FSOW - even though the Environmental Assessment Statement (Doc. No. 168), Positive Declaration (Doc. No. 166), DSOW (Doc. No. 167) and notices of scoping meetings all identified 80 Centre Street as the location for the Manhattan jail - is that the SEQRA/CEQR regulations authorize amendment of a FSOW to incorporate relevant new information. *See* Doc. No. 77 at 20*, citing,* 62 RCNY § 5-07(e); 6 NYCRR § 617.8(g). The City's reliance on these regulations is misplaced. SEQRA and CEQR allow "substantial, relevant information" to be included in a FSOW to make the FSOW more expansive and complete to ensure maximum disclosure. These regulations are not meant to effectuate the "bait and switch" on the public that occurred here. Changing the project location in the FSOW after the public comment period for scoping has ended plainly fails to satisfy the purpose or intent of SEQRA and the mandatory scoping required under CEQR.

Unable to refute that DOC violated SEQRA, as well as its own guidance, by failing to present the location of the Manhattan jail for public comment during scoping, the City pronounces in conclusory fashion that "their [sic] can be no doubt that the public had ample opportunity to comment on the 124-125 Worth [sic] Street site during review of the DEIS." Doc. No. 77 at 20. According to the City, because the DEIS identified the correct site location and was available for public comment, the City did not run afoul of SEQRA. The City's response

completely undermines the purpose of mandatory scoping and utterly fails to address the import of conducting scoping on one location and then switching the project location without holding a new scoping meeting. *See* Doc. No. 49 at 11-12. If the project location changes, as it did here, and scoping of the particular issues associated with the actual site is not performed, then the affected public and interested and involved agencies have lost an important and mandatory opportunity to comment on topics that must be considered in the EIS. Moreover, the newly affected individuals are effectively disenfranchised for the remainder of the review. Contrary to the City's suggestion, these newly affected individuals, who are not necessarily following the SEQRA process on a day to day basis, are not somehow obligated to learn about the post-scoping change in location so that they can comment on the DEIS.

In its response, the City does not dispute that it refused to either issue a new DSOW or hold a new scoping hearing on the actual jail location, despite numerous requests to do so. Doc. Nos. 6 and 76 ¶¶ 82-83; *see also* Doc. No. 55 ¶ 20. Additionally, implicit in the City's argument that 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," is an acknowledgement that there are distinct potential significant adverse impacts associated with the 124-125 White Street location that were not included in the DSOW. Doc. No. 77 at 19, *citing* Doc. No. 78 ¶25 (emphasis added); *see also* Doc. No. 55 (J. Lee Aff.) at ¶¶ 17, 18 (explaining the distinct potential significant adverse impacts associated with 124-125 White Street, including the closure of White Street itself).

The City's only response to the testimony of petitioners DCTV and Cuccia, who would have raised additional environmental considerations had the City conducted scoping on 124-125 White Street, is that neither DCTV nor Cuccia provided written comments to the DEIS. *See*

Doc. No. 66 (Tsuno Aff.) ¶¶ 50-52.[7] Again, the City ignores its own non-compliance, and seeks to impose an obligation on the public to follow-up on DOC's mistakes. DOC's failure to take the time to conduct scoping on the actual location for the Manhattan jail because it was rushing to approvals is not a harmless error that the public is obligated to find out about and try to mitigate.

The short-cuts and failures of the City to comply with the procedural mechanisms of SEQRA/CEQR are symptomatic of the errors that occur when agencies rush through a project. The City's effort to shut out the public and short-circuit environmental review of the BBJS project is precisely the outcome that SEQRA was meant to prevent and must be firmly rejected by this Court. Strict compliance with SEQRA required DOC to present the actual project location for the Manhattan jail during mandatory scoping so that the public could participate and engage in an "essential and mandatory part of the SEQRA process." *In re Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 426 (2017).

B. DOC Violated SEQRA By Failing to Meet The Regulatory Time Frame For Issuing Its Findings And By Carrying Out the BBJS Project Before Rendering Its SEQRA Findings

At the time Petitioners filed the Verified Petition (Doc. No. 6), DOC had not issued any SEQRA Findings. Doc. No. 194. Accordingly, in their Memorandum of Law in support of the Verified Petition, Petitioners argued that such failure by the lead agency constituted a per se violation of SEQRA and that the CPC and City Council approvals were accordingly improper. *See* Doc. No. 49 at 14. Petitioners relied in part on the lower court's holding in *Northern*

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[7] In an unavailing attempt to discredit petitioners, the City points out that while DCTV was not concerned with the Manhattan jail location at 80 Centre, its building suffered damage as a result of construction of the nearby federal buildings, which the City contends are "further from DCTV than 80 Centre." *See* Doc. No. 77 at 19, fn. 5. The City is grasping at straws. The City's failure to scope the actual location of the jail is not somehow excused because DCTV did not oppose the original location.

Manhattan Is Not For Sale v. City of New York, No.161578/2018, 2019 WL 6916075 (Sup. Ct. N.Y. Cnty. Dec. 19, 2019) *("Northern Manhattan")*. Doc. No. 49 at 15. By Decision and Order entered July 23, 2020, the First Department reversed the lower court's decision, holding that the City Council acted properly in approving a rezoning "notwithstanding that the Council acted prior to the lead agency's issuance of its written statement of findings two months later." *Northern Manhattan is Not for Sale v. City. of New York,* No.161578/2018, 2020 WL 4210411, at *4 (1st Dep't July 23, 2020).

Petitioners did not rely exclusively on *Northern Manhattan* with respect to its arguments concerning DOC's Findings. First, Petitioners in this proceeding contend that pursuant to 6 NYCRR § 617.11(b), DOC was required to issue its SEQRA Findings at the very least within 30 calendar days after the filing of the final EIS. *See* Doc. No. 49 at 13. Second, Petitioners also contend that DOC violated SEQRA by carrying out the project in advance of its SEQRA Findings. The First Department's decision in *Northern Manhattan* did not address either of these issues. *See infra.*

As a threshold matter, Petitioners maintain that the City's backward approach of having involved agencies, including the City Council, issue required approvals before the lead agency completes the environmental review process turns SEQRA on its head, and is contrary to the purpose and intent of SEQRA to inject environmental considerations into the decision-making process. The City argues that that it would have been "inefficient and illogical" for DOC to adopt SEQRA Findings before the CPC and City Council granted land use approvals necessary for the BBJS project. *See* Doc. No. 77 at 24. This position constitutes an abdication of DOC's pivotal responsibilities as the lead agency in the SEQRA/CEQR process. The lead agency is supposed to issue a Findings statement after the 10-day period that is afforded to agencies and

the public to consider the FEIS. *See* 6 NYCRR § 617.11(a). It is patently obvious that the SEQRA review for a proposed project is supposed to come to an end with the issuance of a Findings statement shortly after the FEIS is issued. *See* Environmental Conservation Law § 8-0109(8) ("When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, *it shall make an explicit finding* that the requirements of this section 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.") (emphasis added). Contrary to the position that is being taken by Respondents, the requirement to issue SEQRA Findings is not a meaningless act meant to occur whenever the lead agency finally gets around to it; SEQRA is not meant to peter out with a whimper well after all of the required approvals have been granted. The 30-day deadline in 6 NYCRR § 617.11(b) is supplementary, ensuring that in no event should the Findings statement issue later than 30-days after the filing of the FEIS, except in limited circumstances not implicated here.[8]

The City disputes the applicability of the 30-day time frame under 6 NYCRR § 617.11(b) for the lead agency to adopt SEQRA Findings on the ground that "the lead agency itself has proposed the action under consideration," contending that "where no SEQRA applicant is involved, SEQRA only requires a lead agency to make its finding statement by or before making

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[8] Petitioners further maintain that DOC's SEQRA Findings (Doc. No. 194), issued over six months after the FEIS was deemed complete and totaling a mere six pages in length for an $8.7 billion project, with one short paragraph devoted to the Manhattan jail, do not come close to meeting the requirement that DOC consider the relevant environmental impacts presented in the EIS, weigh and balance them with social, economic and other essential considerations, provide a rationale for the agency's decision as to whether to proceed with an action, and certify that the SEQR requirements have been met. 6 NYCRR § 617.11(d).

its "final decision to undertake, fund, approve or disapprove an action." *See* Doc. No. 77 at 21-22. The City's argument is squarely refuted by the plain language of SEQRA's regulations.

SEQRA's regulations provide that "[i]n the case of an action involving an applicant, the lead agency's filing of a written findings statement and decision on whether or not to fund or approve an action must be made within 30 calendar days after the filing of the final EIS." 6 NYCRR § 617.11(b). The definition of "applicant" under SEQRA is broad and includes "any person making an application or other request to an agency to provide funding or to grant an approval in connection with a proposed action." *Id.* at § 617.2(d). A "person" is defined to include State or local agencies, individuals, corporations, governmental entities, partnerships, associations, trustees or other legal entities. *Id.* at § 617.2(aa). "Agency" means any State or local agency. *Id.* at § 617.2(c). "Local agency" means any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the State. *Id.* at § 617.2(w). On its face then, an "applicant" is not limited to private, non-governmental entities, as urged by the City.[9]

The City's attempt to rewrite SEQRA to restrict the meaning of "applicant" to private applicants only, and to ignore the Record, which plainly demonstrates that this action involved DOC, MOCJ and DCAS as applicants for approvals from the CPC and the City Council, a

[9] Examples of situations where the 30-day time period under 6 NYCRR § 617.11(b) would not apply (*i.e.*, actions that do not involve an applicant) include agency planning and policy making activities and adoption of agency rules and regulations that may affect the environment. In those instances, unlike here, there is no application or request to grant an approval. *See* 6 NYCRR §§ 617.2(b)(2) and (3) (defining actions to include "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions" or "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment.").

distinct legislative body, must fail.[10] The meaning of "applicant" under SEQRA and 6 NYCRR § 617.11(b) is a matter of pure statutory interpretation for which no deference is required. *See In re New York Botanical Garden v. Bd. of Standards & Appeals of City of New York,* 91 N.Y.2d 413 (1998) ("where 'the question is one of pure legal interpretation of statutory terms, deference to the [Board of Standards and Appeals] is not required,'" *citing In re Toys "R" Us v. Silva,* 89 N.Y.2d 411, 419 (1996)); *see also In re Teachers Ins. & Annuity Ass'n of Am. v. City of New York*, 82 N.Y.2d 35, 42 (1993). Moreover, the merits of limiting the meaning of "applicants" under SEQRA to private applicants for purposes of 6 NYCRR § 617.11(b) are properly addressed to the Legislature and regulatory rule-making processes. *See* N.Y. STAT. § 363 ("It is a general rule of construction that omissions in a statute cannot be supplied by construction; omissions are to be remedied by the Legislature, and not by the courts."); *see also, N. Manhattan is Not for Sale*, 2020 WL 4210411 (holding that legislative body, not the courts, may expand scope of SEQRA/CEQR process); *Davis v. Davis,* 71 A.D.3d 13, 21 (2d Dep't 2009) ("It is the role of the Legislature, and not the courts, to make law. Courts may not legislate under the guise of interpreting statutes.") *citing Bright Homes, Inc. v. Wright*, 8 N.Y.2d 157, 162 (1960) ("Courts are not supposed to legislate under the guise of interpretation, and in the long run it is better to

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[10] The Record establishes that applicants, as defined under SEQRA's regulations, sought discretionary approvals for the BBJS project, thereby rendering the project "an action involving an applicant." 6 NYCRR § 617.11(b). DOC, together with respondents New York City Mayor's Office of Criminal Justice ("MOCJ") and New York City Department of Citywide Administrative Services ("DCAS") were joint applicants for site selection and property acquisition for the Manhattan jail. Doc. Nos. 186, 191. DOC and MOCJ were co-applicants for a zoning text amendment, special permit, and a City map amendment necessary for the Manhattan jail. Doc. No. 91; *see also* Doc. No. 168 (DOC listed as applicant on Environmental Assessment Form). In its Answer to the Verified Petition, the City admits that DOC, MOCJ and DCAS are applicants for approvals concerning the BBJS project. Doc. No. 76 ¶¶ 13, 15, 17, 114; *see also* Doc. No. 78 ¶ 3 (noting that affidavit is submitted in opposition to Verified Petition challenging BBJS project "proposed by applicant City, through the New York City Department Correction and the Mayor's Office of Criminal Justice.").

adhere closely to this principle and leave it to the Legislature to correct evils if any exist."); *People v. Freeman*, 4 Misc. 2d 572 (N.Y. City Ct. Special Sess. 1954) (finding that the courts may not engage in judicial legislation, and that any error or oversight in statute must be corrected by Legislature itself).

Even if this Court were to excuse the City's failure to comply with the regulatory time period for the issuance of DOC's SEQRA Findings under 6 NYCRR § 617.11(b), it should find that DOC violated SEQRA because it began to carry out the BBJS project before issuing its Findings. *See* 43 RCNY § 6-01; ECL § 8-0109(8); 6 NYCRR § 617.3(a). The assertion by the City that it satisfied SEQRA's procedural requirements because DOC made its Findings before its "final decision to fund the project" (Doc. No. 77 at 22) is specious and disingenuous. Notably, although the City casts DOC's decision to fund the BBJS project as the outer limit for when DOC, had to issue SEQRA Findings, DOC failed to even identify funding as part of the action on the Environmental Assessment Statement it completed for the project. *See* Docket 168 at 49. The public record here demonstrates that the City began to carry out the BBJS project shortly after issuance of the City Council's Land Use Approvals and months before DOC issued SEQRA Findings in clear violation of SEQRA.[11]

[11] While judicial review of an administrative action is usually limited to the facts and record adduced before the agency when the determination was made, "non-record items can be added if 'the record is incomplete or substantial questions arise which cannot be resolved therefrom.'" *Mattia v. Vill. of Pittsford Planning and Zoning Bd. of Appeals*, 61 Misc. 3d 592, 598 (Sup. Ct. Monroe Cnty. 2017) (citing *Piasecki v. Dep't of Soc. Servs.*, 225 A.D.2d 310, 311 (1st Dep't 1996)) (admitting non-record emails which "directly impact[ed] the ultimate decision at issue."). Here, it is appropriate for the court to consider publicly available materials demonstrating that the City took steps in furtherance of the BBJS project after the Council granted ULURP approvals and before the lead agency (DOC) issued its SEQRA Findings in March 2020.

In November 2019, a RFQ for demolition of the Brooklyn Detention Center and for Queens Garage project were issued on behalf of DOC with respect to the BBJS project.[12] In January 2020, DOC transferred all of the detainees in the Brooklyn Detention facility to other facilities in order to begin to facilitate implementation of the BBJS.[13] In February 2020, an RFQ for design-build teams was issued on behalf of DOC and the City incurred considerable expense to convene workshops to discuss project design.[14] *See* Doc. Nos. 47, 48.

The City Council's "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" also confirms that the City began to carry out the BBJS project before the March 11, 2020 Findings. *See* https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/03/072-DOC.pdf. The report, for example, confirms that the Brooklyn Detention Facility, which will be replaced by a new jail as part of the BBJS, "has not housed people in custody since mid-December, 2019 and is closed." *Id*. at 2. The report also indicates that DOC's November 2019 plan transferred $10.5 million in funding to MOCJ in furtherance of a new re-entry planning RFP, which was one of the Points of Agreement negotiated between the Council and the Mayor's office to gain approval of the BBJS. *Id.* at 14, 16.

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[12] *See* fn. 4, *supra*.

[13] 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/ (last visited July 7, 2020).

[14] Ian Michaels, 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 (last visited July 7, 2020).

By issuing RFQs, transferring Brooklyn detainees, and transferring funds in furtherance of the BBJS project before the lead agency made its March 11, 2020 SEQRA Findings, the City violated the most fundamental mandate of SEQRA/CEQR 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; ECL § 8-0109(8); 6 NYCRR § 617.3(a).

POINT II.

IT WAS ARBITRARY AND CAPRICIOUS FOR THE CITY TO PROCEED WITH ONE ULURP FOR ALL FOUR JAILS

One of Respondents' defense strategies is to mischaracterize the Petitioners' claims as so extreme that they can be shot down easily. Accordingly, it is important to clarify exactly what Petitioners DO and DO NOT contend in this proceeding. Petitioners DO NOT contend that one ULURP can never be used for a multi-borough project, but rather DO contend that it was arbitrary and capricious to do so in this case. Petitioners DO NOT contend that the City "was required to ignore the integrated and interdependent nature of the project," but rather DO contend that this neither dictates the use of only one ULURP nor establishes that it was rational to proceed with one ULURP in this case. Petitioners DO NOT contend that design build is never allowed or that a project has to be completely designed or a developer selected before it can be certified into ULURP or undergo meaningful environmental review, but rather DO contend that, in this case, the City did not satisfy the most basic parameters before commencing review under SEQRA and ULURP, thereby rendering the review by public officials and the public that is supposed to happen prior to project approval absolutely meaningless. *See* Point III, *infra*.

It was arbitrary and capricious for the Department of City Planning to proceed with one ULURP process for the site selection for four giant jail buildings in four different boroughs.

While ULURP might not expressly prohibit the City from doing this, it was arbitrary and capricious for the City to do so in this case, when proposing site selection for separate buildings of tremendous scale and complexity, each with entirely dissimilar surroundings and impacts, regardless of the fact that the projects may be programmatically related.

In response to the Petitioners' challenge to its exercise of discretion for using one ULURP in this case, the City has identified a total of four instances between 2001 and 2019 in which the City has used one ULURP for actions concerning multiple boroughs: the 2001 adoption of a Unified Bulk, Lexington Avenue Rezoning and Special Downtown Brooklyn Rezoning ("Unified Bulk/Lexington Avenue/Downtown Brooklyn Rezoning"); the 2003 Whitehall and St. George Ferry Terminal Disposition (to award a lease for a concession for management of retail facilities and public areas already under construction); the 2008 Randall's Island Connector (site selection and acquisition of a ¼ mile easement to facilitate construction of a pedestrian and bike pathway); and the 2019 elimination of a Special Natural Area District that was replaced with a Special Natural Resources District ("SNRD").[15] The City completely ignores the single most analogous project it has undertaken, the Solid Waste Management Plan ("SWMP"). In that case, the City proceeded with four separate ULURPs for site selection and land use approvals for four separate marine transfer stations in different boroughs to decentralize the City's solid waste management infrastructure (which formerly relied exclusively on the Fresh Kills Landfill in Staten Island) and achieve borough equity in the handling of the City's waste. The few and far-between, completely non-analogous actions identified by the City in response to Petitioners' claim illustrate how arbitrary it was to proceed with one ULURP in this case.

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[15] The SNRD ULURP actually only involved one borough when it was ultimately approved, as a proposal for a similar district in the Bronx was dropped by the time the ULURP was approved. Doc No. 80 at fn. 1.

With the exception of the site selection and acquisition for the ¼ mile Randall's Island Connector, which action facilitated construction of a pedestrian and bike pathway to merely connect the already planned South Bronx Greenway with existing trails on Randall's Island, none of the projects cited by the City were expected to result in significant new development that would not have occurred absent the proposed action that was the subject of the ULURP.

The Whitehall and St. George Ferry Terminal disposition subject to ULURP involved the disposition by lease of retail and advertising space in the Staten Island ferry terminals at Whitehall Street in Manhattan and in St. George in Staten Island. The lease did not result in any new construction; it merely chose "a single operator to provide consistent maintenance of the common areas to preserve the beauty of the architect's designs through the consistent integrated appearance of all storefronts, retail carts, telecommunications venues and advertising areas." C 030186 PPY, at 6, https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/030186.pdf. This lease was deemed by the City to lack the potential for any significant adverse environmental impacts, as the City determined that the lease was a Type II action under CEQR, exempt from any environmental review. *Id*. at 3. The fact that these retail and advertising spaces were in different boroughs does not make it analogous to the ULURP at issue in this case, which was for four completely new and physically separate large developments.[16]

The rezoning and zoning text amendments considered in combined ULURPs in the 2001 Unified Bulk/Lexington Avenue/Downtown Brooklyn Rezoning and 2019 SNRD actions are also not analogous, as these actions also were not expected to result in significant development

[16] If the City should one day decide to award a lease to one operator of or service provider for the four jails, such a decision would be more suitable to one ULURP. This kind of action, involving the day to day operation of space within existing buildings in order to provide consistent services, is wholly different from the initial site selection for the initial construction of the four jails.

that would not have occurred had the City taken no action. *See, e.g.,* September 13, 2019 Notice of Completion of the Final Environmental Impact Statement for the SNRD at 2 and 8, https://a002-ceqraccess.nyc.gov/ceqr/ProjectInformation/ProjectDetail/13964-19DCP083Y#b ("While the proposal may change the proportion of sites proceeding as-of-right, the overall amount, type, and location of development in the affected area is not anticipated to change. The sites anticipated to develop in either the No Action scenario or the With Action scenario would be expected to be similar" and "the proposed actions are not expected to cause a significant change in the overall amount, type, or location of development. The proposal is not expected to induce development where it would not have occurred absent the Proposed Actions. However, the land use actions (certifications, authorizations, and special permits) necessary to facilitate development on a site may be changed or eliminated by the Proposed Actions.")

Petitioners understand that the City views the four different jail developments in four different boroughs as programmatically related in that they are all associated with the ultimate closure of Rikers Island. Nevertheless, this view does not justify nor was it rational to address these developments in one ULURP. The City completely fails to recognize the fact that it proceeded with four separate ULURPs for the most analogous multi-borough action in the City's history – site selection for the four marine transfer stations in different boroughs that together comprised the main elements of the City's SWMP proposed in 2004 and approved in 2006. In that case, the four separate yet programmatically interrelated marine transfer stations were reviewed in one environmental impact statement but the City sought site selection and the required zoning approvals with four separate ULURPs. *See, e.g.,* separate CPC reports approving Brooklyn Marine Transfer Station and Manhattan Marine Transfer Station, respectively, http://archive.citylaw.org/wp-

content/uploads/sites/31/cpc/2005/04_13_2005/C050176PSK.pdf; http://archive.citylaw.org/wp-content/uploads/sites/31/cpc/2005/04_13_2005/C050173PCM.pdf.

The City's position that "closing the jails on Rikers Island would have been impossible without the approval of, and ability to proceed with, all four borough-based jail sites" did not dictate that it was necessary to proceed with one ULURP.[17] It just means that the City would have had to secure separate ULURP approvals, as it did in the case of the SWMP. And there is no support for the City's suggestion that one ULURP for each jail would have somehow defeated the entire plan to close Rikers or required DCP or the Commission to "ignore the integrated and interdependent nature of the project." Doc. No. 80 ¶ 19.

The City could have and should have followed the process that it went through for the entirely analogous site selection for the four marine transfer stations in different boroughs that were programmatically related for the City's SWMP, the goal of which was strikingly similar to the stated goal of the BBJS of decentralizing the City's jail system to achieve greater borough equity. It was arbitrary for the City not to do the same thing here, given the completely different locations of the sites for each new jail, and the different impacts on the respective surrounding communities. *See In re Charles A. Field Delivery Serv. (Roberts)*, 66 N.Y.2d 516, 520 (1985) (finding agency's actions to be irrational when the agency failed to follow its own precedent or offer an explanation from such departure, stating, "[f]rom the policy considerations embodied in

[17] The City's decision to proceed with one ULURP application for all four jails comprising the BBJS project may have been a very deliberate choice of a course of action that would ensure approval of the entire BBJS project at the City Planning Commission and the City Council. This course of action made it much more difficult for any City Planning Commission or City Council member to vote against the ULURP approval event if they opposed one or more of the jails, since a vote against any one particular jail would have been a vote against the entire BBJS project and, therefore, politically unpalatable.

administrative law, it follows that when an agency determines to alter its prior stated course it must set forth its reasons for doing so.")

POINT III.

THE USE OF DESIGN BUILD FOR THE BBJS PROJECT PRECLUDED COMPLIANCE WITH ULURP OR SEQRA

As the City admits in its opposition to the petition, design-build is "new to ULURP." Doc. No. 80 ¶ 24. This was also noted at the time by the CPC, in its report approving the various zoning actions necessary for the Manhattan jail. As the CPC stated, "projects before the Commission typically follow a *Design – Bid – Build* development process … The first phase of this Design – Bid – Build process is the schematic design phase, where the conceptual design of the project achieves approximately 30 percent completion." Doc. No. 123 at 76 (emphasis in original). Respondents' answering papers confirm that "the typical project is submitted for Commission review at the schematic level of design, or about 30%." Doc. No. 80 ¶ 24. The City does not dispute the fact that these typically required thresholds were not met in this case, as disclosed in the CPC Report, where the CPC acknowledged 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." Doc. No. 123 at 76. Thus, this not simply a question of the petitioners' "perceived deficiencies in the planning board's formal findings," as suggested in Respondents' Memorandum of Law. *See* Doc. No. 77 at 49. The question at issue is whether use of the Design Build process, even to save time and money, was actually compatible with the requirements of SEQRA and ULURP. *See* Doc. No. 123 at 76; Doc. No. 80 ¶ 24.

Petitioners are not arguing that the City can never avail itself of design build, or that the Manhattan jail had to be completely or finally designed before the project could be certified into ULURP or undergo a meaningful environmental review. And neither ULURP nor SEQRA require that a developer be selected before review can commence. Rather, petitioners contend that for this project, which had been deemed to result in significant adverse impacts and thus required a full EIS before it could get certified into ULURP, the lack of even 30% design left too many open questions regarding the Manhattan jail to allow for the meaningful review by decisionmakers or the public that is required by ULURP and SEQRA prior to approval.

The City argues that there was time pressure created by the statute passed by New York State Legislature on April 12, 2018 allowing – but in no way mandating – design build for this particular project and also somewhat arbitrarily requiring that the City publish a request for qualification for a design build contractor by April 12, 2020. A two-year timeframe might not be problematic for projects that do not need to be studied in an EIS or do not need to undergo ULURP, but the BBJS project here required both. Since a project requiring an EIS cannot be certified into ULURP until the draft EIS is completed, this two-year period presented a significant challenge to New York City, particularly because public scoping on an EIS is required for all EISs under CEQR, which is time consuming.[18] The design-build timeframe set by the Legislature did not justify the City's departure from the typical schematic design level before certifying the project into ULURP and commencing meaningful environmental review.

[18] The New York City Public Works Investment Act, 2019 Laws of New York, Ch. 749, which the City notes may lead to more widespread use of design-build, has a three-year timeframe (*see* § 14), rather than the two-year timeframe authorized in the New York City Rikers Island Jail Complex Replacement Act. 2018 Laws of New York Ch. 59, Pt. KKK. Accordingly, the 2019 statute is more compatible with projects that are subject to ULURP and might also require an EIS.

Again and again, the City puts itself in a box and then argues that the box of its own creation dictated a particular process that has left injustice in its wake at every turn. Clearly the 2018 legislation authorizing design-build for the project put the City in a bind – requiring that the project commence within two years of enactment of the design build authorization even though it was not disputed that the BBJS was going to require a full EIS and also needed to go through ULURP. Doc. No. 80 ¶ 8. The City accepted and allowed itself to be placed in this unrealistic box and rushed to proceed with the project at all costs, despite the fact that the statute's timeframe put the City in a difficult position with respect to legitimate and meaningful compliance with its NYC Charter required ULURP process and SEQRA.

This compressed time period perhaps explains why the City did not take the time to re-scope the project when, after public scoping was completed, the City changed the site of the Manhattan jail from 80 Centre Street, as originally disclosed in the DSOW, to 124-125 White Street,. At that time, it was already late November 2018, and preparation of the DEIS, which was needed to get certified into ULURP, was already well underway. Re-scoping would have required a new public notice, a new public scoping meeting, and a new written comment period, all of which might have jeopardized the City's chances of meeting the already unrealistic timeframes associated with the state legislation. *See* RCNY §§ 5-07 and 5-07(b) and (d) (requiring a public scoping meeting between 30 and 45 days after notice of the draft scope is published in the City Record, and requiring a period of at least 10 days thereafter for the receipt of written comments).

To support its position that the project was sufficiently defined to go through public review, the City cites the proposed redevelopment of the former East 126th Street Bus Depot into mixed-use affordable housing, a community facility and the Harlem African Burial Ground

Memorial, as well as the Seward Park Mixed-Use Development Project, an approximately 1.65 million square-foot, mixed use, mixed income development on City-owned sites in Manhattan. *See* Doc. No. 80 at 24. These are not relevant comparisons since neither of these actions resulted in approval of a build ready project. Rather, these were zoning changes that would allow ultimate development consistent with the zoning actions approved. Moreover, the environmental review of conceptual designs for both of these projects were done in generic EISs, used in cases when projects are not yet fully defined.

The ULURP for the 126th Street Bus Depot did not approve an actual project. Rather, it approved a change of use for the site to allow residential development as of right, a zoning text amendment to include the rezoning area as a "mandatory inclusionary housing area" that would require anything built on the site to include at least 25% of the total residential floor area to be permanently affordable, and a transfer of the site from New York City to the New York City Economic Development Corporation "for future disposition" to a yet to be selected developer. C 170278 PPM, at 5-6, https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/170278.pdf.

The ULURP for the Seward Park Mixed-Use Development Project also did not approve an actual project, but a series of planning actions meant to eventually facilitate the development of nine City-owned sites. The ULURP application was the result of a more than four-year planning process initiated by the Manhattan Community Board 3 in which the project area is located, which resulted in an unanimously approved CB3 set of project guidelines to serve as a broad framework for defining key elements of the proposed project. CPC Report C 120228ZSM, at 9, https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/120228.pdf. *See also id*. at 9, 18, 52, 53, 68 (noting guidelines for, among other things, mixed-use and mixed-income

development, contextual design, massing options, urban design, tower orientation, affordable housing). On the contrary, here, there were no such elaborate or community-driven project guidelines. The only three criteria that had been decided at the completion of the ULURP for the BBJS project were that the jail buildings "establish a civic presence"; complement the surrounding neighborhood by providing active street level frontages and permeability, where possible; and have "architectural design to create visual interest." Doc. No. 123 at 61.

Significantly, both the 126th Street Bus Depot and Seward Park projects were studied in Generic EISs, *see* C 170278PPM, at 7, https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/170278.pdf, and C120228ZSM, at 30, https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/120228.pdf, in recognition of the fact that the details of the specific impacts for these project might not be capable of being fully identified and addressed at the time of the GEISs. *See* 6 NYCRR § 617.10(a); CEQR Technical Manual § 410.

As stated in Petitioners' initial Memorandum of Law (Doc. No. 49 at 16-17), SEQRA and CEQR provide for preparation of a generic or programmatic EIS as the course of action when only preliminary information about a project is available. This course of action contemplates further environmental review when more details become available and establishes "thresholds and criteria" for further environmental review of impacts that were not or could not be sufficiently addressed in the GEIS. *See* 6 NYCRR § 617.10(c); 62 RCNY § 6-13. This method is noted and exemplified in the GEIS for the Seward Park Project, which states that a "GEIS is a more general EIS that analyzes the impact of a concept or overall plan rather than those of a specific project plan. The GEIS is useful when the details of a specific impact cannot be accurately identified, as no site-specific project has been proposed[.]"

11DME102M_FGEIS_01_Project_Description.pdf, at 1.8, https://a002-ceqraccess.nyc.gov/ceqr/ProjectInformation/ProjectDetail/7946-11DME012M#b. As noted in the GEIS for the Seward Park project, "the proposed land uses and illustrative massings are intended to be illustrative of a possible configuration of the proposed uses and the possible interactions among those proposed uses across the project site. The eventual build configuration of uses would be subject to change based on the results of the environmental review, the results of developer(s)' response(s) to the RFP(s), market conditions, and further discussions with stakeholders, among other factors." 1DME102M_FGEIS_01_Project_Description.pdf, at 1.6, https://a002-ceqraccess.nyc.gov/ceqr/ProjectInformation/ProjectDetail/7946-11DME012M#b. *See also* East 126th Street Bus Depot FGEIS at ES-3, https://a002-ceqraccess.nyc.gov/ceqr/ProjectInformation/ProjectDetail/12151-16DME011M#b ("There is no specific development proposal under consideration at this time. Instead, a reasonable worst-case development scenario has been formulated … [and is] the subject of this environmental review. Only after the approvals comprising the Proposed Project complete [ULURP], an RFP soliciting proposals for the development of the project site would be issued."). Not every action studied in a GEIS results in additional environmental review at a later date, but the City admits that in each case a further assessment is conducted, once more specifics are available, to determine whether subsequent actions are consistent with the conditions and thresholds in the GEIS.

The GEIS for Seward Park commits to further assessment of some construction impacts for example, when a developer is selected. See FGEIS at 19-4, 19-7, https://a002-ceqraccess.nyc.gov/ceqr/ProjectInformation/ProjectDetail/7946-11DME012M#b (requiring "[f]urther assessment related to construction impacts at 350 Grant Street (Seward Park High School) resulting from construction at Sites 1, 2 and 3 will be conducted upon selection of a

developer or developers for these sites," taking into consideration, among other things, the specific development project(s) to be constructed and the proposed construction means and methodologies).

Here, unlike with the 126th Street Bus Depot and Seward Park approvals, there will be no further "check" on the EIS assumptions when a developer is ultimately chosen to construct the Manhattan jail. Significantly, every time the Seward Park project changes, the City goes back and in a Technical Memorandum considers whether those changes would result in any significant adverse environmental impacts not already identified in the GEIS and any subsequent Technical Memoranda. This has happened four different times. *See* https://a002-ceqraccess.nyc.gov/ceqr/ProjectInformation/ProjectDetail/7946-11DME012M#b (identifying four Technical Memoranda prepared since completion of the final GEIS in 2012).

Although the City has obviously used a GEIS course of action in the past, doing so here did not seem to meet the City's timeframe. Instead, the City rushed to judgment, and, in preparing an EIS rather than a GEIS, declined to set up a process for further environmental review based on established thresholds as it did in the 126th Street Bus Depot and Seward Park, two projects cited by the City as examples of why it proceeded properly in this case.

The City also notes that design build was used for the Mario A. Cuomo Tappan Zee Bridge. However, that project was not located in New York City and was not subject to ULURP, which is applicable only to certain actions that are reviewed by the New York City Planning Commission under section 197-c of the New York City Charter. In fact, the Tappan Zee project was not subject to any municipal statutes or regulations, only state and federal requirements, and, accordingly, was more compatible with a design-build approach. *See* Tappan Zee FEIS at 3-1, 3-3 (describing the regulatory requirements must be met to implement the project),

https://www.newnybridge.com/documents/feis/vol1/03-process-agency-coordination-public-participation.pdf.

As stated above, Petitioners do not contend that design-build should never be used by the City. However, in this case, for a project that was subject to the ULURP process and also required an EIS, it was irrational for the City to proceed with design build, which deprived both the reviewing agencies and the public of meaningful review and input regarding the massive Manhattan jail project.

POINT IV.

THE CITY FAILED TO SATISFY SEQRA'S HARD LOOK REQUIREMENT

In its initial Memorandum of Law and accompanying affidavits, Petitioners showed that in approving the Project, the City failed to satisfy SEQRA's "hard look" and "reasoned elaboration" standard, because it failed to conduct any real analysis of alternatives and either dismissed, ignored, or improperly deferred consideration of a variety of environmental impacts. *See* Doc. No. 49 at Point III; *In re Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986). In response, Respondents simply repeat their flawed justifications for the lack of analysis contained in the FEIS. Although City Respondents claim that the applicable legal standard mandates that "this Court should defer to DOC's reasoned judgment," (Doc. No. 77 at 43), deference to an agency's decision-making under SEQRA does not obviate the need for the Court to undertake a searching review. Instead, "the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors." *Akpan v. Koch*, 75 N.Y.2d 561, 571 (1990). The "[court's] duty . . . is to scrutinize the record," including the relevant environmental assessments and community concerns with respect to a project, "to determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision." *In*

re Town of Henrietta v. Dep't of Envtl. Conservation of State of N.Y., 76 A.D.2d 215, 224 (4th Dep't 1980); *see In re Bd. of Co-op. Educ. Servs. of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie*, 268 A.D.2d 838, 840 (3d Dep't 2000); *Corrini v. Vill. Of Scarsdale*, No. 03-02361, 1 Misc. 3d 907(A), 2003 WL 23145905, at *11 (Sup. Ct. Westchester Cnty. Dec. 23, 2003). Here, scrutiny of the Record compels a conclusion that Respondents failed to take the required hard look.

A. The City Failed to Satisfy the Requirement to Consider Alternatives

The City paid mere lip service to SEQRA's requirement that alternatives be included in the EIS to "provide[] the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures." 6 NYCRR § 617.9(a)(2). In this case, as is required, the City studied the impacts associated with a no action alternative, *i.e.*, not doing the project at all (Doc. No. 190 (FEIS) at 7-13 to 7-17), and an alternative with no unmitigated significant adverse impact. *Id*. at 7-18 to 7-19. These analyses combined comprise a total of six pages of the FEIS. Petitioners do not dispute that the obligation to consider alternatives is subject to a rule of reason, but contend that the City's superficial analysis of alternatives was lacking and unreasonable.

The City's analysis of alternatives fails to include an analysis of an alternative site, contrary to the City's guidance in the CEQR Technical Manual calling for analysis of alternatives sites where the action at issue is site selection for public facilities. *See* CEQR Technical Manual at 23-2, §150 ("The consideration of one or more alternative sites for a proposed project is appropriate when the objectives of the proposed project are not site dependent, and it is often considered when the project is a site selection. In order to consider an alternative site for private developments, the applicant must own or own a right to use the alternative site. Projects for which alternate site analyses may be appropriate include proposals

for siting public facilities, such as a municipal garage, or projects where identified significant impacts may be reduced or eliminated"). While the FEIS notes (Doc. No. 190 at 7-18) that there were two other sites that would have met the project objectives – 80 Centre Street and 125 Worth Street – the City did not bother to actually evaluate these two alternatives. Rather, the City rejected both of these alternatives in a few paragraphs. *Id*. This did not meet SEQRA's requirements for consideration of alternatives.

Per SEQRA, an EIS must include "a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor. The description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed." 6 NYCRR § 617.9(b)(5)(v). Here, the City's failure to evaluate even these two alternatives in a level of detail sufficient to permit a comparative assessment with 124-125 White Street deprived the public and the government decisionmakers of any true comparison in order to "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." *See* ECL §§ 8-0109(1), (2)(d).

B. The Record Establishes that the City's Analysis of Potential Significant Adverse Environmental Impacts Lacked Substance and Was Irrational

In its initial Memorandum of Law and supporting affidavits, Petitioners demonstrated that the City acted irrationally by using the CEQR Technical Manual as an excuse for uniformly disregarding public comments with respect to potential significant adverse environmental impacts in the areas of public health, neighborhood character, historic and cultural resources, open space, shadows, noise, socioeconomics, and transportation. Doc. No. 49 at 29-41. In

response, the City contends that DOC's use of the Manual was rational and that "DOC did not rely on the *Manual* to disregard comments." Doc. No. 77 at 26.

The lead agency may not use the *Manual* as if it were a rule to disregard public comments concerning the particular development at issue. *See In re Ordonez v, City of New York*, No. 450100/2018, 60 Misc. 3d 1213(A), 2018 WL 3385054, at *23 (Sup. Court, N.Y. Cnty, July 11, 2018). The *Manual* requires the consideration of public comments in addition to the technical analyses. *See* CEQR Technical Manual at 3-2 (the lead agency should "consider public policy and public comments in addition to the technical studies" to further evaluate the impacts of the project).

In contrast to the comments alleged to have been ignored in the recently decided case *N. Manhattan is Not for Sale ,* 2020 WL 4210411, the comments that Petitioners contend were ignored by the City in this case are not comments that parse sub-issues or relate to issues that are beyond the scope of SEQRA/CEQR review. C*ompare N. Manhattan is Not for Sale,* 2020 WL 4210411 at *3-*4 (city not required to analyze mix of ethnicities that would occupy units in the development, impacts on patterns of racial or ethnic concentrations, or characteristics of business ownership). Here, Respondents ignored public comments directly relevant to specific technical analyses in this case, such as open space, public health, socioeconomics and neighborhood character, all of which are categories of impacts that are well within the scope of SEQRA/CEQR review under the CEQR Technical Manual. *See* CEQR Technical Manual at Chapters 7, 20, 5, 21. Accordingly, the Court should find that approval of the Manhattan jail was arbitrary and capricious insofar as DOC disregarded public comments concerning the Manhattan jail that went to the heart of impact categories required to be studied by the *Manual*.

1. Open Space/White Street

It was not rational for the City to ignore and dismiss comments on the DEIS regarding the loss of the White Street open air pedestrian plaza by simply stating that it currently does not function as an open space. The fact that this plaza was promised to the community in connection with the siting of the existing jail has not been disputed by Respondents – the records of such dedication are in the City's own records, which are annexed to the Affidavit of Kerri Culhane (Doc. No. 68) as Exhibit A (Doc. No. 69). What is left of the Chinese characters that were embedded on the surface of the plaza per the City's designs are even visible, though ignored, in photographs in the FEIS. Doc. No. 187, Figure 4.6-3. The fact that this plaza is not presently functioning as an open space because the City has violated the commitments it made to the Chinatown community when it imposed the existing jail on Chinatown in the late 1980s, is not a rational or appropriate response to a comment regarding the impact of its permanent loss and replacement with a 230-foot-long tunnel.

The City does not even attempt to justify why ignoring the impacts to the White Street pedestrian plaza was acceptable. The City's only response regarding the loss of the White Street pedestrian plaza is that, in response to comments, "DOC explained that the project would replace a space currently used for vehicle parking with a design that will transform it into a vibrant space and a safe pedestrian walkway, including retail along both sides of the corridor." Doc. No. 78 ¶ 76. There is no response in the Record regarding the City's prior commitments regarding White Street and DOC's improper incursion into the pedestrian plaza space, or in Respondents' Memorandum of Law or their supporting affidavits. *See* Doc. No. 55 (Jan Lee Aff.) ¶ 18; Doc. No. 68 (Kerri Culhane Aff.) ¶¶ 17-18, 26, 27 and 35. *Compare In re Ordonez,* 60 Misc. 3d 1213(A), 2018 WL 3385054, at *6, *18, *20 (noting various instances in which the City made project modifications in response to specific public comments).

Rather, the City merely states that "[t]he FEIS, however, considers the open space resources of the neighborhood as they are, not as they were decades ago, or as Petitioners would like them to be." Doc. No. 78 ¶ 91. The fact of the White Street pedestrian plaza is not a question of merely what the Petitioners "would like" the open space resources in the neighborhood to be. Instead, the issue that Petitioners have raised again and again, and that has been utterly and completely ignored by the City again and again, both in comments on the DEIS and in this proceeding, is that the Manhattan jail would result in the permanent closure of an open space pedestrian plaza on White Street that was promised in order to mitigate impacts to Chinatown from the existing jail. The failure to even acknowledge what should have been the existing condition of White Street and the value that it provides to the community in terms of open space, light and air, access, and neighborhood character (*see* Doc. No. 68 (Culhane Aff.) ¶¶ 25-27; Doc. No. 190 at 10-76 to 10-77; Doc. No. 50 (Betty Lee Aff.) ¶¶ 4-8), even in its DOC-commandeered state, is galling and violates SEQRA and the City's own guidance for its implementation. The City's refusal to acknowledge the importance of White Street and its own broken promises, together with the City's reliance on the presence of the existing jail as the basis for the conclusion that a new jail would not have a significant adverse impact on Chinatown's neighborhood character, *see* Point IV.B.3, *infra*, are unfortunately consistent with the historic marginalization of this particular community.

2. Public Health

The City does not dispute that Petitioners raised timely and detailed comments regarding the potential significant adverse public health impacts associated with demolition of the existing MDC and construction of a new Manhattan jail, including providing the City with numerous studies documenting the negative impacts of construction on vulnerable and elderly populations, such as Chung Pak residents next door to the Manhattan Jail; negative impacts on food security

for the Chinatown community; and increased exposure to air contaminants due to particulate matter emitted from the World Trade Center collapse. *See* Doc. No. 20 at Exhibits B, H, J and K. The City's response that a public health assessment would be "extraneous," "excessively time-consuming," and "needless" is characteristic of its systemic disregard of the people and businesses of Chinatown. Doc. No. 77 at 25-26.

The City's contention, moreover, that it "responded extensively and thoroughly to public comments" relating to the public health impacts of the Manhattan jail is unsupported by the Record. The City argues that per the CEQR Technical Manual, no public health assessment was required because "no unmitigated significant adverse impact" was found in the areas of air quality, hazardous materials and noise. Doc. No. 77 at 27; Doc. No. 190 at 10-136. The Record, however, reveals otherwise.

For example, section 4.14 of the FEIS provides that "[e]missions from non-road construction equipment and on-road vehicles have the potential to affect air quality. In addition, emissions from dust-generating construction activities (i.e., truck loading and unloading operations) also have the potential to affect air quality." Doc. No. 187 at 4.14-13. The City then concludes, without any analysis, empirical basis or specifics, that a series of measures would be taken to reduce these known air pollutant emission impacts during construction, and "[w]ith these measures in place, construction activities at the Manhattan Site would not have the potential to result in any significant adverse air quality impacts." *Id*. at 4.14-2-3.

But there is nothing in the DEIS or 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 to establish that they would effectively mitigate the potential significant adverse air quality impacts from construction of the project. In short, contrary to the City's contentions,

there is no analysis or empirical evidence in the Record from which to rationally draw the conclusion that "construction at the Manhattan Site would not result in the potential for significant adverse construction air quality impacts, and no further analysis is required" (Doc. No. 187 at 4.14-16), or the conclusion that no public health assessment was warranted.

Furthermore, contrary to DOC's self-serving statements, a reading of the FEIS responses cited by the City confirms that DOC failed to meaningfully consider public health impacts on vulnerable populations in Chinatown and food security concerns. DOC's fleeting responses to public comments which lacked analysis and are unsupported by substantial evidence do not satisfy SEQRA. *See, e.g*. Doc. No. 190 at 10-146 (Response 14-3) (wherein DOC claims that construction of the proposed project at the Manhattan Site would not result in significant adverse impacts related to PM2.5 air emissions, but "Construction-Manhattan" section of the DEIS (found in Section 4.14) does not even mention PM2.5); Doc. No. 190 at 10-18 (wherein DOC falsely concludes that the DEIS "analysis" accounted for residents and sensitive receptors at Chung Pak and along Baxter Street "as appropriate" in the air quality, noise, transportation, and construction analyses).

3. Socioeconomics and Neighborhood Character

One of the Legislature's main goals in enacting SEQRA was to ensure that "[s]ocial, economic, and environmental factors [would] be considered together in reaching decisions on proposed activities." ECL § 8-103(7). The City does not dispute that SEQRA encompasses socio-economic concerns, and "the potential displacement of local residents and businesses is an effect on population patterns and neighborhood character, which must be considered in determining whether the requirement for an EIS is triggered." *See, e.g., Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 366-367 (1986); *see also* ECL § 8-0105(6) (defining "environment" as "physical conditions which will be affected by a proposed action,

including . . . existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character").

Respondents fail to rebut Petitioners' claims that the City did not take the requisite 'hard look' at socioeconomic and neighborhood character impacts of the Manhattan jail. *See* Doc. No. 6 ¶¶ 148, 214-221; Doc. No. 68 (Culhane Aff.) ¶¶ 23, 27, 30-40. Dismissed by the City as mere "disagreements" with their conclusions, Petitioners' allegations instead highlight unequivocal violations of the City's obligation under SEQRA to conduct "a reasoned elaboration so a reviewing court may determine how the agency came to its conclusion," which is not met when an agency bases its approval on deficient analyses, or as in this case, no analysis at all. *Corrini*, 2003 WL 23145905, at **6–7 (*quoting Glen Head-Glenwood Landing Civic Council v. The Town of Oyster Bay*, 88 A.D.2d 484, 491 (2d Dep't 1982)). In that circumstance, "neither the public nor a reviewing court knows what factors were considered, and they cannot be satisfied that the required hard look has been taken." *Id.*

The City's response to Petitioners' claim that the City improperly deferred consideration of the potential impacts on displaced businesses and their employees is that it "rationally determined" that no analysis was warranted and that it is going beyond what is required under SEQRA by "voluntarily" undertaking measures to assist displacement businesses. *See* Doc. No. 77 at 39. According to the City, "[p]etitioners' reading of SEQRA would discourage the City and other project sponsors from going above and beyond SEQRA by subjecting even voluntary measures to SEQRA's analysis framework when performing such analysis would not otherwise be warranted." *Id*. at 40. The City's circular argument begs the question of when analysis under SEQRA is required.

In this case, the City, without regard to the historical context surrounding the proposed Manhattan jail, narrowly relies on the CEQR Technical Manual to draw its conclusion that no direct displacement assessment is warranted. In so doing, the City failed to give due consideration to the fact that the proposed jail would result in the direct displacement of 6,300 square feet of local retail space located in the North Tower at 124 White Street that was leased to the Chinatown community as partial mitigation for the construction of the North Tower, or that the Manhattan Jail will preclude a community development opportunity for Chinatown at 125 White Street. Doc No. 6 ¶¶ 75, 105. The City's conclusions regarding socioeconomics and the potential disruption of business activity are also not rational because they rely, in part, on the flawed transportation analysis (Doc. No. 190 at 10-53 (Response 2-2), 10-59, (Response 2-12)), and on an incomplete construction impact analysis. *See* Point IV.C3, *infra*. The City's disregard of pertinent information is insufficient to satisfy SEQRA.

The City's response to Petitioners' showing that the City failed to take a 'hard look' at indirect business displacement impacts is also lacking. The City argues that visitors and employees at the Manhattan jail would increase the consumer base and therefore there would be no significant adverse indirect business displacement. *See* Doc. No. 77 at 32-33. But the Record is devoid of analysis to support the City's conclusion. The FEIS responses that the City relies upon do not provide any analysis and merely repeat unsubstantiated conclusions. *See* Doc. No. 190 at 10-52 and 10-61 (Responses 2-2, 2-15). Nor does the City refute Petitioners' assertions that DOC failed to take the potential displacement of DCTV employees into account, since DCTV alone has 60 employees plus over 100 teachers (*See* Doc. No. 66 ¶ 14), or that the City failed to address impacts to tourism or the loss of income to Chung Pak.

With regard to impacts to neighborhood character, a review of the "full chapter" that the FEIS "devoted to" the topic and the responses to comments contained in the FEIS also illustrates that the City failed to take the requisite 'hard look." *See* Doc. No. 77 at 27. The Record does not contain any meaningful response to or evaluation of the impact of the proposed jail on the elements that give Chinatown a distinct sense of place, including the White Street pedestrian plaza and artwork, Chinatown and Little Italy Historic District, and food vendors that supply Chinatown residents with a unique and fresh food supply. *See* Doc. No. 68 (Culhane Aff.) ¶¶ 36, 42; Doc. No. 66 (Tsuno Aff.) ¶ 45; Doc. No. 50 (B. Lee Aff.) ¶¶ 4, 7, 10, 12.

The City's response to comments from the architectural historian intimately familiar with the Chinatown and Little Italy Historic Districts is particularly revealing. *See* Doc. No. 190, Comment 5-6 and Response 5-6 (10-75 and 76). Kerri Culhane observed that construction of a massive jail block would be grossly out of scale at the edge of a low-rise historic immigrant district, and that impacts to neighborhood character were not analyzed in the DEIS. *Id.* Yet in its discussion of the surrounding neighborhood, the City overlooks and fails to even mention the presence of low-rise residential buildings. *See* Doc. No. 190 at 10-82, 10-83, 10-86 and 10-141 (Responses 5-14, 6-1, 6-5, and 13-6, respectively). The City's purported analysis is entirely dismissive and does not even acknowledge the low-rise residential immigrant district let alone address the extent to which neighborhood character would be impacted. In essence, the City repeats its mantra that a jail is already on the site and therefore building a larger one in its place will have no significant adverse impact. SEQRA requires more.

C. Critical Analyses Were Either Not Undertaken or Were Improperly Deferred

The Court of Appeals has considered whether a lead agency may omit analyses that are essential to an understanding of environmental impacts of a project for a later day and has

unequivocally held that such analysis cannot escape public comment and agency review under SEQRA. *In re Bronx Comm.for Toxic Free Schs. v. New York City Sch. Contr. Auth.*, 20 N.Y.3d 148, 152, 156 (2012); *See* Doc. No. 49 at 23-24. Because *Bronx Committee* is squarely on point, the City tries to distinguish the holding, but Respondents' distinctions are without merit.

First, Respondents emphasize that the agency in *Bronx Committee* "admitted the environmental significance of the measures at issue." *See* Doc. No. 77 at 34. This is not a distinction at all, because DOC, in the FEIS, acknowledges that there are potential significant adverse impacts in several impact areas, which will be "refined" in future plans. Second, Respondents argue that the facts here are unlike the facts in *Bronx Committee*, but the City never explains the ostensible difference, claiming in conclusory fashion that "the FEIS has taken a "hard look" at potential environmental impacts, and forthcoming studies and measures will merely "refine but are not likely to alter this detailed analysis." Doc. No. 77 at 35.

1. The City's Transportation Analysis of the Manhattan Jail is Incomplete and Did Not Follow the Methodology Described in the Scope for the EIS

In the DSOW for the EIS, which proposed that the Manhattan jail would be located at 80 Centre Street, the City proposed that the transportation analysis would analyze five (5) intersections, including Mott Street, Elizabeth Street and Bowery along Canal Street. Doc. No. 167 at Figure 24. In the FSOW for the EIS, after the site was changed to White Street, the City disclosed that the transportation analysis would analyze four locations. Doc. No. 169 at Figure 29. In both scopes, the City described the "Traffic Analysis Methodology" and stated that the transportation analysis would "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. *Id*. at 30-31; Doc. No. 167 at 23-24.

Without any explanation, the City failed to follow this stated methodology for analysis of transportation impacts of the Manhattan jail. Although the City contents that it conducted "[e]xtensive data gathering and identification of intersections that might be affected by the [Manhattan jail] project," that "Project generated trips were assigned to the street network," and that there was an "extensive traffic data collection program to determine the level of service under existing conditions" (Doc. No. 78 ¶¶ 111, 113 and 114), none of this data is provided in the FEIS. No data is presented regarding existing conditions of intersections surrounding the jail, including the two intersections that were purported to be studied – Walker Street and Centre Street intersection and the Baxter Street and Walker Street intersection - nor is there any data regarding the future without the project in the build year of 2027, or the future with the project in 2027. There is *no* data to support the conclusions of the transportation chapter of the EIS regarding the Manhattan jail.

Yet, the FEIS contains this data for the other three jails. As shown in FEIS Appendix F, Respondents conducted existing level of service analyses at intersections surrounding the proposed jail sites in the Bronx, Brooklyn and Queens (Doc. No. 190, Tables F.2-1, F.3-1, F.5-1), level of service analyses in the future without the project for the project build year of 2027 in the Bronx, Brooklyn and Queens (*Id*. Tables F.2-2, F.3-2, F.5-2), and then layered onto to this construction with-action intersection level of service analyses for the Bronx, Brooklyn and Queens (*Id*. Tables F.2-5, F.3-5, F.5-3).

The FEIS Transportation chapters for all of the other proposed jail sites refer to v/c ratios, delays, and LOS for all of analyzed lane groups at all analyzed intersections in all peak periods

under existing conditions, without action conditions, and with action conditions that are provided in Appendix F. *See* Doc. No. 189 at 5.9-17-18 (existing conditions - Queens), 5.9-20 (future without action – Queens), 5.9-22 (future with action – Queens); Doc. No. 185 at 3.9-21 (existing conditions – Brooklyn), 3.9-23 (future without action – Brooklyn), 3.9-25 (future with action – Brooklyn); Exhibit 92C at 2.10-23 (existing conditions – Bronx), 2.10-25 (future without action – Bronx), 2.10-27 (future with action – Bronx).

The Transportation chapter of the EIS for the Manhattan jail references Appendix F for the Transportation Planning Factors and Travel Demand Forecast Memorandum (Doc. No. 190 at 369), which summarizes the transportation planning factors to be used for the transportation analyses for all of the jails and is referenced for all of the jail sites. However, there is absolutely no reference to data in Appendix F regarding v/c ratios, delays, and LOS for all of the analyzed lane groups at all analyzed intersections in all peak periods under existing conditions, without action conditions, and with action conditions in the Manhattan jail transportation chapter. There is no technical backup for the conclusions regarding the intersection capacity analyses in the existing, without action and with action conditions for the Manhattan jail site. This omission was pointed out in Brian Ketcham's letter annexed as Exhibit C to the Jan Lee Affidavit in Support of the Verified Petition. Doc. Nos. 55 and 58. Although the City's opposition references other aspects of Brian Ketcham's letter (Doc. No. 78 at fn. 13 and ¶ 119), Respondents have provided absolutely no explanation for this conspicuous absence of any backup data.

This omission of data may be due to the fact that the City abruptly changed the site from 80 Centre Street to 124-125 White Street as of late November 2018, and there was not sufficient time given the City's rush to meet the April 2020 deadline to assess existing conditions at the relevant intersections, upon which the no action and with action traffic information would have

been layered. The CEQR Technical Manual states that "[t]ime periods in which traffic counts should not be taken include the weekend before Thanksgiving through mid-January and the last week of June through mid-September (coinciding with Department of Education (DOE) summer vacation)" as traffic volumes and patters are unusually low or high during these periods of time and "do not provide representative traffic data." Manual at 16-23. In any event, it was not rational for the City to depart from its own methodology for analyzing the transportation impacts for the Manhattan jail, and to exclude data from the FEIS for the Manhattan jail that was in fact gathered for each of the other jail sites in accordance with the stated methodology. *See In re Charles A. Field Delivery Serv. (Roberts)*, *supra*, 66 N.Y.2d at 520.

2. Historic Impacts/Archeological and Architectural Resources

In response to Petitioners' showing that DOC's future planned consultation with the City's Landmarks Preservation Commission (LPC) constitutes an improper deferral of environmental analyses, DOC contends that its "commitment to additional archaeological review, in consultation with LPC, was in addition to DOC's SEQRA obligations, not a deferral of such obligations." Doc. No. 77 at 37-38. The City's position, if accepted, would set a precedent allowing projects to proceed before important and relevant information is made available to the public and decision-makers and would completely undermine the purpose and intent of SEQRA. *See Bronx Comm.,* 20 N.Y.3d at 156. In addition, the City's tone-deaf response and promise to "share" its post-hoc analysis with Petitioners, including AICH, ignores

the City's long history of purposeful non-inclusion of and utter disregard for Indigenous peoples and their rights.[19]

If DOC wants to demolish and reconstruct a jail on a site of archeological significance then it must to do so in the open and deliberative process, which the law requires, and not in a bilateral negotiation with the LPC, which is not an independent body and whose commissioners are appointed by the Mayor.[20] *See In re Merson v. McNally*, 90 N.Y.2d 742, 750 (1997) (holding that a SEQRA review process conducted through closed bilateral negotiations "would bypass, if not eliminate, the comprehensive, open weighing of environmentally compatible alternatives both to the proposed action and to any suggested mitigation measures."); *see also In re Penfield Panorama Area Cmty. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 349 (4th Dep't 1999) (invalidating SEQRA review where remediation plan had not been part of public review, holding that "deferring resolution of the remediation was improper because it shields the remediation plan from public scrutiny").

The City's own studies established that the project may disturb "intact historic period archaeological deposits," (Doc. No. 186 at 4.5-9) and recommended "additional archaeological analyses to confirm the presence or absence of archaeological resources within those areas and to determine the need for additional archaeological investigations." *Id*. at 4.5-16. Just like the maintenance and monitoring measures that were kept from public review in *Bronx Committee*, here "a Work Plan would be prepared and submitted to LPC for review and approval" and

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[19] The City does not refute that AICH was excluded from the hand-selected but now disassembled Neighborhood Advisory Committee for the Manhattan jail or that it did not even advise AICH of the meetings at all. S*ee* Doc. No. 53 (Iakowi:He'Ne' Aff.) ¶¶ 19-20. Nor does the City address that its overt lack of inclusion violates the principles contained in the American Indian Religious Freedom Act, United Nations Declaration on the Rights of Indigenous Peoples and treaties. *Id*. ¶¶ 6-8, 28.

[20] *See* https://www1.nyc.gov/site/lpc/about/about-lpc.page.

"additional archaeological investigations would be conducted in consultation with LPC." *Id*. According to the FEIS, after "the completion of the additional archaeological investigations necessary within the areas of archaeological sensitivity and LPC concurrence with the conclusions of those investigations, the proposed actions would not result in significant adverse impacts on archaeological resources." *Id*. at 4.5-17. DOC's conclusion, based upon plans and investigations that have yet to be done and that are outside public purview, is plainly irrational and arbitrary.

SEQRA does not permit an applicant -- not even a City agency -- to make it up as it goes along with the promise of "trust me." DOC's coordination with LPC does not in any way "justify short-circuiting State Environmental Quality Review Act (SEQRA) review" and does not come close to satisfying SEQRA's hard look requirement. *Bronx Comm.*, 20 N.Y.3d at 149.

DOC's attempt to rationalize its complete disregard for the impacts of construction on the historic and architecturally significant DCTV Firehouse is equally unavailing and should be rejected. To counter Petitioners' assertions and the affidavit of DCTV co-founder, Keiko Tsuno, the City wraps itself in DOB policy TPPN #10-88, claiming that the policy only required analysis of architectural resources within a 90-foot radius of the Manhattan jail. According to the City, since DCTV was "170 feet from the site, [it] fell outside this radius and thus was reasonably considered not at risk of significant adverse physical construction impacts." Doc. No. 77 at 28; *see also* Doc. No. 78 ¶ 81.

The City is wrong. Just because the DCTV Firehouse building falls slightly outside the 90-foot radius of the DOB Policy, it does not mean that the City acted reasonably in determining

that the DCTV building was not at risk of significant adverse physical construction impacts.[21] There is no dispute that the City was well aware of the historic and architectural significance of the DCTV building and its close proximity to the Manhattan jail site, having identified it as a nearby architectural resource in the FEIS. *See* Doc. No. 186, Figure 4.5-1, Table 4.5-1 and 4.5-18. The Record is also clear that there were numerous comments raising concerns over the impacts of construction on sensitive structures in the area of the Manhattan jail. *See*, *e.g.*, Doc. No. 190 at 10-81 (Comment 5-12) and 10-166 (Comment 14-35). The City gave no consideration to these comments, improperly relying on DOB policy.

The DOB policy (TPPN #10-88) is not a rule that must be strictly applied. And even if it were, the New York City Building Code ("Building Code") establishes minimum requirements for the design and construction of the foundations of buildings. The Building Code requires that "foundations shall be proportioned to limit settlements to a magnitude that will not cause damage to the proposed construction or to existing adjacent *or nearby buildings* during or after construction." Building Code § 27-657. Thus, under the Building Code, the City is prohibited from causing damage to buildings located more than 90 feet away, and damage to nearby structures must be considered.

It was not rational for the City to exclude the DCTV building from any analysis of direct, physical impacts of a massive multi-year demolition and reconstruction project. DCTV is much more than a historic and architectural resource. It is also an important community resource, providing a variety of services, programming and community benefits that have had a

[21] The DCTV building is less than one block (approximately 100 feet) away from the jail. *See* Doc. No. 66 (Tsuno Aff.) at ¶¶ 4, 19, 29, 34, 35, 46. Petitioners do not concede that the building is 170 feet from the Manhattan jail site as was stated in the FEIS.

transformative effect on thousands of people over the past fifty years. *See* Doc. No. 66 (Tsuno Aff.) ¶¶ 6-19.

3. Construction

In this case, the only objective parameters that were settled when the Manhattan jail project began undergoing environmental impact review and was certified into ULURP were proposed maximum permissible building envelopes, which were slightly reduced before the project was approved. The City admittedly did not know critical information, including how the existing buildings are going to be demolished; how long demolition or construction will take; where staging will occur; and whether street closures will be required. These unknowns made it impossible for the City to assess construction impacts.

With respect to construction-related impacts on traffic, the FEIS acknowledges as much: "Because detailed plans for the proposed detention facility and detailed construction logistics, including any necessary street or sidewalk closures are not known at this time, the level of specificity necessary to quantify the extent to which traffic operations would be disrupted as a result of street network access accommodations requested to facilitate the construction effort cannot be made at this time. As the design-build process is initiated, an updated assessment of traffic conditions would be made[.]" Doc. No. 187 at 4.14-1.

Similarly, with respect to construction-related pedestrian impacts, the FEIS recognizes that, "[b]ecause detailed plans for the proposed detention facility and detailed construction logistics, including any necessary street or sidewalk closures, are not known at this time, the level of specificity necessary to quantify the extent to which pedestrian operations would be disrupted as a result of construction activity (construction worker related and due to potential public infrastructure access accommodations requested to facilitate the construction effort) cannot be made at this time." *Id.* at 4.14-2.

Yet this admitted lack of information did not stop the City from making baldly unsupported statements in the FEIS about these very same things. For example, despite stating that it did not know about necessary sidewalk closures, the FEIS concludes that "construction at the Manhattan Site would not significantly affect the operations of any other nearby businesses, nor would construction obstruct major thoroughfares used by customers or businesses. Potential sidewalk closures would not front any active businesses, and pedestrians would continue to have views of and access to businesses on surrounding blocks." Doc. No. 190 at 10-143 (Response 4-2).

As with the transportation analysis, there is no data in the FEIS to support the City's statement that no detailed analysis of construction traffic is warranted because construction vehicles and displaced vehicles were assigned to the traffic network and no analyzed intersections is expected to attract 50 or more vehicle trips (Doc. No. 187 at 4.14-11). The evidence for this supposed threshold determination is simply not presented. Moreover, the FEIS assumes that most construction workers would drive to the site (Doc. No. 187 at 4.14-12-13), but their vehicles do not appear to have been assigned to the network to determine potential impacts.

The FEIS shows that the City knows that the groundwater beneath the site is present at a range of 18-23 feet below grade and thus, could potentially be encountered during proposed construction. Doc. No. 186 at 4.1-22. However, because the Manhattan jail has not yet been designed, the FEIS cannot conclude whether or not dewatering during construction will be needed. This piece of information is critical to the DCTV building, which suffered grave foundation damage when the City reduced the water table to build the nearby courthouses and federal buildings nearby, causing the City to abandon the building. Doc No. 66 (Tsuno Aff.) ¶ 31.

Further to the DCTV building in particular, the City admits that it did not assess construction impacts on DCTV, such as vibrations, noise and the effects of potential dewatering, because it the building is too far away from the Manhattan jail site. Doc. No. 77 at 28. However, the City's conclusion that DCTV is 170 feet from the site (*id.*) is incorrect. As stated in the Tsuno Affidavit, the DCTV building is approximately 100 feet from the Manhattan jail site and the entrance to a newly renovated theatre is even closer to the proposed jail. *See* Doc. No. 66 ¶¶ 34, 42. Due to the nature of the DCTV building and the community services that are provided inside, the impacts of construction on this building (*see id.* at 35-38, 43, 47, 50, 51, 52, 54) should not have been overlooked.[22]

POINT V.

THE COURT SHOULD REMIT THIS MATTER FOR PREPARATION OF A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

In this proceeding, Petitioners are seeking an order invalidating the land use approvals. Even if the land use approvals are not annulled, however, the Court should direct Respondents to prepare a supplemental environmental impact statement ("SEIS") after holding scoping on the actual proposed location of the Manhattan jail -- 124-125 White Street. *See* Doc. No. 6 at 53; Doc. No. 49 at 41. The SEIS should take an actual hard look at all of the areas that the City completely failed to consider, or merely referenced in passing in the FEIS, including the loss of open space at White Street, the transportation impacts of the Manhattan jail, public health, archeological/historic resource impacts, socioeconomics and neighborhood character. *See*

[22] The City's own failure to conduct public scoping on 124-125 White Street cannot excuse the City from having to address these impacts. The fact that DCTV did not comment on the DEIS is a direct consequence of the City's own failure to strictly comply with SEQRA when it failed to conduct public scoping on the actual jail location. DCTV cannot be held culpable and forced to suffer the consequences as a result of the City's indisputable violation of law.

Point IV, *supra*; Doc. No. 49 at Point III. A hard look must be meaningful, capturing the true overall impacts of a project.

In addition, the SEIS should also study the impacts of new information that was not studied in the FEIS, including but not limited to, moving the location of vehicular ingress and egress from Baxter Street to Centre Street and new project components, such as construction of a temporary intake facility. *See* Doc. No. 6 ¶¶ 192 -193; Doc. No. 44 at 15-16; Doc. No. 49 at 41, fn. 7. The City has no response to Petitioners' showing that these changes to the project were not studied, and admits that relocation of the vehicular ingress and egress from Baxter to Centre Street was not reflected in any of the environmental review documents for the Manhattan jail. *See* Doc. Nos. 6 and 76 at ¶ 192.

Changes in the project, newly discovered information, or a change in circumstances are proper bases for directing the preparation of a supplemental environmental impact statement ("SEIS"). 6 NYCRR § 617.9(a)(7)(i); *see also Bronx Comm. for Toxic Free Schs.,* 20 N.Y.3d at 156. The criteria to be used to determine whether an SEIS is required is the importance and relevance of the information and the present state of the information. *See* 6 NYCRR § 617.9(a)(7)(ii).

SEQRA regulations plainly require a lead agency to prepare an SEIS if environmentally significant modifications are made to a project after the issuance of the FEIS. In re *Jackson,* 67 N.Y.2d at 400; *In re Doremus v. Town of Oyster Bay,* 274 A.D.2d 390 (2d Dep't 2000); *Bryn Mawr Props., Inc. v. Fries,* 160 A.D.2d 1004 (2d Dep't 1990); *Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay,* 88 A.D.2d 484 (2d Dep't 1982); 6 NYCRR § 617.9(a)(7). Additionally, "a lead agency's responsibility under SEQRA to examine changes to a project does not end simply because the agency has issued its findings." *In re Comm. for*

Environmentally Sound Dev., Inc. v. City of New York, 190 Misc. 2d 359, 371 (Sup. Ct. N.Y. Cnty. 2001).

Here, even though DOC's Findings were not issued until March 2020, there is nothing in the Findings that mentions, let alone takes the requisite hard look at these changes to the Manhattan jail, which eluded any environmental review. *See* Doc. No. 194. Accordingly, because the Record demonstrates that there were substantial changes made to the project after the completion of the FEIS, the Court should remand this matter for preparation of a supplemental EIS regarding, at minimum, relocation of the vehicular entrance and construction of a temporary intake facility. *See Green Earth Farms Rockland LLC v. Town of Haverstraw Planning Bd.*,No. 2465-2012, 45 Misc. 3d 1209(A), 2014 WL 5344127 (Sup. Ct. Rockland Cnty. Aug. 23, 2014), *aff'd as modified*, 153 A.D.3d 823 (2d Dep't 2017), *citing*, *In re Bryn Mawr Props.,* 160 A.D.2d 1004; *cf., In re Friends of Smith Farm v. Town Bd. for Town of Clarkstown,* 45 AD3d 765 (2d Dep't 2007); *Develop Don't Destroy Brooklyn, Inc. v. Empire State Dev. Corp.,* 30 Misc. 3d 616, 632 (Sup. Ct. N.Y. Cnty. 2010) (court remanded the matter for further findings by the lead agency on certain project impacts and the need for an SEIS).

Preparation of a SEIS is warranted here for the additional reason that there has been a drastic change in circumstances and newly discovered information regarding public health since completion of the environmental review process. The COVID-19 pandemic is a generation defining event, and is perhaps the most important global experience since World War II and the Great Depression. The effects of the pandemic, including its economic effects which have caused the City to alter its commitments relating to the BBJS project and have changed the project's build-year, should be accounted for and evaluated in a SEIS.

The fiscal 2021 budget for MOCJ reveals that certain programs agreed to by the City in the BBJ Points of Agreement ("POA") will not be funded in order to meet the City's Program to Eliminate the Gap.[23] *See* Doc. No. 44. The commitments in the POA were part of the basis of the City Council's approval of the BBJS project (Doc. No. 151) and their delay is a substantial change in the BBJS that requires further study. In addition, a delay in construction is a change in circumstance that warrants preparation of a SEIS. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, 33 Misc. 3d 330, 340–41 (Sup. Ct. N.Y. Cnty. 2011), *aff'd*, 94 A.D.3d 508 (1st Dep't 2012) (affirming lower court's granting of petitions to extent of remanding matter to prepare supplemental environmental impact statement (SEIS) assessing environmental impact of delay in construction of the project and to make further findings on whether to approve modified plan).[24]

The dangerous coronavirus, which presents a grave threat to already vulnerable populations, further underscores the need to assess the public health impacts from demolition and construction of the Manhattan jail in the densely populated Chinatown community. *See* Doc No.

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[23] The POA programs that will no longer be funded in Fiscal 2021 include expansion of a Crisis Management System and the opening of a community justice center focused on providing law enforcement alternatives to arrest and incarceration, local options to complete mandatory volunteer service, and reducing recidivism post-incarceration.

[24] The City Council's Report to the Committee on Finance, Fiscal 2020-2024 Executive Financial Plan Overview, dated May 6, 2020, revealed that the "[p]lanned commitments for new borough-based jails have been reduced by $472 million in the Executive Commitment Plan and moved into the Fiscal 2025-2029 plan. Continued delays of these projects into years beyond the current Administration decrease the chances of these jails being built." https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/05/Financial-Plan-Overview.pdf at 13; *see also* City Council's 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, (Mar. 16, 2020), at 5, https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/03/072-DOC.pdf (noting that BBJS project is predicated on an ADP of under 4,000 and that "[u]nless the Administration begins to recognize more substantial savings associated with population declines and BBJ, the strategic decision to allocate savings for investments in new borough-based jails will be incredibly difficult to implement."

64 (Zelikoff Aff.) ¶¶ 9-10 (explaining increased adverse public health risks to Asian Americans, elderly and children in proximity to construction impacts). Similarly, the project's potential significant adverse impacts to small businesses are even more acute due to COVID-19, which has devastated businesses in Chinatown that were already struggling and not fully recovered from the impacts of 9/11. *See* Doc. No. 68 ¶ 21.

The current pandemic has also revealed heightened public-health implications on institutionalized populations. The BBJS project was designed with an average daily population ("ADP") of 3,300, a number based in part on sweeping legal restrictions to the use of bail and pretrial detention. *See* Doc. No. 79 (Affidavit of Dana Kaplan) ¶ 14. According to the City, as of December 2019, the ADP was just under 6,000, and as of May 29, 2020, the ADP dropped to below 4,000 as a result of the release of certain detainees due to the COVID-19 crisis. *Id*.

However, in April 2020, the State passed a series of significant revisions to the bail reform legislation, making more cases and situations eligible again for bail and detention. The Center for Court Innovation estimated that "relative to the effects of the original law and the pre-COVID-19 jail population—the revised legislation will lead to a 16 percent *increase* in the number of people detained in the city's jails awaiting trial." https://www.courtinnovation.org/publications/bail-revisited-NYS. The assumptions relied upon when the City prepared the DEIS/FEIS as to the projected number of detainees are no longer valid in light of the pandemic and changes in bail reform laws.

This Court must ensure that DOC acts as "steward of the air, water, land and living resources" so as to protect the environment for the use and enjoyment of this and all future generations." ECL § 8–0103(8); *see Green Earth Farms Rockland LLC,* 45 Misc. 3d 1209(A), 2014 WL 5344127. Given the extraordinary and historic public health and economic crisis, the

Manhattan jail should be reassessed in a SEIS, including but not limited to, with regard to the build-year, open space, density and public health and safety of detainees, employees and host communities.

POINT VI.

THE RECORD ESTABLISHES THAT THE CITY DID NOT GIVE HONEST CONSIDERATION TO THE FAIR SHARE CITERIA

Petitioners showed in their prior Memorandum of Law that the City's Fair Share Report and FEIS merely paid lip service to the fair share factors, rather than undertaking a meaningful analysis of alternative sites, as legally required. *See* Doc. No. 49 at 49-53. In response, the City contends in conclusory fashion that it met the applicable legal standard, which only requires "substantial compliance" with the Fair Share Criteria. *See* Doc. No. 77 at 53. The Record demonstrates, however, that the City's "Fair Share Analysis" contained no analysis at all, and merely recited the applicable Fair Share Criteria and a pre-ordained outcome, without evaluation of alternative sites or the extent to which the character of the already overburdened neighborhood would be adversely affected by the construction of a new larger jail.

The City blatantly misrepresents the Record evidence by arguing that the Fair Share Analysis "expressly considered neighborhood character, recognizing the proximity of Chinatown and Little Italy." *See* Doc. No. 77 at 55. Pages 7-8 of the pages of the Fair Share report, cited by the City, merely describe the 400-foot radius around the site to include Chinatown, Tribeca, and portions of Soho and Little Italy. Simply listing the applicable criteria and creating maps and charts is not tantamount to honest consideration of the fair share factors, including neighborhood character, as required under the law. *See* Doc. No. 21.

The "discussion" of criteria 4.1(b) on page 12 of the Fair Share Analysis is similarly lacking and fails to describe the extent to which neighborhood character would be adversely

affected by the high concentration of facilities in the neighborhood. With regard to Criteria 4.1(c), the City again blatantly mischaracterizes the Record evidence. Contrary to its contention, the City did not provide "multiple particularized reasons in addition to cost-effectiveness as to why alternate sites, including alternate non-City sites, were not feasible." Doc. No. at 56. Rather, the City described the reasons that *only* one other site – 80 Centre Street – was *preferable* to 124-125 White Street, and then disregarded 80 Centre as an option due to the City's self-imposed time frames for closing Rikers Island and cramming the project into an unnecessary and inappropriate design-build box. *See* Point III, *supra*. Such self-imposed limitations are not a basis for the City to avoid its obligations under the City Charter. *See Ocean Hill Residents Ass'n v. City of New York,* No. 23921/2011, 33 Misc. 3d 1230(A), 2011 WL 6091178 (Sup. Ct. Kings Cnty. Nov. 22, 2011) Misc. (rejecting City's contention that they are limited by what buildings are offered by private parties as "a self-imposed limitation that cannot be a basis to avoid its obligations" under Fair Share Criteria).

By characterizing its legal obligation under the Fair Share Criteria as one of "disclosure" only and highlighting in their Memo of Law that the City proceeded with the original location in *In re 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) ("*Silver"),* anyway, after conducting a new Fair Share review (Doc. No. 77 at 54), the City reveals its contempt for the requirement as a meaningless hurdle. Although the City may abhor the thought, it is legally required to conduct a meaningful analysis of the burdens associated with the project as it relates to the equitable distribution of public facilities, including in instances, such as here, where there are already a large number of facilities located in the vicinity of the site. *See Id.* It is clear on this Record that the City failed to engage in such honest consideration. *See Ocean Hill Residents Ass'n,,*

33 Misc. 3d 1230(A), 2011 WL 6091178 (finding insufficient evidence as to whether the City gave honest consideration to the Criteria and allowing disclosure to create a more fully developed factual record to determine whether there was a rational basis for the City to locate proposed shelter at site, despite the over concentration of shelters in that community).[25]

[25] In light of absence of any honest, meaningful analysis in the Record, the City's attempt to distinguish *Silver* on the ground that *Silver* involved a complete failure to consider the fair share factors is unavailing. Additionally, none of the court decisions cited by the City support a finding that the City substantially complied with the Fair Share Criteria. *See Cmty. Planning Bd. No. 4 v. Homes for the Homeless*, 158 Misc. 2d 184, 191-92 (Sup. Ct. N.Y. Cnty. 1993) (holding fair share criteria inapplicable because shelter was not a city facility); *In re Turtle Bay Ass'n v. Dinkins*, 207 A.D.2d 670 (1st Dep't 1994) (finding substantial compliance where 18 alternative sites were inspected and City honestly reviewed whether proposed site would have an impact on community); *Tribeca Cmty. Ass'n v N.Y.C. Dep't of Sanitation*, No. 101498/09, 2010 WL 151534 (Sup. Ct., N.Y. Cnty. Jan. 11, 2010), *aff'd*, 83 A.D.3d 513 (1st Dep't 2011) (finding that a meaningful analysis occurred where five alternative sites were considered and there was not another similar facility within a half mile of site); *Bloomberg v. Liu*, No. 401122/2013, 43 Misc. 3d 1203(A), 2014 WL 1258240 (Sup. Ct. N.Y. Cnty. Mar. 12, 2014), *aff'd*, 133 A.D.3d 414 (1st Dep't 2015) (after searching record, court found that meaningful analysis occurred); *Ass'n for Cmty. Reform Now v. Bloomberg*, No. 114729/05, 13 Misc. 3d 1209(A), 2006 WL 2686520 (Sup. Ct., N.Y. Cnty. Sep. 19, 2006) (court upheld fair share review where there was an absence of similar facilities in the community).

CONCLUSION

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

Dated: New York, New York
July 30, 2020

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