SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

CHHAYA COMMUNITY DEVELOPMENT CORPORATION, MINKWON CENTER FOR COMMUNITY ACTION, INC., GREATER FLUSHING CHAMBER OF COMMERCE INC., and Robert LOSCALZO, Petitioners, For a Judgment Pursuant to C.P.L.R. Art. 78 -against- NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY CITY PLANNING COMMISSION, and CITY COUNCIL OF THE CITY OF NEW YORK, Respondents.	**Index No. 706788/2020** **AMENDED VERIFIED PETITION** **ORAL ARGUMENT REQUESTED**

Petitioners, by their attorneys Paula Z. Segal and Daniel N. Carpenter-Gold, of TakeRoot Justice, hereby verify and affirm, under the penalties of perjury, that the following is true and correct:

PRELIMINARY STATEMENT

1. Flushing is a neighborhood under siege. Its working-class residents, primarily people of color, face an ever-increasing rate of displacement resulting from massive real-estate speculation over the last decade. Affidavit of Annetta Seecharran (May 7, 2020) (Dckt. No. 13) ("2020 Seecharran Aff.") ¶ 3; Affidavit of John Park (May 1, 2020) (Dckt. No. 19) ("2020 Park Aff.") ¶ 3; Affidavit of John Choe (May 7, 2020) (Dckt. No. 23) ("2020 Choe Aff.") ¶ 5. New residential development has not lowered rents, but instead created a surplus of unaffordable luxury housing, leading to a 21% rental vacancy rate. 2020 Seecharran Aff. ¶ 5. The median household income in Flushing has steadily declined, while the median sales price per housing

unit has sharply increased, pushing up the number of people considered severely rent-burdened in the area. 2020 Park Aff. ¶ 3.

2. Respondent City Council has approved a "Special Flushing Waterfront District" and upzoning of properties in its boundaries (collectively, these actions are referred to herein as the "Rezoning"). The Rezoning will exacerbate and amplify these threats. It is designed to facilitate nearly 3,000,000 zoning square feet of new development and nearly 1,800 new apartments, *see infra* ¶ 37 et seq., representing a profound and permanent change to the face of the Flushing waterfront. The massive influx of people in the area will burden the infrastructure and environment in ways that Respondents acknowledge, but never studied as required by the State Environmental Quality Review Act ("SEQRA").

3. A comparable rezoning, planned for the same area, called "Flushing West," was proposed only a few years ago. Unlike the Rezoning, Respondents Department of City Planning ("DCP") and City Planning Commission ("Commission") found that Flushing West would have the potential of creating negative environmental impacts on the environment in the Environmental Assessment Statement ("EAS") they adopted for Flushing West. The agencies determined that the Flushing West rezoning application would require a full environmental review before it could be considered for approval by the Commission and the City Council, including an Environmental Impact Statement ("EIS") and the public hearings required by SEQRA when an EIS is drafted. The application would be incomplete without an EIS and could not proceed to review for potential approval. After the public comment on the Draft Scope of Work for the Flushing West EIS, the City withdrew that proposal.

4. In the present matter, Respondents have cut off environmental review prematurely. No Draft Scope of Work was ever prepared. Instead, Respondents declared that the

project is not subject to full environmental review and the accompanying public scrutiny of its impacts on the basis of an absurd determination that the Rezoning could not possibly result in environmental harm. *See* May 7, 2020 Affidavit of Chris Walters Aff., Ex. B (Dckt. No. 5) (herein "the Negative Declaration" or "Neg. Dec.").[1]

5. To buttress the Negative Declaration, the Commission and DCP issued a false assessment of the likely impacts of the Rezoning in the EAS. Subsequent approvals of the Rezoning by the Respondents Commission and City Council were made "based on the environmental determination." City Council Land Use Resolution 1502, Dec. 10, 2020, Affirmation of Paula Segal (February 12, 2021) ("Segal Aff."), Ex. D. *See infra* ¶¶ 32-33.

6. The determination in the EAS that no environmental harm will result from the Rezoning rests on its claim that the additional development permitted by the Rezoning—called the "development increment"—is negligible, and therefore the impacts related to increased development, such as secondary displacement or the strain on local infrastructure, will also be negligible.

7. The negligible development increment alleged by the EAS, in turn, is predicated upon two erroneous claims: first, that the total amount of new development that would be permitted is far less than the Rezoning allows on its face, and second, that the speed of new development that would have occurred in the absence of the Rezoning—the baseline against which the development increment is measured—would be far faster than is reasonable. They claim, in essence, that the nearly all of the 2,900,000-zsf project would have been built by 2025

[1] The Walters Aff. and its exhibits were written prior to the approval of the Rezoning by Respondents; throughout, the Rezoning is referred to as the "Proposed Rezoning." The Proposed Rezoning referred to therein is identical to the Rezoning that Respondent City Council approved.

anyway, and therefore the project has no chance of impacting the environment. *See infra* ¶¶ 40-56.

8. As a result, Petitioners face an imminent threat to their neighborhoods, proposed under false pretenses and approved without an adequate understanding of the impacts it would cause. Petitioners were also denied the opportunity to present the flaws in the EAS to the Department and Commission in a manner that would allow them to be corrected.

9. Petitioners therefore bring this challenge to the unlawful and arbitrary approval of the Rezoning without an Environmental Impact Statement and the unlawful and arbitrary issuance of the Negative Declaration and EAS.

PARTIES, JURISDICTION, AND VENUE

10. Respondent New York City Department of City Planning ("DCP") is an "agency" within the meaning of SEQRA, Envtl. Cons. L. § 8-105(3); *see also* 6 N.Y.C.R.R. § 617.2(c), and City Environmental Quality Review ("CEQR"), 43 R.C.N.Y. § 6-02; *see also* 62 R.C.N.Y. § 5-02(c)(3). DCP accepted a flawed EAS and made the unlawful determination that prematurely ended environmental review of the Rezoning (the Negative Declaration). Neg. Dec. at 1.

11. Respondent New York City City Planning Commission ("Commission") is an "agency" within the meaning of SEQRA, Envtl. Cons. L. § 8-105(3); *see also* 6 N.Y.C.R.R. § 617.2(c), and CEQR, 43 R.C.N.Y. § 6-02; *see also* 62 R.C.N.Y. § 5-02(c)(3). It took two separate unlawful actions that led to the approval of the Rezoning: it accepted DCP's unlawful Negative Declaration, Neg. Dec. at 1, and subsequently approved the Rezoning itself on the basis of that Negative Declaration and a flawed EAS. For the former its role was as lead agency pursuant to SEQRA. *Id.* The Rezoning approval was made in the context of the Uniform Land Use Review Procedure ("ULURP"), N.Y.C. Charter § 197-c(h), in which the Commission has a

prescribed role. *See* Commission Disposition Sheet, Nov. 4, 2020, Segal Aff., Ex. A; City Planning Commission Resolution C 200033 ZMQ (Cal. 11, Nov 4, 2020), Segal Aff., Ex. B.

12. Respondent New York City Council (Council) is an "agency" within the meaning of SEQRA, Envtl. Cons. L. § 8-105(3); *see also* 6 N.Y.C.R.R. § 617.2(c), and CEQR, 43 R.C.N.Y. § 6-02; *see also* 62 R.C.N.Y. § 5-02(c)(3). The Council approved the Rezoning on the basis of the unlawful Negative Declaration and flawed EAS pursuant to its role in ULURP, N.Y.C. Charter § 197-d(c). *See* City Council Meeting Minutes 7-9, Dec. 10, 2020, Segal Aff., Ex. C; City Council Land Use Resolution 1502, Dec. 10, 2020, Segal Aff., Ex. D.

13. Petitioner Chhaya Community Development Corporation ("Chhaya") is a nonprofit housing and community organization that has advocated for the needs of New York City's South Asian community for the past 20 years. 2020 Seecharran Aff. ¶ 2. Chhaya serves approximately 3,000 households each year and supports over 25 active tenant associations and tenant unions, many in or near Downtown Flushing. *Id.* Chhaya's work encompasses tenant rights, financial empowerment, sustainable homeownership, foreclosure prevention, immigration services, small business support, civic engagement, and broader community building and research and advocacy around community needs. *Id.* Chhaya participated as much as it was able in the limited public review of the proposed rezoning of Downtown Flushing. *Id.* ¶ 4. However, it was prevented from providing comments on the environmental review of the proposed rezoning by the Negative Declaration, which eliminated the public hearings that would otherwise have given it the opportunity. *Id.* The Rezoning increases pressures on Chhaya's members who are low-income tenants, small immigrant-owned businesses and families with children in schools that serve the neighborhood. *See* Additional Affidavit of Annetta Seecharran (February 11, 2021). The influx of housing and amenities to serve thousands of new high-income residents will

push the infrastructure that Chhaya's member rely on past its breaking point, and push residential and commercial tenants out. *Id.*

14. Petitioner MinKwon Center for Community Action, Inc. ("MinKwon") is nonprofit community-based organization located in the heart of downtown Flushing. 2020 Park Aff. ¶ 3. MinKwon primarily serves low-income, limited-English-proficient residents who live and work in the Greater Flushing area. *Id.* MinKwon has been actively engaging with Flushing residents about the potential redevelopment of the Flushing waterfront for years. *Id.* ¶¶ 7-8. Like Chhaya, MinKwon participated as much as it was able in the limited public review of the proposed rezoning of Downtown Flushing. *Id.* ¶ 4. Although MinKwon has heard substantial concerns from Flushing residents about any rezoning that could increase rents in the area, *id.* ¶ 8, it was limited in raising these concerns as regards the proposed rezoning by the Negative Declaration, which eliminated the public hearings that would otherwise have been conducted. *Id.* ¶ 4. The imminent implementation of the Special Flushing Waterfront District puts the community that MinKwon empowers, educates, and serves at severe risk of displacement. Additional Affidavit of John Park (February 12, 2021), ¶ 4 et seq.

15. Petitioner Greater Flushing Chamber of Commerce Inc. ("Chamber") is a nonprofit organization with many members in downtown Flushing and the surrounding neighborhoods. 2020 Choe Aff. ¶ 3. The Chamber serves local businesses; it has been working on a community-led development plan that would reflect local residents' and business owners' vision of Downtown Flushing. *Id.* ¶ 7. Like Chhaya and MinKwon, the Chamber participated in public processes related to the proposed rezoning to the extent it was able but would have raised concerns specific to the environmental review if such comments were permitted. *Id.* ¶¶ 4, 6-7.

Now, the Chamber and its members are threatened by the likely negative impacts of the Rezoning.

16. Petitioner LoScalzo is a resident of Whitestone, Queens. Affidavit of Robert LoScalzo (May 7, 2020) (Dckt. No. 25) ("LoScalzo Aff.") ¶ 1. LoScalzo has studied the planning history of Downtown Flushing and neighboring Willets Point. *Id.* ¶ 5. He frequently travels for time-sensitive business purposes through the area affected by the proposed rezoning and is concerned about the impacts the proposed rezoning will have on traffic in the area. *Id.* ¶¶ 6, 8. Petitioner LoScalzo would have brought these concerns to Respondents during the public-review process ordinarily provided by SEQRA and CEQR but was unable to because of the improperly issued Negative Declaration. *Id.* ¶¶ 16-20.

17. This Court has jurisdiction over this proceeding: Petitioners allege that Respondents' issuance of the Negative Declaration and approval of the Rezoning were in violation of lawful procedure, affected by an error of law, and were arbitrary, capricious, and an abuse of discretion. C.P.L.R. § 7803(3). The issuance of a Negative Declaration is a final agency action as required by C.P.L.R. § 7801. *See, e.g.*, *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223 (2003). The approval by the Council of an application in ULURP is likewise a "final action." N.Y.C. *See* Charter § 197-d(c).

18. This proceeding was timely filed within the limits set by C.P.L.R. § 217(1).

19. Venue is proper in the County of Queens because material events took place here. C.P.L.R. §§ 506(b), 7804(b).

STATEMENT OF FACTS

I. Downtown Flushing

20. Over the last decade Flushing has been a focal point of the luxury housing boom that has transformed many parts of New York City. In fact, apart from Williamsburg, Brooklyn, Flushing has seen the largest number of new luxury units in the five boroughs. *See, e.g.*, Stefanos Chen, *The Decade Dominated by the Ultraluxury Condo*, N.Y. Times (Jan. 10, 2020), attached as Walters Aff. Ex. G (Dckt. 10). As a result, the predominately working-class immigrant community has been experiencing growing displacement pressure as property values, residential rents, and commercial rents rise beyond the means of its residents.

21. Between 2010 and 2017, the median household income in Flushing steadily declined, while the median sales price per housing unit sharply increased in Queens Community District 7 from $670,290 to $876,000. 2020 Park Aff. ¶ 3. During the same period, the percentage of individuals severely rent-burdened in the area rose from 31.3% to 39.9%. *Id.*

22. The luxury developments, and even the affordable housing created through Mandatory Inclusionary Housing, have failed to meet the needs of the community and are clearly not designed for current residents: Downtown Flushing has some of the highest rates of poverty in the borough, and one in three residents of the project's census tract live below the poverty line. 2020 Seecharran Aff. ¶ 5.

23. Neighborhood amenities have not kept up with the construction boom and increasing density, and there are no signs that this will change anytime soon. Nearly every elementary and middle school serving the Flushing community is categorized as overcrowded. Every single high school that serves the community is considered overcrowded, including Francis Lewis High School which is operating at 208% of its capacity. *See* N.Y.C. Dept. Educ.,

Space Overutilization in New York City Public Schools: Report on the 2017-2018 School Year 21 (2019).[2]

24. Like the developers and the City, Petitioners have a development plan: a new school and library; a youth center and senior center; spaces and amenities for education and stewardship, including passive recreation spaces and publicly accessible bathrooms, included in any new waterfront esplanade design. *Id.* This is a vision of waterfront development that considers the challenges facing the Flushing community, meets the needs of the community, and does not overburden the existing infrastructure. *See, e.g.*, 2020 Seecharran Aff. ¶ 9; 2020 Park Aff. ¶ 6; 2020 Choe Aff. ¶ 7. In contrast, the Rezoning only worsens the overcrowding from which Flushing residents already suffer. 2020 Seecharran Aff. ¶ 5. The community needs any development on this land to include community amenities to accommodate the corresponding increase in community needs resulting from increasing density. *Id.*

II. The Rezoning Proposal

A. The Applicant

25. FWRA LLC (Applicant), a private company, applied for and is the primary beneficiary of the Rezoning. FWRA LLC is a partnership of F&T Group, United Construction and Development Group, and Young Nian Group LLC. *See* Tarry Hum, *Special Flushing Waterfront District: A Massive Giveaway?* Gotham Gazette (Jan. 31, 2020);[3] *see also* EAS at 17,

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[2] Available at https://www.schools.nyc.gov/about-us/planning-and-buildings/district-planning (follow link to "Space Over-Utilization Report").

[3] Available at https://www.gothamgazette.com/opinion/9087-special-flushing-waterfront-district-massive-giveaway.

65 ("The Applicant is comprised of three property owners within the Project Area;" detailing ownership of Applicant-owned parcels).[4]

26. F&T Group, one of the partners in the Applicant, is a member of the Board of Trustees of the Flushing Willets Point Corona Local Development Corporation ("FWPCLDC"). *See* Flushing Willets Point Corona LDC, *Board of Trustees* (accessed May 7, 2020), https://www.queensalive.org/board.

27. The New York State Attorney General sanctioned FWPCLDC in 2012 for "t[aking] steps to create the appearance of independent 'grassroots' support" for development plans for neighboring Willets Point "…by concealing their participation in community organizing efforts." N.Y. State Attorney General *Press Release: A.G. Schneiderman Ends Illegal Lobbying Of NYC Officials By Three Local Development Corporations* (Jul. 3, 2012) *available at* https://ag.ny.gov/press-release/2012/ag-schneiderman-ends-illegal-lobbying-nyc-officials-three-local-development. This included "ghost-writing letters and op-eds and preparing testimony for unaffiliated community members," *id.*, as well as "organiz[ing] transportation to City Council hearings for supporters," impermissibly ghost-writing op-ed pieces, preparing testimony for third parties and providing transportation for apparent "supporters" of discretionary land use actions, thereby attempting to influence legislation in contravention of the Not-for-Profit Corporation Law. Assurance of Discontinuance No. 12-068 (July 2, 2012) *available at* https://ag.ny.gov/sites/default/files/press-releases/2012/AOD-No-12-068.pdf.

28. FWPCLDC was previously involved in developing "Flushing West," a proposal for rezoning Flushing that included the same properties impacted by the present Rezoning and

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[4] The version of the EAS referenced here is excerpted from the original, with exhibit pagination inserted. All pinpoint citations to this document included herein refer to the exhibit pagination.

that proposed that the City should make nearly identical changes to the ones that are the subject of the present Petition. That failed attempt was based on a plan that FWPCLDC commissioned Respondent DCP to create for the area. Joe Anuta, ***A tiny nonprofit has outsize influence on city zoning plan***, Crain's New York (Jun. 29, 2015) ("In an uncommon arrangement, [FWPCLDC] agreed to pay $800,000...to hire the city as a subcontractor."), attached as **LoScalzo Aff. Ex. B.**

29. That attempt was aborted after the Draft Scope of Work for the Flushing West Environmental Impact Statement (herein "Flushing West DSOW") was published and exposed to public comment. **The Commission, the lead agency on that application, never released the Final Scope of Work or EIS for the project, never submitted a completed rezoning application, and never advanced the project for further review.** ***See*** **Ryan Brady,** ***Flushing West plan dropped by city*****, Queens Chron. (Jun. 2, 2016).**[5]

B. Procedural History of the Rezoning

30. In October 2017, the Applicant initiated a Pre-Application process with DCP for a new, private application for zoning changes that would enable F&T Group to build substantially the same[6] **large set of new residential and commercial buildings that it attempted to get permission to build via the abandoned City Flushing West rezoning proposal.** ***See*** **Segal Aff., Ex. E. Its completed Pre-Application Statement (PAS) was filed in August 2018.** ***Id.***

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[5] Available at https://www.qchron.com/editions/queenswide/flushing-west-plan-dropped-by-city/article_cce639e3-9482-589f-9905-8fd2afb217b9.html.

[6] F&T Group has an ownership interest in two sites included in the Rezoning Area: Sites 3 and 4, or Lots 85, 212, and 249. EAS at 65; Walters Aff. Ex. D. Between the City's 2015 proposal and the present application, plans for these Sites have changed little. In 2015, they planned for a total of 606 residential units, a 184-room hotel, approximately 57,000 square feet of retail, a community space and parking. The plan now is substantially the same, but larger: 807 residential units, a 225-room hotel, approximately 65,000 square feet of retail, a community space, parking, and 200,000 square feet of office space.

31. A PAS is the first step for any applicant to requesting a change to land use rules in New York City. After DCP declares a PAS to be complete, an applicant must provide environmental review materials to allow the agencies to evaluate the proposed changes per SEQRA. Environmental review must be completed prior to an application's certification for the City's Uniform Land Use Review Procedure ("ULURP").

32. During calendar year 2019, FWRA LLC paid over $1,000,000 to lobbyists, including New York City's largest single lobbying contract of 2019, as part of its renewed efforts to get the City to rezone the. *See* N.Y.C. Off. City Clerk, Lobbying Bureau Annual Report 29, 32 (Mar. 1, 2020).[7] These funds were specifically targeted at lobbying Olga Abinader, the DCP signatory of the Negative Declaration, to advance the "pre-certification of the Special Flushing Waterfront District app and L[and] U[se] Review Process." N.Y.C. Off. City Clerk, *FWRA LLC Lobbyist Search Report* (performed on Feb. 10, 2020), https://bmp.nyc.gov/elobbyist/search. The improperly issued Negative Declaration was the culmination of that pre-certification process.

33. DCP made the Negative Declaration and accepted the EAS for the Rezoning on December 16, 2019. *See* Neg. Dec. at 1. The Commission approved the same day, *id.*, and certified the application for ULURP. *See* N.Y.C. Dept. City Planning, Zoning Application Portal, Special Flushing Waterfront District (accessed Feb 12, 2021), https://zap.planning.nyc.gov/projects/P2017Q0052.

34. ULURP requires the relevant Community Board and Borough President to examine and provide recommendations on the Rezoning, and then requires Respondents

[7] Available at https://www.cityclerk.nyc.gov/assets/cityclerk/downloads/pdf/2020_Annual_Report.pdf.

Commission and the City Council to vote on the proposal. *See generally* N.Y.C. Charter §§ 197-c, 197-d.

35. On March 12, 2020, the Borough President recommended that the City Council disapprove the application; prior to that, on February 12, 2020, Queens Community Board 7 recommended approval only if specific changes are made to the proposal.[8] *See* 2020 Seecharran Aff. Ex. 5 (Dckt. No. 18) (Borough President recommendation, including summary of Community Board 7's recommendation).

36. Respondent Commission approved the proposal on November 4, 2020, over the objection of Commissioners Michelle De La Uz and Orlando Marin. Commission Disposition Sheet, Nov. 4, 2020. *See* Segal Aff., Exs. A & B. On December 10, 2020, Respondent City Council also approved the proposal, City Council Meeting Minutes 7-9, Dec. 10, 2020, *see* Segal Aff., Exs. C & D, constituting "final action" on the ULURP application. N.Y.C. Charter § 197-d(c). Respondents based their approvals on the Negative Declaration. *See e.g.* City Council Res. No. 1502, Segal Aff, Ex. D ("WHEREAS, the Council has considered the relevant environmental issues, including the negative declaration issued December 16th, 2019…").

C. Summary of Rezoning

37. To facilitate nearly 3,000,000 zsf of new development, including more than 1,700 new apartments, *see* Walters Aff. ¶ 10; *id.* Ex. D (chart summarizing key numbers from the EAS and other sources), Respondents have made two zoning changes that impact properties owned by the Applicant and its affiliates. First, they have created a new "Special Flushing Waterfront District," that relaxes bulk distribution requirements for the area along Flushing Creek and adds

[8] The Applicant did not make the recommended changes.

waterfront-walkway requirements. EAS at 22-23; *see also id.* at 43 (map of rezoning area). Second, Respondents upzoned properties that had previously been restricted to low-density manufacturing; for the first time since the adoption of the 1961 Zoning Resolution, these properties are now in a zoning district that allows high density residential development. *Id.* at 22.[9]

38. The Rezoning also drastically increased the amount of residential development capacity available on a large lot adjacent to the Applicant-owned properties, Lot 200. *Id.* at 30; Walters Aff. ¶ 28 n.7. Lot 200 is currently the site of a U-Haul storage facility and truck parking. *Id.* Over 350 additional dwelling units are permitted to be developed on Lot 200 now, as compared to under the zoning district designation it had prior to the Rezoning. *See* Walters Aff. Ex. D.

39. Virtually all of the direct impact from the proposed rezoning will occur in the area between 36th Ave. and Roosevelt Ave. ("Rezoning Area"). The remainder of the area, between Roosevelt Ave. and 40th Rd., is already developed and receives only limited zoning benefits. *See* EAS at 29. In fact, there does not appear to be any land-use rationale for the inclusion of this area in the Special District.[10]

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[9] M3-1 and C4-2 zoning district designations of these properties both changed to M1-2/R7-1.

[10] The lots in Subdistrict C were recently developed with a large residential and commercial space as a development called "Sky View Parc." Walters Aff. ¶ 62. The EAS states that "Sky View Parc…is not expected to be affected by the Proposed Actions (except for the potential re-allotment of accessory parking within its existing parking garages)." EAS at 29. Inclusion of the additional area without clear purpose is a violation of the principle that all zoning have "purpose" and a "reasonable relation between the end sought to be achieved…and the means used to achieve that end." *Asian Americans for Equality v. Koch*, 531 N.Y.S.2d 782, 787 (1988).

III. The Negative Declaration and the Environmental Assessment Statement

40. Despite Applicant's plans for a new megadevelopment, and significant increased density permitted by the Rezoning, Respondents issued an EAS finding that the development would result in relatively little newly permitted development overall and would even decrease hotel, retail, self-storage, and parking uses on the site. EAS at 37, 39.

41. On the basis of this analysis, Respondents found that the Rezoning "would not have a significant adverse impact on the environment," Neg. Dec. at 1, and that no "significant effects upon the environment…are foreseeable," *id.* at 3. Respondents issued the Negative Declaration based on the accompanying EAS on December 16, 2019. *Id.* at 3.

42. "Flushing West," proposed just four years prior as a City application to make substantially the same changes to the same properties had received a "Positive Declaration" during environmental review. *see generally* Flushing West DSOW at 19-29 (describing the proposal), Walters Aff. Ex. C. Respondent DCP "determined that the [Flushing West] may have a significant adverse impact on the environment" and would require an EIS. *Id.* at 7.

A. Increment of Development between No-Action and With-Action Scenarios

43. The EAS bases nearly all of its analysis on a comparison of two projected development scenarios: the state of the Rezoning Area in 2025 if the Rezoning does not occur (No-Action Condition), and the state of the same area in the same year if the Rezoning occurs (With-Action Condition). Walters Aff. ¶ 13. The difference between the amount of development in the No-Action and With-Action Conditions, typically measured in terms of square footage of new construction or the number of new apartments and hotel rooms, provides the basis for assessing the environmental impact the then-proposed Rezoning would potentially cause. *Id.*;

EAS at 29 ("The potential environmental impacts of the Proposed Actions are based on the incremental difference between the No-Action and With-Action conditions.").

44. The EAS predicts that under the With-Action Condition—the world in 2025 in which the Rezoning does occur—there will be about 2,900,000 zoning square feet ("zsf")[11] of construction in the Rezoning Area, nearly all of it new. Walters Aff. ¶ 10; *id.* Ex. D. However, the EAS only analyzes some of the affected area; it only includes about 2,510,000 zsf in its analysis. Further, it predicts that in the No-Action Condition—without the rezoning—there would be about 2,380,000 zsf of development. EAS at 73. As a result, the incremental development that the EAS uses as the basis for its analysis is relatively tiny: only about 130,000 zsf, roughly 5% of the total predicted development. Walters Aff. ¶ 23; EAS at 73.

45. By definition, the size of the increment is determined by the assumptions made about the No-Action and With-Action Conditions. Both scenarios contain strong assumptions that drive up the expected development in the No-Action Condition while minimizing the expected development in the With-Action Condition, artificially and arbitrarily shrinking the increment.

46. Respondents suppress the amount of development in the With-Action Condition, in two key ways: they leave out the majority of the site that received the largest zoning change, and they assume that construction of a waterfront walkway will be permitted, despite needing discretionary permits from the State Department of Environmental Conservation ("DEC").

[11] Zoning square footage measures the total square footage of construction counted toward the maximum amount of development permitted by the relevant zoning provisions. Walters Aff. ¶ 10 n.2.

B. The With-Action Condition Reveals Too Little Development and Relies on a Mitigation that Cannot be Built without Discretionary Approval the Applicant did not have at the Time the EAS was Adopted

47. First, the EAS includes only sites owned by the Applicant in its increment calculations. Walters Aff. ¶ 45; EAS at 30, 39. The lots in the Rezoning Area not owned by the Applicant—Lots 75, 200, and 210—are excluded from most of the EAS's analyses. *See* EAS at 29-30. No justification is given for this choice, other than the observation that these lots "are not controlled by the Applicant and do not have any known redevelopment plans." *Id.* at 30.

48. The decision to exclude these sites from the increment analysis has a particularly large impact because the major zoning change in the Rezoning—the change in zoning districts in the northern portion of the Rezoning Area—disproportionately affects those sites. Those parcels, which include Lots 75 and 200, are now available for much heavier residential development as a result of the Rezoning. *See id.*at 22 (describing the upzoning). In fact, Lot 200 constitutes the *majority* of the area affected by that upzoning. Thus, by relying on an environmental analysis that excluded Lot 200 from its increment calculations, Respondents failed to analyze the bulk of the impact of the Rezoning. Walters Aff. ¶ 49 & n.21.

49. As a result of the Rezoning, Lot 200 saw its total development potential increase to more than 580,000 zsf, *id.* ¶ 53; *id.* Ex. D, dwarfing the increment of 130,000 zsf actually used in the EAS. In other words, including Lot 200 would more than quintuple the total development Respondents used to analyze possible environmental impacts. Furthermore, the Rezoning allows for residential uses, *id.* ¶ 53; *see also* EAS at 22: the additional capacity on Lot 200 allows for at least 749 new apartments, more than tripling the total amount of new residents that the Rezoning was projected to bring to the Rezoning Area in the EAS. Walters Aff. ¶ 55.

C. The With-Action Condition Relies on a Mitigation that Cannot be Built without Discretionary Approval the Applicant did not have at the Time the EAS was Adopted

50. Second, in the With-Action Condition, Respondents assume that the Applicant will construct a waterfront walkway alongside Flushing Creek. Based on the installation of this walkway, Respondents assert that the Rezoning will "improve the environmental conditions of the area," EAS at 24, help to satisfy the City of New York's "OneNYC 2050" goals, *id.* at 52, increase open space, *id.* at 57, and improve urban design in the area, *id.* at 61. Much of this walkway would be constructed on or adjacent to tidal wetlands regulated by the State Department of Environmental Conservation ("DEC"). *See id.* at 78 (map of tidal wetlands). The Applicant, and anyone else building in the area, would therefore need a DEC permit to construct anything like the expansive waterfront area anticipated in the EAS. As no such permit has been approved or even filed, *see id.* at 63 (stating that an application "will be" submitted), the walkway is a purely hypothetical amenity.

51. If the walkway were removed from the EAS's analysis, the predicted environmental benefit of the Rezoning would substantially decrease. In particular, the ratio of open space to resident population ("open-space ratio"), which Respondents predict will increase as a result of the rezoning by about 2.5%, would instead *decrease* by about 3.6%. Walters Aff. ¶¶ 56-59.

D. The No-Action Condition Predicts Too Much Development, Too Fast

52. The EAS also makes several inappropriate assumptions regarding the No-Action Condition—the future condition of the site without the Rezoning—resulting in a baseline amount of development almost equal to the capacity after the Rezoning.

53. Currently, the Rezoned Area is primarily vacant lots and vacant commercial buildings. *Id.* at 18 ("Site 1 is currently vacant…. Site 2 is also vacant…. Site 3 is a surface

parking lot and temporary construction staging area. Lot 75 contains a…vacant commercial building…. Site 4 is currently vacant…. Lot 210, adjacent to Site 4, contains a vacant auto-body shop."). The only currently occupied building in the Rezoned Area is a 104,500 zsf building used by a self-storage and truck-rental operation on Lot 200. *Id.* at 33; *see also* Walters Aff. Ex. D (size of building in zsf). Even this is substantially underbuilt: the zoning regulations in effect prior to the Rezoning allowed for two to four times as much development as is currently there. Walters Aff. ¶ 28 n.7. This has not been utilized in the generations since the adoption of the Zoning Resolution in 1961 made such development possible.

54. Despite these current and persistent conditions, the EAS predicts that, even without Rezoning, the area would see a sharp increase in development by 2025. Specifically, Respondents expect that an area which currently has two buildings totaling 133,140 zsf, would become the site of about 2,600,000 zsf of development by 2025: a twenty-fold increase in four years. Walters Aff. ¶ 33(i); *id.* Ex. D.

55. This new development would include three new market-rate residential buildings bringing about 1,500 new apartments. *Id.* at 30-32; Walters Aff. ¶ 30. This rate of increase—about 300 apartments per year—would be roughly equal to the rate at which new housing is being constructed in the entire neighborhood combined. *See* Walters Aff. ¶ 30. Meanwhile, commercial development Respondents expect to appear by 2025 would substantially *exceed* the total amount of commercial development expected within a quarter mile of the project in the same time period. Walters Aff. ¶ 31.

56. Respondent DCP projected a far smaller amount of development in the 2015 Flushing West DSOW. For the same area and analysis year, DCP predicted in that analysis that only about 1,600,000 zsf of new development, including about 1,100 new apartments, would be

built by 2025. Walters Aff. ¶ 33; *id.* Ex. D. This analysis was based in part on the finding that the zoning and economic-development planning that was then, and is still, in effect "ha[s] not engendered a significant overall change in the area." Flushing West DSOW at 12. After five years in which no new construction was built in the Rezoning Area, however, Respondent DCP revised their prediction for the amount of development that would occur there by 2025 from 1,600,000 zsf to 2,600,000 zsf—*upwards* by over 60%—to be built in half the time.

LEGAL FRAMEWORK AND AGENCY GUIDANCE

57. As the Court of Appeals has explained,

> SEQRA insures that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.

Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 414-15 (1986).

58. "The heart of SEQRA is the Environmental Impact Statement (EIS) process." *Id.* at 415. SEQRA requires Respondents to prepare an Environmental Impact Statement ("EIS") for "any action…which may have a significant effect on the environment." Envtl. Cons. L. § 8-0109(2). The EIS is the mechanism through which an agency decision-maker, before approving a land use change, becomes "fully informed of all pertinent environmental issues" so it can consider them. *Sutton Area Community v. Bd. of Estimate of City of N.Y.*, 78 N.Y.2d 945, 947 (1991).

59. Decision makers, including Respondents, must (1) identify "the relevant areas of environmental concern," (2) take "a hard look at them" and (3) make "a reasoned elaboration of

the basis for its determination" of potential impacts on the environment. *Chinese Staff and Workers Ass'n v. City of N.Y.*, 68 N.Y.2d 359, 363-64 (1986) (internal quotation marks omitted) (determination annulled on ground that agency did not take a "hard look" at the potential for impacts on an aspect of the environment covered by SEQRA).

60. An EIS enables a decision-maker to take that "hard look" at the potential impacts of a proposal before electing whether or not to approve it. An important and necessary part of that process is the opportunity for the public, who have other interests and more direct knowledge of the potential impacts than the Respondent City Agencies, to weigh in on both the Draft Scope of Work and the Draft EIS. Envtl. Cons. L. § 8-0109(4)-(5); 6 N.Y.C.R.R. §§ 617.8(d), 617.9(a)(3)-(4).

61. "To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." 6 N.Y.C.R.R. § 617.7(a)(2). If it does so, it issues a "Negative Declaration of Significance." *See* 62 RCNY § 5-02.

62. "Criteria [that] are considered indicators of significant adverse impacts on the environment" include "a substantial change in the use, or intensity of use, of land" and "the encouraging or attracting of a large number of people to a place." 6 N.Y.C.R.R. § 617.7(c)(1)(viii), (ix); *accord* R.C.N.Y. § 6-06(a)(3), (8). Similar, and in some cases identical, criteria are required under CEQR. *See* R.C.N.Y. § 6-06(a). Additional criteria may be necessary to comply with SEQRA—the list is "illustrative, not exhaustive." 6 N.Y.C.R.R. § 617.7(c)(1). An analysis of potential impact must "take[e] into account social and economic factors." Envtl. Cons. L. § 8-0113(2)(b). Any project that may have an impact based on these criteria requires an EIS. *UPROSE v. Power Auth. of State of N.Y.*, 285 A.D.2d 603, 608 (2d Dept. 2001) ("An EIS is

required if the proposed project '*may include* the potential for at least one significant adverse environmental impact'….") (quoting 6 N.Y.C.R.R. § 617.7(a)(1)).

63. In assessing these criteria, Respondents "must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts." 6 N.Y.C.R.R. § 617.7(c)(2). These must include any "subsequent actions which are…likely to be undertaken as a result [of the project], or…dependent [on the project]." *Id.*

64. In addition to the statutory and regulatory requirements of SEQRA and CEQR, the New York City Mayor's Office of Environmental Coordination has published a City Environmental Quality Review Technical Manual. Walters Aff. Ex. E (herein "Technical Manual"). The Technical Manual is not a legally binding regulation. *See generally Ordonez v. City of N.Y.*, 110 N.Y.S.3d 222 at *22-23 (Sup. Ct. N.Y. Cty. July 11, 2018) (slip copy). It does, however, reflect the City's own interpretation of the controlling law, and City agencies are therefore generally required to comply with it. *See, e.g.*, *Chatham Towers, Inc. v. Bloomberg*, 793 N.Y.S.2d 670, 6778 (Sup. Ct. N.Y. Cty. 2004) *aff'd as modified*, 795 N.Y.S.2d 57 (1st Dept. 2005) (describing failure to follow Technical Manual as "gross oversight[] on the EAS").

65. The Technical Manual directs reviewing agencies to develop a "Reasonable Worst-Case Development Scenario," or RWCDS, for both the No-Action Condition and With-Action Condition of a proposed action as a part of an initial determination of significance. Technical Manual at 2-5. The increment between the amount of development in the two RWCDSs forms the basis for assessing the impact of the project in most of the areas that will subsequently be presented in the EAS, upon which the actual determination will be made. *Id.* at 2-11.

66. In developing the RWCDS for a proposed action that would affect an area beyond the site that the applicant plans to develop, the Technical Manual directs agencies not to limit their analysis to the applicant's sites, but to "consider the change in development potential for all the sites" affected. *Id.* at 2-9. Any such sites which are "soft," meaning that they have conditions favorable to further development, should generally be included in the RWCDS. *Id.* at 2-10. In determining whether a site is a "soft site," the Technical Manual recommends first determining whether the site is "built to substantially less than the maximum allowable floor area ratio (FAR)" and whether the lot is large enough for development, typically 5,000 sf or larger. *Id.* at 2-6. If a site meets both requirements, then the Technical Manual recommends consideration of several factors, including "Recent real estate trends in the area" and "Recent and expected future changes in residential population and employment in the study area." *Id.*

67. The Court of Appeals has held that an agency discharges "its statutory responsibility [under SEQRA] by studying hypothetical…'full-build' uses" for all sites to be rezoned. *Neville v. Koch*, 79 N.Y.2d 416, 427 (1992). SEQRA requires the RWCDS to be the "maximum allowable zoning square feet" that would be permitted if the rezoning is granted. *Id.* at 422. This procedure "is followed even where the applicant proposes [to build] a project that is less dense than allowed as-of-right under the requested zoning." *Id.*[12]

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[12] In *Neville*, the Court of Appeals precisely explained the procedure that Respondents should have followed for developing the RWCDS and environmental review of rezoning Lot 200:

> When the action subject to environmental review is a rezoning, the City … requires that the EIS include analysis of a project reflecting what the City considers a reasonable *full build-out of the allowable floor area*. According to the City, this procedure is followed even where the applicant proposes a project that is less dense than allowed as- of-right under the requested zoning. In that event, a conceptual project using the maximum allowable zoning square feet is treated as the project, with the actual proposal viewed as an alternative. In that manner, the City seeks to insure that the full range of what it considers reasonable as-of- right development is subject to environmental review.

79 N.Y.2d at 422 (emphasis added).

68. The RWCDS is the starting point for the EAS; the EAS is the basis for a Determination of Significance. *See* Technical Manual § 200 et seq, p. 1-7.

69. As with an EIS, the standard of review for an EAS is "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them and made a 'reasoned elaboration' of the basis for its determination." *Chatham Towers*, 793 N.Y.S.2d at 677-78 (quoting *Jackson,* 67 N.Y.2d at 417). Failure to perform adequate analysis at the EAS stage requires annulment of the Negative Declaration of Significance and preparation of a full EIS. *E.g.*, *Chatham Towers*, 793 N.Y.S.2d at 680 ("[I]t remains clear that the NYPD failed to meet the 'hard look' requirement that is required under applicable CEQR and SEQRA provisions, and this Court is left no other alternative than to order that the NYPD conduct a full EIS.").

ARGUMENT

70. Respondents' approval of the Rezoning strikes at the heart of SEQRA. In order to avoid an EIS entirely, and to end the environmental review process without public comment, Respondent DCP falsely determined "that there will be no [significant] adverse environmental impacts" from the Rezoning per 6 N.Y.C.R.R. § 617.7(a)(2) in its EAS and the Commission thus issued a Negative Declaration; the Commission and City Council approvals were made on the basis of this dishonest determination.

71. The EAS grossly underestimated the amount of harm the proposed rezoning is likely to cause. Its authors manipulated the analysis criteria they are required to use in the EAS

process, comparing an artificially low amount of anticipated development to an artificially high baseline. The EAS assumptions contradict SEQR, CEQRA, and the Technical Manual, as well as the analysis Respondent DCP adopted only four years prior. The Negative Declaration is therefore arbitrary, capricious, an abuse of the Council's the Commission's and DCP's discretion, and contrary to law, and should be annulled. An EIS is required but was not done.

72. The Commission and the Council approved the Rezoning on the basis of the Negative Declaration and without an EIS. Because the Negative Declaration is unlawful and the EAS does not follow the law or the Technical Manual, the Commission's and the Council's approvals of the Rezoning are likewise arbitrary, capricious, an abuse of discretion, and contrary to law, and should likewise be annulled.

I. The EAS Does Not Take a "Hard Look" at the Extent of Development under the Proposed Rezoning

A. The EAS Ignores the Likely Impact of the Upzoning of Lot 200

73. The With-Action Condition RWCDS in the EAS is suppressed by Respondents' improper assumptions. First, Respondents ignore the impact of upzoning Lot 200, which greatly increases the total amount of development allowed in the Rezoning Area.

74. Lot 200 has only a single self-storage building, EAS at 30. Prior to the Rezoning, its development capacity was limited by the M3-1 zoning governing its northern portion, meant primarily for manufacturing, and the C4-2 zoning on its southern portion, meant primarily for commercial uses, *id.* at 18 n.2. The Rezoning changed the zoning district of Lot 200 to an M1-2/R7-1 district. *Id.* at 22. This change permits residential development for the first time on the

northern portion of the site, and almost doubles the maximum residential floor-area ratio ("FAR")[13] of the southern portion, from 2.43 to 4.6. *Id.* at 24; Walters Aff. ¶ 50.

75. However, Lot 200 was excluded from the RWCDSes in the EAS, thereby erasing the additional development capacity added by its increased development capacity from the calculation of the increment of increase in that same capacity that would result from the Rezoning. Walters Aff. ¶ 45. Respondents did not study the hypothetical full-build use of Lot 200, as required by SEQRA. *See Neville,* 79 N.Y.2d at 427.

76. The only justification provided for failing to include the site in the EAS's calculations is that Lot 200 is "not controlled by the Applicant and do[es] not have any known redevelopment plans." EAS at 30. The fact that a parcel is not currently owned by the Applicant is an irrational and insufficient justification for excluding it. Respondents must consider all of the environmental impacts that "may" result from a proposed action, including any "reasonably related" actions that are "likely to be undertaken as a result" of the proposed rezoning. 6 N.Y.C.R.R. § 617.7(c)(1), (2)(ii). Whether development is likely to result from a rezoning does not depend on the current owner of a parcel, but on whether the new zoning rule will allow more construction on it than is allowed under present rules. *See* Technical Manual at 2-10 to 2-11; Walters Aff. ¶¶ 46, 47.

77. Had Respondents applied the correct analysis, it would be clear that Lot 200 should have been included in the EAS's RWCDS analysis. Lot 200 has acquired development rights that it did not have prior to the rezoning, allowing nearly 300,000 zsf of new residential development. A study of hypothetical full-build uses for it should therefore have been done as

[13] The FAR of a given lot is the total zoning square footage of development on the lot, divided by the square footage of the lot. N.Y.C. Zoning Res. § 12-10.

part of the process of determining the significance of the Rezoning under SEQRA and CEQR. *See* Technical Manual at 2-9 to 2-10; Walters Aff. ¶ 48.

78. If Respondents properly included Lot 200 in the EAS analysis, it would radically increase the increment between the No-Action and the With-Action RWCDS, and therefore the potential environmental impact, of the proposed rezoning. If built to its maximum residential capacity under the Rezoning, Lot 200 would add about 584,000 zsf of new residential development, or about 794 new apartments.[14] Walters Aff. ¶¶ 53-55; *id.* Ex. D. This additional amount would triple the number of new residents that the proposed rezoning is anticipated to bring and *quintuple* the total anticipated development increment. *Id.* ¶ 54.

79. The increment is the basis for nearly all the analysis in the remainder of the EAS, which itself is the basis of the Negative Declaration. In ignoring the massive new development capacity added to Lot 200, the EAS assumed less development in the With-Action Condition than reasonable, and shrunk the increment between No-Action and With-Action.

80. Therefore, Respondents have failed to meet the SEQRA and CEQR requirements of considering all "impacts that may be reasonably expected to result from the proposed action," 6 N.Y.C.R.R.§ 617.7(c)(1), and failed to take the requisite "hard look" at all relevant environmental impacts, *Chatham Towers*, 793 N.Y.S.2d at 678.

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[14] The EAS claims that, if the site were to be developed after the proposed rezoning, it would be developed only by the addition of a 177,000-zsf building in the northern half because U-Haul, the current owner of the site, would not want to demolish the building currently occupying the southern half. EAS at 37; Walters Aff. ¶ 51. But this is an unreasonable assumption, because the lot would allow for far more valuable development. Walters Aff. ¶¶ 52-53. And even if development were limited to the additional building, that would still more than double the roughly 130,000-zsf development increment predicted in the EAS, EAS at 73, and increase the increment of commercial development by more than ten times, Walters Aff. ¶ 52.

B. The EAS Assumes the Issuance of Permits that are Discretionary in the With-Action Scenario

81. Respondents offset some of the environmental harms created by the proposed development by assuming that the Rezoning will catalyze the construction of a large waterfront walkway along Flushing Creek. Walters Aff. ¶ 56. But the walkway would have to be built largely within or adjacent to tidal wetlands, and therefore would require DEC permits that have not yet been issued. *Id.* ¶ 57; EAS at 63. Respondents err in assuming that the walkway will be built without first confirming that it would be permitted by the DEC.

82. The "erection of any structures" in an area "immediately adjacent to inventoried wetlands" requires a permit from the DEC. Envtl. Cons. L. § 25-0401(1)-(2). This specifically includes "construction of any facilities or roads" within 150 feet of a tidal wetland. 6 N.Y.C.R.R. § 661.4(b), (ee)(1)(iii). Flushing Creek is an inventoried tidal wetland, and Respondents admit that much of the Rezoning Area is subject to DEC wetlands jurisdiction. *See* EAS at 63 (describing permit requirements); *id.* at 78 (map of DEC wetlands jurisdiction, apparently prepared for the Applicant by a third party).

83. The DEC's tidal-wetlands jurisdiction substantially overlaps with the location of the proposed walkway, *see id.* at 78, and therefore a DEC permit would be required for some or all of that construction. At the time that the EAS was drafted, the Applicant had not been issued such a permit. *See id.* at 63.

84. Despite the missing permit, the EAS assumed that the entirety of the proposed walkway would be built, and that it would offset the open-space and urban-design impacts of the proposed rezoning.

85. In the "Open Space" section of the EAS, the extra space created by the walkway is taken into account in calculating the open-space ratio, a comparison of the total local

population with nearby parkland, recreation areas, and other open space; the open-space ratio is used as a proxy for determining the amount of impact the Rezoning would have on access to these amenities. *See id.* at 57. The presumed walkway would add about 3.1 acres of open space, which the EAS touts as about a 2.5% increase over the No-Action Condition. *Id.* at 120. But if no waterfront walkway were built, the incremental increase in residential population in the Rezoning Area would result in a *decrease* in the open-space ratio of 3.7%. *See* Walters Aff. ¶ 59.

86. In the "Urban Design and Visual Resources" section of the EAS, the walkway is considered qualitatively, as part of the evidence leading to the conclusion that urban design would be improved by the proposed rezoning. The EAS notes that the With-Action Condition would result in "additional commercial and residential FAR" in the Rezoning Area, but that the additional amenities, including the walkway, would offset the increase in density. EAS at 61. Although it is difficult to assess the impact of the walkway on the more abstract analysis in this section of the EAS, it is apparent that the analysis relies on its construction.

87. Respondents should not have assumed the construction of an amenity which would require a permit from the DEC, a separate government body. A Negative Declaration requires certainty: to issue one, Respondents must "determine either that there *will be no* adverse environmental impacts or that the identified adverse environmental impacts *will not be* significant." 6 N.Y.C.R.R. § 617.7(a)(2) (emphasis added). With respect to the impacts offset by the walkway, the EAS determines at best that there would not be significant adverse impacts *if* the DEC permits the requested development. To avoid this kind of problem, the Technical Manual directs City agencies to allow project components "that seek to reduce environmental effects" into the EAS only where "mechanisms for their implementation" are included along with them. Technical Manual at 2-9. Here, because their implementation hinges on the issuance

of a permit by an unrelated state agency, there is no implementation mechanism for the walkway, and therefore its construction should not have been assumed in the EAS.

II. The EAS Relied on an Artificially High Baseline of Development for Its Analysis

88. In addition to overlooking much of the development that would result from the Rezoning in the With-Action Condition RWCDS, the EAS artificially inflated its projections for development without the Rezoning in the No-Action Condition RWCDS.

89. The Flushing Creek neighborhood envisioned as the No-Action Condition is radically transformed from the neighborhood that exists today: the empty lots, vacant buildings, and storage units that make up the Rezoning Area today incredibly bloom into a dense megadevelopment by 2025 with no change to land use regulations. *See generally* Walters Aff. ¶¶ 27-32; *compare* EAS at 41 (map of current land use by lot) *with* EAS at 46 (map of development projected in No-Action Condition). The impact of this assumption of massive, improbably rapid, development is to make the Rezoning look like a marginal tweak in the rules, rather than what it is: a City action to facilitate the replacement of the current neighborhood with a new one.

90. An EAS must consider the impact stemming from the action that is being proposed, 6 N.Y.C.R.R. § 617.7(c), and therefore the baseline from which that impact is measured is critically important. The Technical Manual explains that it provides the baseline "[f]or most technical areas" of an analysis. Technical Manual at 2-11. And the EAS itself notes that all the "potential environmental impacts of the Proposed Actions are based on the incremental difference between the No-Action and With-Action conditions." EAS at 29. Thus, use of an inappropriate No-Action RWCDS is a breach of Respondents' duty to take a "hard look" at the potential environmental impacts, *Chatham Towers*, 793 N.Y.S.2d at 678, and

prevents the "fully informed" decision-making required by SEQRA and CEQR, *Sutton Area Community*, 78 N.Y.2d at 947.

91. The No-Action Condition RWCDS assumption, of massive, improbably rapid development, has no basis in fact or analysis. The Rezoning Area is almost entirely empty. The only buildings are on Lots 75, 200, and 210; the buildings on Lots 75 and 210 are vacant. EAS at 18. The sole occupied building is the self-storage facility on the southern half of Lot 200, *id.*, and even that lot is substantially underbuilt. *See* Walters Aff. ¶ 28 n.7. The remainder of the lots are either vacant or used for parking. EAS at 18. Despite these conditions, the EAS predicted that most of the Rezoning Area will be built to the maximum density allowed by the prior zoning–almost 2,500,000 zsf of new development, *see id.* ¶ 32–within five years. *Id.* at 30-33; Walters Aff. ¶ 29. This new development would include approximately 1,500 new apartments. EAS at 30. This rate of growth in new apartments is roughly equal to the total growth in apartments projected for the *entire EAS study area*, outside of the Rezoning Area, or roughly equal to the rate of new luxury condo units developed *in all of Flushing* between 2009 and 2019. *See* Walters ¶ 30. Respondents provide no justification for the aggressive pace of new development they assume in the No-Action Condition, beyond the guiding principle that the lots would be developed "to the maximum permitted FAR." EAS at 30. This is an assumption divorced from the decades-long trends in the area; it is an irrational basis for the EAS's development calculations.[15] Walters Aff. ¶¶ 27-32.

[15] What we have learned about the future of our economy in the year between that Negative Declaration in December 2019 and the City Council's approval of the Rezoning on its improper basis in December 2020 makes the projection that this area will be developed as they predicted in 2019 in five years absent any land use changes doubly absurd. Walters Aff. ¶ 27 n.6.

92. The numbers used here also directly contradict Respondents' assumptions in an environmental review they issued just four years prior. In the Flushing West DSOW, Respondents determined that the Rezoning Area, would have about 1,600,000 zsf of development by 2025 without further action, and in fact found that the current zoning scheme has "not engendered a significant overall change in the area." *See* Flushing West DSOW at 12, 71; Walters Aff. ¶ 33(i). But the EAS predicts that the exact same sites will have *2,600,000* zsf by 2025. *Id.* Similarly, the Flushing West DSOW envisions about 1,100 new apartments in its No-Action Condition, while the EAS predicts 1,500. *Id.* ¶ 33(iii). The EAS provides no explanation of Respondents' decision, after 5 years without development at the Rezoning Area, to revise their 2025 projection *upward* by 50%.[16]

93. Finally, the new buildings projected in the No-Action Condition RWCDS cannot be built at all because they violate LaGuardia Airport's height restrictions. No new construction may pierce the "Approach Surface" of any airport in New York City as-of-right. N.Y.C. Zoning Res. § 61-21(a). As Respondents admit, the Rezoning Area "lies underneath the airport's primary approach path." *id.* at 18. Indeed, LaGuardia's Approach Surface extends southeast across Flushing Bay and directly over the Rezoning Area, restricting as-of-right building height in the area to about 150 feet above sea level, including any bulkheads. *See* Walters Aff. ¶¶ 39-40; *id.* Exs. H, I (Department of Buildings analysis of LaGuardia's Approach Surface and accompanying map). But the buildings projected by Respondents in the No-Action Condition RWCDS are built up to 205 feet from the curb, EAS at 31-32, or up to about 193 feet above sea

[16] Respondents elsewhere acknowledge that their Flushing West analysis includes information that should be used in the instant EAS. *See* EAS at 59 (EAS's Historic and Cultural Resources analysis "draws from the research conducted for…the Flushing West Rezoning Proposal….").

level, Walters Aff. ¶ 40 n.17, far taller than is permitted in the area. As it is not clear that the projected development could even be built to the same density without building to those heights, the bulk development assumptions in the No-Action Condition are likely also incorrect.

94. The assumption of development at an unlawful and unreasonable density and pace in the No-Action Condition RWCDS entirely determines the conclusion that the Rezoning "would not have a significant adverse impact on the environment." Neg. Dec. at 1. If the impact of the Rezoning were instead measured from the projections that Respondents made in the 2015 Flushing West DSOW, the incremental impact of the project would be an immense 1,000,000 zsf (the 2015 analysis had a baseline development of 1,600,000 zsf for the Projected Development Sites; the Rezoning With-Action Condition RWCDS predicts approximately 2,600,000 zsf). This is more than *seven times* the increment assessed in the EAS. *See* Walters ¶ 36. In terms of new apartments, using the Flushing West baseline of about 1,100 would result in a projected increase of about 400 apartments as result of the Rezoning, two-and-a-half times the increment in the EAS. *See id.* ¶ 33(iii).

95. Respondents acted in contravention of their legal duty to account for any reasonably likely environmental impact in formulating the No-Action Condition RWCDS. Their assumptions directly contradict their own recent findings of the likely development in the area, without justification for this reversal. Further, the assumptions are manifestly unreasonable, in that they assume a rate of development that is not likely or feasible without the proposed actions. Therefore, the EAS cannot support Respondents' decision to issue the Negative Declaration, and the Negative Declaration cannot support the subsequent approvals by the Commission and the City Council. Each of these determinations must be annulled.

III. The Rezoning Requires an Environmental Impact Statement

96. The EAS's errors go to the heart of the justification for Respondents' Negative Declaration and, therefore, the approval of the Rezoning. If reasonable No-Action and With-Action Condition RWCDS' were used, the incremental amount of development would have been far larger than the EAS projects. This larger increment, in turn, would lead to analyses that would find significant environmental impact in many of the analyzed areas and require mitigations of those impacts to be considered.

97. To take only the largest changes: acknowledging the likely redevelopment of Lot 200 would add about 450,000 zsf of development to the With-Action Condition, including 749 new apartments, Walters Aff. ¶¶ 53, 55 (about 584,000 total zsf, less about 130,000 existing zsf), and adopting the Flushing West baseline would subtract about 900,000 zsf of development from the No-Action Condition, including about 400 apartments, *id.* ¶ 33(iii) (change from about 1,500 new units to about 1,100 new units). *See also generally* Walters Aff. Ex. D. The increment would therefore grow from about 132,000 zsf and 293 new apartments, EAS at 73, to roughly 1,500,000 zsf and roughly 1,150 new apartments (or, at the rate of 2.74 people per apartment, about 3,200 new residents). This is surely a "substantial change in the use, or intensity of use, of land" that will attract "a large number of people to a place," meeting the SEQRA standard for determining that an action under consideration has enough likelihood of environmental impact to require its study by the agency considering taking that action.

98. The increment is at the heart of Respondents' analyses, and an error of this size renders the EAS meaningless. The increment is "the basis by which the potential environmental impacts of the Proposed Actions are evaluated." *Id.* at 37. Because the increment is off by an order of magnitude, therefore, virtually all of the components of the EAS will also be wrong. The result is that Respondents could not have considered all possible environmental impacts and

determined that none could occur, 6 N.Y.C.R.R. § 617.7(a)(2), and could not have identified all the relevant impacts and taken a "hard look" at them, *Chatham Towers,* 793 N.Y.S.2d at 678. This failure also prevents the EAS from serving its purpose: ensuring that the Council was able to take its own "hard look" at the rezoning proposal when deciding to approve it. *Chinese Staff and Workers Ass'n*, 68 N.Y.2d at 363.

99. It is clear that the Rezoning "may have a significant effect on the environment," Envtl. Cons. L. § 8-0109(2), and was therefore ineligible for a Negative Declaration. The EAS on which the Negative Declaration is based, furthermore, contains key assumptions that are both unjustified and contrary to Respondents prior findings. Therefore, the issuance of the Negative Declaration is contrary to law, arbitrary and capricious, and an abuse of Respondents' discretion, and must be reversed.

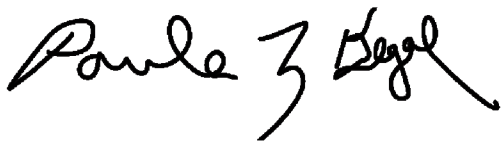
100. The Commission's and the Council's approvals of the Rezoning relied on both the Negative Declaration and the EAS; they were both made without the benefit of an EIS. Because of the flaws in the EAS and the unlawful nature of the Negative Declaration, the approvals were not based on a "hard look" at the possible impacts of the Rezoning, and do not meet the requirements of SEQRA or CEQR. Therefore the approvals of the Rezoning must also be reversed.

REQUEST FOR RELIEF

Wherefore, Petitioners respectfully request that this Court annul the Department of City Planning and the City Planning Commission's December 16, 2019 Negative Declaration, the City Planning Commission's November 4, 2020 approval of the application to create the Special Flushing Waterfront District and upzone lots in the northern portion of the District (Resolution Nos. C 200033 ZMQ and N 200034 ZRQ), and the City Council's approval of the same (Land Use Items 0694-2020 and 0695-2020 and Land Use Resolutions 1502 and 1503). Further, Petitioners request that this Court declare that these actions cannot be approved without an Environmental Impact Statement, and grant all other relief it finds to be just and proper.

Additionally, Petitioners respectfully request that this Court hear oral argument on this issue as soon as is practicable given the restraints of the coronavirus pandemic.

Respectfully submitted,



Paula Z. Segal, Esq.
Brooklyn, New York

Attorney's Verification

Paula Z. Segal, an attorney duly admitted to practice in the State of New York and an employee of TakeRoot Justice, attorneys for petitioners in the within action, hereby affirms the following to be true under the penalties of perjury: that the foregoing Verified Complaint is true to his knowledge, except as to those matters herein stated to be alleged upon information and belief, and as to those matters she believes them to be true; and that the grounds of her belief as to all matters not stated upon knowledge are from conversations with Petitioners, publicly available documents, and/or documents furnished to him by Petitioners.

The undersigned further states that this verification is made by the undersigned and not by petitioners because petitioners are not in the county where affirmant has her office.

Dated: February 12, 2021

Paula Z. Segal, Esq.