Elizabeth St. Garden, Inc. v City of New York
2022 NY Slip Op 33730(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 152341/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART 59**

Justice

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ELIZABETH STREET GARDEN, INC., RENEE GREEN, ELIZABETH STREET, INC., ELIZABETH FIREHOUSE LLC, and ALLAN REIVER,

Petitioners,

- v -

THE CITY OF NEW YORK, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, MARIA TORRES-SPRINGER, NEW YORK CITY COUNCIL, and NEW YORK CITY PLANNING COMMISSION,

Respondents.

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INDEX NO. 152341/2019

MOTION DATE 12/28/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 26, 27, 28, 32, 36, 37, 38, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 152

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the Petition is granted; and it is further

ORDERED and ADJUDGED that the Negative Declaration dated November 9, 2018 for the "Haven Green" Project (CEQR No. 18HPD105M) is hereby VACATED and ANNULLED and the matter is remitted to respondents for further proceedings consistent with this decision and order.

DECISION

The petitioners in this proceeding seek to (1) enjoin respondents from taking any further action in support of the "Haven Green" project on the grounds that respondents have failed to comply with their obligations under the State Environmental Quality Review Act ("SEQRA"), City Environmental Quality Review ("CEQR"), and Uniform Land Use Review Procedure ("ULURP"), including declining to prepare an Environmental Impact Statement ("EIS"); and (2) "annul the Environmental Assessment Statement prepared for and the Negative Declaration issued by Respondents on November 9, 2019 regarding the Proposed Project."

The court's analysis of the petitioner's challenge begins with the background provided by the respective parties. The challenged Environmental Assessment Statement ("EAS") describes the Project, thusly:

> The Project Sponsors, a joint venture of Pennrose, LLC, RiseBoro Community Partnership, and Habitat for Humanity NYC, are seeking construction financing and the approval of several discretionary actions (collectively, the "Proposed Actions") to facilitate the development of an approximately 92,761 gross square foot (gsf) mixed-use building containing affordable, senior housing as well as local retail and community facility uses in the Nolita neighborhood of Manhattan, Community District (CD) 2 (the "Development Site"). The Proposed Actions include seeking construction financing from the New York City Department of Housing Preservation and Development (HPD) and several discretionary actions, including proposing

> an Urban Development Action Area (UDAA) designation, Urban Development Action Area Project (UDAAP) approval, and the disposition of City-owned property.
>
> The through-block Development Site, located on the block bounded by Elizabeth Street to the east, Mott Street to the west, Spring Street to the south, and Prince Street to the north, is an unimproved, City-owned lot. It is currently subject to a month-to-month lease operating as a commercial sculpture garden with some public access, free programming, and events. The Development Site is zoned C6-2 and is located within the Special Little Italy District. The Development Site is also located within the Chinatown and Little Italy Historic District, which is listed on the State and National Registers of Historic Places.
>
> Under the Proposed Actions, the Development Site would be redeveloped with the Proposed Development, a 7-story (approximately 74 ft. tall; approximately 86 ft. tall including the mechanical bulkhead), approximately 92,761gsf mixed use building containing approximately 123 units of affordable, senior housing (124 units total including the superintendent's unit), approximately 4,454 gsf of ground floor local retail, and approximately 12,885 gsf of community facility space, as well as approximately 6,700 sf of publicly accessible open space.

The petitioner Elizabeth Street Garden is the lessee of the parcel sought to be developed and the Firehouse is adjacent to the parcel. As described by the petitioners in the Petition,

> Elizabeth Street Garden is a beautifully landscaped, publicly-available green open space located in a part of Community District 2 that sorely lacks open space, let alone green open space. The Garden is landscaped with a large lawn of lush green grass, seasonal flowers, including roses and daffodils, bushes, and numerous trees including two mature pear trees, one mature royal empress tree, and several young trees. Also situated throughout Elizabeth Street Garden are a

> large number of statues and sculptures, some of significant historical value.

As this proceeding seeks relief under CPLR Article 78, the court, while mindful and appreciative of the extensive and comprehensive submissions of the parties, limits its consideration to the documents and actions of respondents challenged in the Petition as submitted in the record.

Respondent New York City Department of Housing Preservation and Development ("HPD") issued a Request for Proposals ("RFP") entitled "Mott-Elizabeth Streets RFP" for the subject project on September 14, 2016. By further letter dated October 12, 2018, HPD assumed lead agency status under the CEQR Rules because the proposal involved discretionary actions subject to review under CEQR and SEQRA. The letter stated that among the land use actions were the sale of the subject parcel to the developers under ULURP and the designation of the parcel as an Urban Development Action Area Project ("UDAAP").

HPD transmitted the ULURP application to the New York City Department of City Planning on November 2, 2018. Respondents place in the record a copy of the project EAS dated November 9, 2018 and a "Negative Declaration" of the same date issued by HPD, which states: "Pursuant to the CEQR rules adopted on June 6, 1991, Executive Order 91, HPD has completed its technical review of an Environmental Assessment Statement (EAS) dated

September 24th, 2018 and has determined that the proposed actions will have no significant effect on the quality of the environment." On March 5, 2019, HPD submitted a revised ULURP application which apparently appears to have sought only the sale of the subject parcel as a contemplated land use action. The City Planning Commission, by Resolution dated April 10, 2019, approved HPD's application based upon the environmental determination. By Resolution dated June 26, 2019, the New York City Council approved the disposition of the property as proposed under ULURP stating: "The Council finds that the action described herein will have no significant impact on the environment as set forth in the Negative Declaration."

Petitioners assert ten causes of action. The first cause of action alleges that the negative declaration fails to comply with SEQRA in that it is an impermissible conditional negative declaration. The second cause of action claims that the Negative Declaration was not properly published and therefore violates SEQRA. The third cause of action contends that the EAS is deficient because it fails to state that the project, as proposed, does not comply with the special zoning regulations applicable to the Project. The fourth cause of action, based upon similar assertions, alleges that HPD failed to take the required "hard look" at the Project's land use based upon what petitioners claim is a failure to comply with the parcel's

special district zoning. The fifth through ninth causes of action assert hard look failures of the EAS in terms of (a) open space (fifth cause of action), (b) historic and cultural resources (sixth cause of action), (c) neighborhood character (seventh cause of action), (d) public policy (eighth cause of action), and (e) cumulative impacts (ninth cause of action). The tenth cause of action challenges the ULURP approval on zoning grounds. Respondents oppose the claims made by the petitioners in their entirety.

New York State case law precedent sets forth the parameters for this court's consideration of the SEQRA/CEQR claims, as follows:

> SEQRA requires agencies subject to its provisions to adopt procedures necessary to implement the requirements of the statute provided that such 'procedures shall be no less protective of environmental values [than the procedures provided in SEQRA]', although procedures more protective of the environment can be adopted (see, ECL 8-0113 [3] [a]).
>
> Thus, the propriety of respondents' determination must be judged not only according to the requirements of SEQRA but also according to the regulations promulgated by the City of New York in CEQR to the extent those regulations are more protective of the environment.
>
> The initial determination to be made under SEQRA and CEQR is whether an EIS is required, which in turn depends on whether an action may or will not have a significant effect on the environment (ECL 8-0109 [2]; CEQR 7 [a]). In making this initial environmental analysis, the lead agencies must study the same areas of environmental impacts as

> would be contained in an EIS, including both the short-term and long-term effects (ECL 8-0109 [2] [b])5 as well as the primary and secondary effects (CEQR 1 [g]) of an action on the environment. The threshold at which the requirement that an EIS be prepared is triggered is relatively low: it need only be demonstrated that the action may have a significant effect on the environment.

Chinese Staff and Workers Assn v City of New York, 68 NY2d 359, 364-65 (1986) (citations omitted). However, the court's review is not unbounded. As the Court has further guided:

> SEQRA contains no provision regarding judicial review, which must be guided by standards applicable to administrative proceedings generally: 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803 [3]). In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively.
>
> More particularly, in a case such as this, courts may, first, review the agency procedures to determine whether they were lawful. Second, we may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination. Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process.
>
> Our inquiry is tempered in two respects. First, an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. "Not every

> conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" (Aldrich v Pattison, 107 AD2d 258, 266, supra; Coalition Against Lincoln W. v City of New York, 94 AD2d 483, 491, affd 60 NY2d 805, supra. The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal (see, Webster Assoc. v Town of Webster, 59 NY2d 220, 228). Second, the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives (see, e.g., ECL 8-0109 [8]). Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (Aldrich v Pattison, 107 AD2d 258, 267, supra; see also, Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, 435 US 519, 555).

Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 416-17 (1986).

Indeed, the submissions made by the parties here are extensive and the expertise brought to the facts and circumstances of this matter is substantial. Nonetheless, this court lacks the authority and expertise to substitute its judgment for the statutorily and precedentially mandated limited review of whether the respondents' determinations are arbitrary and capricious.

Considering the petitioners' claims, it is undisputed and respondents have treated this as a Type 1 action under SEQRA (6 NYCRR 617.4).

> For Type I actions, the developer must submit a full EAF which must be used to determine the significance of such actions. The very purpose of an EAF is to

> assist an agency in determining the environmental significance or nonsignificance of actions . . . While an EAF is used to determine significance or nonsignificance, the purpose of an EIS is to examine the identified potentially significant environmental impacts which may result from a project.

Matter of Merson v McNally, 90 NY2d 742, 750-51 (1997). The Court provided further guidance on the permissible contents and scope of a negative declaration, stating

> [H]ow to permit an evolving process for identification of environmental concerns and initiatives to meet those concerns yet, on the other hand, to guard against an avoidance of the EIS process through private bilateral negotiations between a developer and a lead agency when a project may have potentially significant environmental impacts which need full and open consideration.
> To deal with this dilemma, we start with the definition of a conditioned negative declaration, permitted only in unlisted actions: "a negative declaration issued by a lead agency for an unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental effects; however, mitigation measures identified and required by the lead agency ... will modify the proposed action so that no significant environmental impacts will result."
>
> Applying this definition in the context of a Type I action, we prescribe a twofold inquiry to examine whether a negative declaration has been impermissibly conditioned: (1) whether the project, as initially proposed, might result in the identification of one or more "significant adverse environmental effects"; and (2) whether the proposed mitigating measures incorporated into [] the EAF were "identified and required by the lead agency" as a condition precedent to the issuance of the negative declaration.

On the first point, if all areas of concern involve a minimal risk to the environment, no further inquiry is necessary and modifications in these areas would not impermissibly condition or invalidate an otherwise proper negative declaration. However, where the lead agency has identified potentially significant impacts, or where the record supports an inference that the identified impacts would have to be considered potentially significant, or where the identified impacts fall within typically environmentally sensitive areas or locations, the second prong of the test must be examined.

At the second phase of analysis, a court must examine whether the proposed mitigating measures, incorporated as part of an open and deliberative process, negated the project's potential adverse effects. Under such circumstances, the proposal, as revised, could still result in a determination of nonsignificance and the issuance of a valid negative declaration. In this regard, mitigating measures could be viewed as part of the "give and take" of the application process, and would be less of a concern than those revisions or mitigation measures made after final submission of the EAF.

However, a lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself. Nor could the lead agency achieve the same end by other means, such as supporting the negative declaration with a statement that conditions would be imposed only on an underlying special use permit to reduce environmental impacts; extracting concessions from the developer as necessary prerequisites to the issuance of the negative declaration; or requiring specific mitigation measures, and then approving a proposal that has been revised in compliance with the mandate of the lead agency.

The environmental review process was not meant to be a bilateral negotiation between a developer and lead agency but, rather, an open process that also involves other interested agencies and the public. Thus, there would ordinarily be no inherent problem in revising or modifying project plans to address

> concerns raised during the environmental review, particularly concerns raised by other agencies. However, mitigating measures will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action. Otherwise, the EIS process would be necessary to review the adequacy of the mitigating measures, and any environmentally compatible alternatives to the suggested mitigations. The lead agency's determination of the sufficiency of the proposed mitigation measures would of course be subject to a judicial examination of whether the lead agency took the requisite hard look.

Merson, 90 NY2d at 752-54.

Applying these precedential principles here, the court agrees with the respondents that the Negative Declaration was not impermissibly conditioned. The Negative Declaration states that the Project will be undertaken with certain architectural and construction-related requirements in order to protect historical and cultural resources as identified by the New York City Landmarks Preservation Commission ("LPC") because the project site is located within the Chinatown and Little Italy Historic District. Petitioners assert that these provisions constitute impermissible conditions. However, the court agrees with the respondents that the provisions are in fact statutorily and regulatorily-mandated protections that are generally applicable to any project undertaken in this manner and were not imposed by HPD as a condition of the negative declaration but were part of an open and deliberative permitting process to

avoid negative environmental impacts. See Matter of Incorporated Vil. of Poquott v Cahill, 11 AD3d 536, 541 (2d Dept 2004). Nor were the similarly set forth provisions governing the testing and assessment of possible contaminants on the project site impermissible conditions, as such activities and agency supervision were imposed pursuant to regulation in an open and deliberative manner.

Petitioners in the second cause of action also claim that the Negative Declaration was not timely published. 6 NYCRR 617.12 (c)(1) provides that "Notice of a Type I negative declaration, conditioned negative declaration, positive declaration, draft and final scopes and completion of an EIS must be published in the Environmental Notice Bulletin (ENB) in a manner prescribed by the department." The court, however, agrees with the respondents that the regulation does not impose any timing restriction on the required filing. This is in contrast to 6 NYCRR 617.12 (c)(2) which states "A notice of hearing must be published, at least 14 days in advance of the hearing date, in a newspaper of general circulation in the area of the potential impacts of the action." As there is no timeliness requirement as to the publication of Negative Declaration in the ENB, and it is undisputed that such publication here did finally occur on March 20, 2019,

petitioners' arguments as to the second cause of action provide no basis for relief.

Petitioners' third cause of action alleges that the EAS and respondents' subsequent actions must be vacated because they were affected by an error of law insofar as it is alleged that the "Proposed Project directly violates and is incompatible with the objectives of the Special Little Italy District (SLID) Zoning." Similarly, the fourth cause of action sets forth similar grounds as demonstrating that the respondents failed to take the requisite "hard look" at the impact the project would have on zoning in the project's historic neighborhood. Respondents counter that their description of the Zoning in the EAS is accurate and that the Project as proposed complies with their interpretation of the applicable Zoning.

The court shall deny the petitioners' claims with respect to Zoning as set forth in the third and fourth causes of action because binding precedent compels that "except where the proposed action is a zoning amendment, SEQRA review may not serve as a vehicle for adjudicating legal issues concerning compliance with local government zoning." Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373, 382 (1992). Thus, to the extent that petitioners seek to challenge the project's zoning and compliance therewith, this

proceeding is not the litigation to do so and the court has no power to determine whether or not such claims have any merit.

As cited previously, the petitioners challenge the Negative Declaration on a number of other grounds that the respondent HPD failed to take the required "hard look" at whether the proposed project would implicate a significant effect on the environment triggering the statutory requirement for an EIS to be prepared. Summarizing and encapsulating its precedents and the applicable law, the Court has stated that

> It is well settled that SEQRA is a legislative attempt to ensure that state and local agencies consider the environmental impact of their proposed actions. An agency's initial determination under SEQRA and CEQR is whether an EIS [environmental impact statement] is required, which in turn depends on whether an action may or will not have a significant effect on the environment.' 'In making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects. Where an agency determines that an EIS is not required, it will issue a negative declaration. Although the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion.
>
> Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion. In assessing an agency's compliance with the substantive mandates of the statute, the courts must review the record to determine whether

> the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.

Matter of Chinese Staff v Burden, 19 NY3d 922, 923-24 (2012) (citations and internal quotations omitted); see also Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373, 381-82 (1992). As is relevant here, the Court has also held that with respect to environmental reviews, "the City was entitled to rely on the accepted methodology set forth in the CEQR Technical Manual." N. Manhattan Is Not for Sale v City of New York, 185 AD3d 515, 519 (1st Dept 2020), lv to appeal denied, 35 NY3d 918 (2020); Friends of P.S. 163, Inc. v Jewish Home Lifecare, 146 AD3d 576, 579 (1st Dept 2017), affd sub nom. Friends of P.S. 163, Inc. v Jewish Home Lifecare, 30 NY3d 416 (2017) ("[the administrative agency] is entitled to rely on the accepted methodology set forth in the City Environmental Quality Review Technical Manual [CEQRTM] . . . in making its determination").

The petitioners argue here that while the EAS acknowledges that "the Development Site is located in an area considered to be underserved by open space" and finds that "the Proposed Actions would result in a decrease in the total, active, and passive open space ratios in an area underserved by open space," HPD determined that there was no significant adverse

environmental impact. Respondents argue that the EAS properly found that the open space deficiency in the area would be ameliorated by other resources including bike lanes, other community gardens and the proximity to Washington Square Park.

The EAS itself sets out the review criteria from the CEQRTM to be applied

> According to the CEQR Technical Manual, a proposed action may result in a significant adverse impact on open space resources if (a) there would be direct displacement/alteration of existing open space within the study area that has a significant adverse effect on existing users; or (b) it would reduce the open space ratio and consequently overburden existing facilities or further exacerbate deficiency in open space. The CEQR Technical Manual also states that "if the area exhibits a low open space ratio indicating a shortfall of open space, even a small decrease in the ratio as a result of the action may cause an adverse effect." A five percent or greater decrease in the open space ratio is considered to be "substantial", and a decrease of less than one percent is generally considered to be insignificant unless open space resources are extremely limited. The open space study area analyzed in this attachment is located in an area that is considered underserved by open space as defined in the CEQR Technical Manual Appendix: Open Space Maps.
>
> As discussed below, the detailed open space analysis shows that the Proposed Actions would result in a decrease in the total, active, and passive open space ratios in the half-mile study area. In addition, as discussed below, while the Proposed Actions would result in the displacement of an existing open space resource located on the Development Site, as part of the Proposed Development, a 0.15-acre open space resource would be constructed on a portion of the Development Site. Therefore, the Proposed Actions would not result in a significant adverse open space impact.

The EAS goes on to state that

> As presented . . . in the With-Action condition, as under existing and No-Action conditions, the open space ratios in the half-mile study area would be less than the City's open space planning goals of 2.5 acres of open space per 1,000 residents, including 0.5 acres of passive open space and 2.0 acres of active open space. Specifically, in the future with the Proposed Actions, the total open space ratio is expected to decrease by 2.24 percent, to 0.149 acres of open space per 1,000 residents (as compared to the No-Action condition); the With-Action passive open space ratio would decrease by 11.41 percent to 0.025 acres per 1,000 residents; and the With-Action active open space ratio would decrease by 0.13 percent to 0.124 acres per 1,000 residents.

Therefore, petitioners are correct that based upon the quantitative analysis of the effect of the Project on open space as analyzed within the EAS sets forth that, under the guidelines of the CEQRTM [1], the reduction in open space ratios is sufficient to indicate the presence of a significant adverse impact. Yet, the EAS goes on to find that because of alleged qualitative factors, the impact is not significant. The court agrees with petitioners that respondents lacked a rational basis in the EAS analysis to reach such a conclusion of non-significance.

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[1] The court here notes that the version of the CERQTM used in the preparation of the EAS and referred to in this decision is the March 2014 Edition. The current version of the CERQTM has slightly different wording that is not germane to the issues considered here.

The CEQRTM provides that when there is a significant adverse impact to open space on a quantitative basis as is the case in this EAS, then

> The adequacy of the open space in the study area should be considered in order to determine whether the[] change in open space conditions and/or utilization results in a significant adverse effect to open space. To make this determination, the type of open space (active or passive), its capacity and conditions, the distribution of open space, whether the area is considered "well-served" or "underserved" by open space, the distance to regional parks, the connectivity of open space, and any additional open space provided by the project, including rooftop gardens, greenhouses, new active or passive open space, should be considered in relation to the quantitative changes identified above. These considerations may vary in importance depending on the project and the area in which it is located. (emphasis added).

The infirmity in the EAS' Qualitative Assessment of open space impacts is that it fails to provide any context that would support respondents' conclusion that the reduction in the quantitative open space ratio is compensated for by any of the aforementioned factors set out in the CEQRTM. That is, rather than following the CEQRTM and using the qualitative assessment in relation to the quantitative assessment's finding of a significant decline in the open space ratios, the respondents instead fail to explain how the qualitative assessment reduces the significance of the quantitative reduction in open space caused by the project. Even if, assuming arguendo, the qualitative assessment identified factors that would mitigate

the impact of the significant decline in the open space ratio caused by the project, there is no evidence that in the current record that such mitigations are sufficient to overcome such significance. See Matter of Merson v McNally, 90 NY2d 742, 754 (1997) ("mitigating measures will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action.").

Therefore, as concerns petitioners' fifth cause of action, the court finds that respondents' determination that the project would have no significant adverse impact upon open space is not rationally based and that therefore the negative declaration based upon such determination must be voided and the matter remanded for respondents to conduct a full EIS of the project's impacts.

With respect to the sixth cause of action, petitioners claim that respondents failed to take a hard look at historical and cultural resources because "the EAS almost completely disregards the numerous buildings in the study area that have been identified as contributing to the Chinatown and Little Italy Historic District." Petitioners further assert that because the EAS sets forth that a requirement for a construction protection plan ("CPP") would need to be imposed to ameliorate any significant construction-related impacts in building out the project, it was necessary that the CPP be incorporated into the

EAS for public scrutiny rather than being deferred to a later time. Respondents counter that that there is no requirement in the CEQRTM that every historical building site in the study area be invidiously identified, and that in any event the EAS collectively identified such resources, and that there is no requirement that a CPP must be included with the EAS.

The relevant section of the CEQRTM states that in determining whether there is a significant adverse impact upon historical or cultural resources,

> [I]mpact assessment is directly related to the proposed project and how it would affect the distinguishing characteristics of any resources identified. The assessment asks three major questions: (1) would there be a physical change to the property; (2) would there be a physical change to its setting, such as context or visual prominence (also known as indirect impacts); and (3) if there would be a physical change to the property or setting, is the change likely to alter or eliminate the significant characteristics of the resource that make it important? Put another way, if not for this project, would there be an impact on historic resources? Impacts may result from both temporary (e.g., related to the construction process) and permanent (e.g., related to the long-term or permanent result of the proposed project or construction project) activities. The lead agency should consult with the LPC and/or the SHPO (State or National Historic Preservation Office) in making this determination.

The court finds that petitioners have failed to carry their burden to demonstrate that respondents failed to take a hard look at the historical and cultural resource impacts of the project. At the threshold, while petitioners assert various

alleged deficiencies in the EAS, petitioners fail to identify how respondents' analysis fails to comply with the procedures outlined in the CEQRTM. Furthermore, petitioners fail to identify any significant resource impacts that the EAS overlooked and the imposition of a CPP, without more, does not trigger the need for an EIS to be conducted.

With respect to petitioners' claims that respondents failed to take a hard look at neighborhood character, public policy and cumulative impacts, the court agrees with respondents that these causes of action are not sustainable upon the facts presented here. It is important to note that these environmental elements are derivative of the other impacts considered in the EAS. For example, the CEQRTM states:

> To determine whether a Neighborhood Character assessment is appropriate, answer the following question: Would the project have the potential to result in any significant adverse impacts in the following areas: A. Land Use, Zoning, and Public Policy; B. Socioeconomic Conditions; C. Community Facilities; D. Open Space; E. Historic and Cultural Resources; F. Urban Design and Visual Resources; G. Shadows; H. Transportation; or I. Noise?

As the individual impacts in these areas are examined in the EAS, and the EAS did not find significant impacts in those areas, the EAS cannot be said to have failed to have taken a hard look at neighborhood character. Nor do petitioners provide any evidence that there are other factors overlooked by the EAS that would cumulatively require further analysis in the context of

neighborhood character. Importantly, in this regard, the petitioners do not argue that the respondents failed to follow the guidelines set forth in the CEQRTM in their consideration of these elements. See Real Estate Bd. of New York, Inc. v City of New York, 157 AD2d 361, 365 (1st Dept 1990).

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11/01/2022
DATE

DEBRA A. JAMES, J.S.C.

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