STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

RENEW 81 FOR ALL, by its president Frank L. Fowler, CHARLES GARLAND, GARLAND BROTHERS FUNERAL HOME, NATHAN GUNN, ANN MARIE TALIERCIO, TOWN OF DEWITT, TOWN OF SALINA, and TOWN OF TULLY,

*Petitioners*,

*-against-*

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, MARIE THERESE DOMINGUEZ, in her official capacity as the Commissioner of New York State Department of Transportation, NICOLAS CHOUBAH, P.E., in his official capacity as the New York State Department of Transportation Chief Engineer, and MARK FRECHETTE, P.E., in his official capacity as the New York State Department of Transportation I-81 Project Director,

*Respondents,*

*-and-*

The City of Syracuse,

*Intervenor-Respondent.*

Index No. 007925/2022
Hon. Gerard J. Neri

**MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION**

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## PRELIMINARY STATEMENT

Petitioners Renew 81 for All, by its president Frank L. Fowler, Charles Garland, Garland Brothers Funeral Home, Nathan Gunn, Ann Marie Taliercio, Town of Dewitt, Town of Salina, and Town of Tully (collectively, "Petitioners") argue that the Community Grid should not be constructed. Rather, Petitioners would prefer the "Harriet Tubman Memorial Freedom Bridge Alternative" ("Bridge Alternative"). Petitioners assert a variety of claims in support – primarily that the New York State Department of Transportation ("NYSDOT"), in contravention of the State Environmental Quality Review Act ("SEQRA"), failed to take the necessary "hard look" at the Bridge Alternative which Petitioners claim they "presented in August 2021." Doc. No. 1, ¶172. Essentially, Petitioners argue that the Bridge Alternative is the better option.

However, nothing in SEQRA requires NYSDOT to select Petitioners' preferred option. Rather, SEQRA requires a reviewing agency to analyze the environmental impacts of considered options. Contrary to Petitioners' papers, the record on this matter consisting of years of review of considered options relative to the I-81 project reveals that NYSDOT and the Federal Highway Authority ("FHWA") held public input meetings, undertook a multitude of scientific, environmental, and traffic studies, and worked with engineers and other professionals to analyze many options; one being a "Viaduct Alternative." As described, the Viaduct Alternative consisted of replacing the current viaduct with a higher and wider version. Petitioners' papers fail to describe the "Bridge Alternative" or how the bridge differed from the "Viaduct Alternative" – an option that was repeatedly considered *and* rejected by NYSDOT.

Rather than provide this Court with *any* supporting materials, Petitioners assert a litany of baseless claims for the general proposition that the Bridge Alternative "would create *far fewer* negative environmental impact." Doc. No. 1, ¶172. (emphasis in original). Simply stated,

Petitioners have failed to demonstrate that NYSDOT failed to follow the requirements of SEQRA and as such there is nothing on which this Court could find the determination by NYSDOT to undertake the Community Grid alternative was arbitrary and capricious.

Petitioners cannot challenge an agency decision simply because they disagree with the outcome. Respectfully, the only question for this Court is whether the NYSDOT's selection of the Community Grid alternative is rational. Intervenor-Respondent the City of Syracuse ("City") respectfully submits that not only is the Community Grid alternative a rational decision – the record reflects that the alternative is the preferred outcome of the City residents and businesses.

## STATEMENT OF FACTS

Reference is made to the City's Answer and Counter Statement of Material Facts for a complete recitation of the relevant facts.

## STANDARD OF REVIEW

The Court of Appeals has repeatedly made clear that the standard of review for an agency's decision in an Article 78 proceeding is highly deferential to the agency. Indeed,

> the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; * * * the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence. . . . . The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious.

*Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 N.Y.2d 222, 230–31 (1974) (internal quotations and citations omitted); *see also Save Am.'s Clocks, Inc. v. City of New York*, 33 N.Y.3d 198, 207 (2019) ("This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among

alternatives."); *see also Fairway Manor, Inc. v. Bertinelli*, 81 A.D.3d 821, 822–23 (2d Dep't 2011) ("A local planning board has broad discretion in deciding applications for site-plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary, or an abuse of discretion.").

Similarly, and specifically when it comes to review of SEQRA determinations, courts have held: "[W]here an agency has followed the procedures required by SEQRA, a court's review of the substance of the agency's determination is limited." *In re Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 318 (2006). "The question 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.'" *Id.* (quoting *In re Jackson v. NYS Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)). "The agency's 'substantive obligations under SEQRA must be viewed in light of a rule of reason' and agencies have 'considerable latitude in evaluating environmental effects and choosing among alternatives.'" *Id.* (quoting *Jackson*, 67 N.Y.2d at 417). Also, "'the degree of detail with which each alternative must be discussed will . . . vary with the circumstances and nature of each proposal.'" *Id.* (quoting *Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 228 (1983)).

"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." *Jackson*, 67 N.Y.2d at 417.

"An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. . . . If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)

(citations omitted); *see also Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613 (2004) ("It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.").

For the following reasons, the City respectfully submit that the Petition must be dismissed as this Court lacks jurisdiction over a necessary party. Additionally, the City submits that the Community Grid option is a rational decision and Petitioners' Causes of Action fail to state a claim.

## ARGUMENT

### I. This Court Lacks Jurisdiction Over A Necessary Party

An individual or entity is a necessary party to litigation "if complete relief is to be accorded between the persons who are parties to the action" or if the entity "might be inequitably affected by a judgment in the action." CPLR § 1001(a). The nonjoinder of necessary parties may be raised at any stage of the proceedings, by any party or by the court on its own motion, including for the first time on appeal. *Miller v. Wendy Joan St. Wecker Tr. U/A Aug. 28, 1997*, 173 A.D.3d 1007, 1009 (2d Dep't 2019). Joinder is mandatory if the nonparty is subject to the court's jurisdiction. CPLR § 1001(b). However, if jurisdiction can only be obtained by the entity's consent or voluntary appearance, "the court, when justice requires, may allow the action to proceed without [the entity] being made a party." *Id.* The court must consider five factors in determining whether to allow the action to proceed:

> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;

> 4. the feasibility of a protective provision by order of the court or in the judgment; and
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

*Id.*

"Although a court must consider all five criteria, no single factor is determinative in the discretionary analysis of whether an action may proceed in the absence of a necessary party who is not subject to mandatory jurisdiction." *See Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 N.Y.3d 543, 551 (2012) (citing *Red Hook/Gowanus Chamber of Com. v. New York City Bd. of Standards & Appeals*, 5 N.Y.3d 452, 459 (2005)). "The overall statutory design is intended to (1) guarantee that absent parties at risk of prejudice will not be embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard and (2) protect against multiple lawsuits and inconsistent judgments." *Id*. (citing *Red Hook/Gowanus Chamber of Com*., 5 N.Y.3d at 458-59).

Ultimately, FHWA and the Respondents will be greatly prejudiced if this action proceeds in FHWA's absence because FHWA conducted the federal environmental review for the I-81 project and issued the Record of Decision jointly with the New York State Department of Transportation. Additionally, federal funding will account for 80-90% of the approximately $2.25 billion project. Doc. No. 28 (Frechette Aff., ¶ 63). Further, the risk of inconsistent judgments being rendered in connection with the I-81 project is significant given that several of the Petitioners in this action filed a similar action against the FHWA in the Northern District of New York on November 21, 2022 (Civil Case No. 5:22-cv-01244) and list the New York State Department of Transportation as an "Interested or Necessary Party."

The City therefore respectfully submits that an analysis of the factors set forth in CPLR 1001(b) establishes that this action cannot proceed in FWHA's absence as a party. *Swezey*, 19

N.Y.3d at 554–55 ("Based on our balancing of the five factors delineated in CPLR 1001 (b), we conclude that this case "cannot be decided without the presence of the foreign government" . . . and that the Republic's absence compels dismissal without prejudice under these circumstances . . . .") (citations omitted); *see also A&F Scaccia Realty Corp. v. New York City Dep't of Env't Prot.*, 200 A.D.3d 875, 877 (2d Dep't 2021) ("In a proceeding pursuant to CPLR article 78, the governmental agency which performed the challenged action must be a named party.").

## II. The Community Grid Alternative Is A Rational Decision

Petitioners generally claim that NYSDOT failed to adequately consider the Bridge Alternative, which, according to Petitioners, "would create *far fewer* negative environmental impacts" than the Community Grid. Doc. No. 1, ¶712 (emphasis in original). Notably absent from Petitioners' papers is *any* description of the Bridge Alternative. Petitioners even claim that the "Bridge Alternative [was] presented in August 2021," yet inexplicably fail to include *any* facts concerning the presentation, such as the specific date and forum or the particulars of the alternative. Respondents and this Court are therefore left to speculate as to its particulars, including the proposed location, width, height and the number and location of exits and entrances.

Similarly, Petitioners chose not to identify any differences between the Bridge Alternative and the Viaduct Alternative, which was repeatedly considered, and rejected, by NYSDOT.[1] As explained by Respondent Mark Frechette, P.E. ("P.E. Frechette"), NYSDOT and FHWA "specifically looked at a signature bridge similar to the" Bridge Alternative. Doc. No. 28, ¶22. However, according to P.E. Frechette, there were several

> issues with the signature bridge concept [including] the following:

[1] This is, of course, assuming there are differences. Petitioners seemingly argue that the NYSDOT improperly rejected the Viaduct Alternative. *See* Doc. No. 1, ¶175. The Petition could therefore be construed to read that the Bridge Alternative is simply a slightly different version of the Viaduct Alternative.

- The considerably increased cost did not add commensurate value and would take two years longer to build than the Community Grid Alternative, resulting in lengthier construction disruption including road closures, increased truck traffic, and re-routing of traffic to I-481.
- Once constructed, a signature bridge would cost more to maintain than a street-level roadway. It would also require additional costs for security, both physical and electronic.
- Snow would need to be trucked off the bridge, and any accumulated snow would be a hazard, both to the bridge travelers and areas below the bridge.
- A signature bridge would require acquisition of dozens of additional buildings, impact utilities, and displace businesses employing minority and/or low-income employees and which serve low-income and minority populations. Approximately 12 historical structures would also be impacted.
- A signature bridge would accommodate the approximately 12 percent of vehicles that are through traffic, but would not allow for exits for City destinations.
- The existing Viaduct has been recognized as a barrier between neighborhoods, and the signature bridge concept would result in a new and more substantial barrier between neighborhoods, and nearby areas, including Pioneer Homes and other adjacent properties, would experience increased shadowing throughout periods of the day and could be in full shadow during winter months.

*Id.*

Accordingly, Petitioners' argument that NYSDOT "failed to take a 'hard look' at" the Bridge Alternative is dispelled by the record.

Petitioners further argue that the Community Grid is arbitrary and capricious because it will negatively impact the City and City residents would prefer the current version of I-81 (meaning a bridge rather than a boulevard). *See* Doc. No. 1, ¶¶58, 162, 163; *see also* Doc. No. 6. However, as the City's Counter Statement of Facts establishes, and as briefly set forth below, the City and its residents have repeatedly and consistently expressed their preference for the Community Grid.

The Common Council for the City ("Common Council"), a body elected by the residents of the City, passed a Resolution on January 26, 2015, in favor of "a street level boulevard option to replace the current Route 81 Viaduct, with Interstate 81 Traffic diverted to Interstate 481." Exhibit 4. The 2015 Resolution passed unanimously. Exhibit 5, ¶67.

At the June 12, 2018, Common Council Fact-Finding Public Meeting held with respect to the I-81 project ("2018 Public Meeting") several individuals spoke in favor of the Community Grid. Exhibit 7. Missy Ross, for example, a homeowner in the South Side of Syracuse, spoke forcefully in favor of the Community Grid. *Id.* at 1:45:44-1:46:40. She noted that rebuilding the I-81 viaduct would require an expanded highway as the current iteration is not up to federal highway standards. *Id.* As a mother, she was particularly concerned about the impact on her community because an expansion would "take out more taxpaying land [and] we already can't fund our school district and people are fleeing the City of Syracuse because of it." *Id.* She also argued against the suggestion that converting I-481 to I-81 was an unfair increase in commute time. *Id.* Specifically, Ms. Ross passionately argued that "I don't think it's fair for [suburban residents] to ask me to give up more of my land and tax revenue that's gonna come from right off the backs of my daughter right there. I don't think that's fair for you to save two to three minutes. I'm sorry, it's not OK." *Id.*

Furthermore, on January 23, 2019, more than fifty "stakeholders and civic leaders who represent numerous institutions, organizations, communities and neighborhoods in the greater Syracuse area, [wrote the Governor] to convey [their] strong support for a Community Grid" ("January 2019 Letter"). Exhibit 10. The stakeholders included Mayor Walsh, the Common Council President, seven members of the Common Council, a Dewitt Town Board Councilor,[2] the

[2] The Town of Dewitt is a Petitioner in this action.

Executive Director of the Syracuse Housing Authority, the Executive Director of the Downtown Committee of Syracuse, the President of Armory Development & Management, Syracuse United Neighbors, the Greater Syracuse Tenants Network and the founder of "Syracuse Suburbs for the Grid." *Id*. at 3-4.

In April 2019, the Common Council *again* issued a Resolution finding that "a street level boulevard" was the best "option to replace the current Route 81 Viaduct, with Interstate 81 Traffic diverted to Interstate 481." Exhibit 8, p. 6. Notably, the Common Council specifically referenced the Community Grid in the Resolution, finding that it would "directly address the long-term effects of the destruction of the 15th Ward, redlining, urban renewal, and the original construction of the I-81 Viaduct to promote inclusive development, promote integrated mixed-use housing, resources to local schools through taxes, and help stitch neighborhoods back together within the community." *Id*. at 3. The vote was nearly unanimous. Exhibit 9, ¶65 (April 2019 Agenda with votes).

As the record set forth above makes clear, contrary to Petitioners' unsubstantiated allegations, the City and its residents favor the Community Grid.

## II. Petitioners' First Cause Of Action Fails To State A Claim As NYSDOT Followed The Relevant NYCRR SEQRA Provisions

NYSDOT and FHWA issued a Joint National Environmental Policy Act ("NEPA")/State Environmental Quality Review Act ("SEQRA") Record of Decision and SEQRA Statement ("ROD") on June 3, 2022. Doc. No. 3. The ROD incorporated the Draft Environmental Impact Statement ("DEIS") and the Final Environmental Impact Statement ("FEIS"). *Id.* at 9. As with the ROD, both the DEIS and the FEIS were jointly prepared by the NYSDOT and the FHWA. *See* Exhibit 15; Exhibit 21.

Petitioners generally challenge the ROD and the FEIS.[3] *See generally* Doc. No. 1, ¶1. However, Petitioners explicitly "do[] not challenge any decision making of FHWA or any other federal agency or officer, including the United States Department of Transportation, [and] do[] not make claims under [NEPA] or other federal laws or regulations." *Id.* at ¶14. Petitioners have therefore chosen not to challenge NEPA or the Federal EIS, yet are attempting to challenging the results of those processes and reports. Petitioners' argument represents a fundamental misunderstanding of NYSDOT's SEQRA analysis when a federal agency is involved.

The New York Codes, Rules and Regulations ("NYCRR") set forth specific procedures NYSDOT must follow "for the implementation of the State environmental quality review act (SEQR) by the New York State Department of Transportation." 17 NYCRR § 15.1(a). The provisions set forth the specific requirements of NYSDOT when a federal agency, such as the FHWA, is involved.

As relevant here,

> [i]f the proposed direct action of [NYSDOT] is subject to the requirements of NEPA, the department shall follow the procedures for compliance with NEPA . . . which procedures will result in the preparation of a Federal FEIS. Upon the completion of the Federal FEIS, the department shall have no further obligation with respect to this Part, provided that the department has:
>
> (i) given consideration to the Federal FEIS; and
>
> (ii) prepared a record of decision . . . .

17 NYCRR § 15.6(c)(1); *see also* Exhibit 21, § 1 ("In accordance with 17 NYCRR Part 15, given that a Federal EIS has been prepared, NYSDOT and other New York State agencies undertaking a discretionary action for the Project have no obligation to prepare a separate EIS under SEQRA.").

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[3] Petitioners further argue that NYSDOT failed to "secure the consent of other involved agencies to it acting as lead agency," Doc. No. 1, ¶93, including the City, Doc. No. 11, p. 5 n. 1. The City is not challenging NYSDOT's lead agency status or the receipt of a lead agency notice. Accordingly, any error was harmless. See *King v. Cnty. of Monroe*, 255 A.D.2d 1003, 1004 (4th Dep't 1998). (The City does not concede that there was an error.)

Furthermore, "[i]n the case where a Federal FEIS has been prepared and the department has jointly, with a Federal agency responsible for NEPA compliance, prepared a record of decision for the purposes of complying with 40 CFR 1505.2 . . . , such record of decision, if adopted by the department, may be in lieu of and satisfy the requirement" that NYSDOT "prepare a record of decision." 17 NYCRR § 15.9(a), (b).

NYSDOT fully complied with its duties under 17 NYCRR Title 15 and Petitioners have not claimed otherwise. Specifically, NYSDOT and FHWA jointly prepared a Federal EIS. *See* Exhibit 18. NYSDOT then jointly prepared a ROD with the FHWA. *See* Doc. No. 3. As the NYCRR makes clear, NYSDOT "shall have no further obligation." 17 NYCRR § 15.6(c)(1). As noted above, Petitioners admit that the FHWA process is beyond reproach. Accordingly, Petitioners' various SEQRA process arguments are rendered ineffective in light of Petitioners' choice *not* to challenge the Federal EIS or NEPA.

The City therefore respectfully submits that Petitioners' First Cause of Action fails to state a claim.

## III. Petitioners' Second, Third, Fourth and Fifth Causes Of Action Fail To State A Claim As Petitioners' Failed To Submit Any Supporting Evidence

Petitioners Second, Third, Fourth and Fifth Causes of Action allege that the ROD is arbitrary and capricious for violating the Smart Growth Act, the Climate Leadership and Community Protection Act and the Green Amendment, respectively. *See* Doc. No. 1, ¶¶247-27. However, Petitioners failed to attach *any* supporting evidence, such as scientific reports or expert opinions. The only arguably supporting evidence is introduced through unsworn letters by individuals who do not claim any scientific expertise. *See* Doc. Nos. 4-6.

In support of an Article 78 Proceeding, the "petitioner must demonstrate that the [agency] determination was arbitrary and capricious or without a rational basis." *Patel v. Fischer*, 67 A.D.3d

1193, 1193 (3d Dep't 2009) (citation omitted). Respectfully, Petitioners' conclusory allegations are fatally insufficient. *See Sylvester v. Fischer*, 126 A.D.3d 1330, 1331 (4th Dep't 2015) ("the record is bereft of any evidence to support petitioner's conclusory claims") (citations and quotations omitted).

As for the Fifth Cause of Action, Petitioners merely assert that "[u]pon information and belief, and/or as may be further determined upon filing of the record of proceedings, the ROD, SEQRA Review, and any other approvals for the Project, may otherwise be in violation of other laws, regulations and procedures, and/or arbitrary and capricious." Doc. No. 1, ¶275. Respectfully, Petitioners' Fifth Cause of Action fails to state a claim as they have not even asserted a conclusory allegation of wrongdoing.

Based on the foregoing, the City respectfully submits that Petitioners' Second, Third, Fourth and Fifth Causes of Action fail to state a claim.

## CONCLUSION

Based on the foregoing, the City respectfully submits that this Court lacks jurisdiction over a necessary party. In addition, the City respectfully submits that the Petition fails to set forth any basis for overturning the NYSDOT's rational decision rendered in accordance with applicable SEQRA and NEPA requirements and with respect to the other allegations Petitioners fail to state causes of action. Accordingly, the City requests that this Court grant judgment in Respondents' favor and dismiss the Petition.

November 23, 2022

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**CERTIFICATION OF WORD COUNT**

I, Danielle R. Smith, Esq., an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the foregoing document complies with the word count limits set forth in 22 N.Y.C.R.R. § 202.8-b(a) because it contains 3,275 words, exclusive of the material identified by 22 N.Y.C.R.R. § 202.8-b(b).

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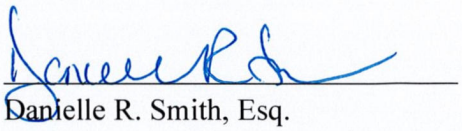
DATED: November 23, 2022



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