SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

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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,

vs.

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

FEDERAL HIGHWAY ADMINISTRATION, and JOHN DOES,

Interested or Necessary Parties.

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**MEMORANDUM OF LAW**

Index No.: 007925/2022

# PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF 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") submit this Memorandum of Law in support of their Verified Petition ("Petition") in this CLPR Article 78 proceeding seeking an Order and Judgment, pursuant to CPLR Article 78, the State Environmental Quality Review Act ("SEQRA"), the Smart Growth Act, the Climate Leadership and Community Protection Act ("CLCPA"), Article I § 19 of the New York State Constitution (the "Green Amendment"), and/or otherwise, with respect to the Interstate 81 ("I-81") Viaduct Project P.I.N. 3501.06 (the "Project"): (1) vacating, annulling, and declaring illegal, invalid, null and/or void the May 31, 2022 Joint Record of Decision and Findings published on June 2, 2022, as supplemented in June, 2022 (the "ROD"), the Final Design Report/Final Environmental Impact Statement/Final Section 4(f) Evaluation (the "EIS"), the review of the Project under SEQRA ("SEQRA Review"), and any other approvals ("Approvals") issued by Respondents New York State Department of Transportation ("NYSDOT"), Marie Therese Dominguez, in her official capacity as the Commissioner of NYSDOT (the "Commissioner"), Nicolas Choubah, P.E., in his official capacity as the NYSDOT Chief Engineer (the "Chief Engineer"), and/or Mark Frechette, P.E., in his official capacity as the NYSDOT I-81 Project Director (the "Project Director," and collectively "Respondents"); (2) directing Respondents to proceed with an alternative for the Project that complies with SEQRA, the Smart Growth Law, CLCPA, and the Green Amendment; and (3) granting such other and further relief as this Court deems just and proper, including Petitioners' costs and disbursements.

Respondents adopted the "Community Grid" Alternative for the Project, which would demolish the I-81 viaduct running through the center of Syracuse (the "Viaduct"), de-designate this section of I-81 as an interstate highway, and route freeway traffic through a system of grade-level intersections with up to 13 to 20 traffic lights through Syracuse. Petitioners are a diverse but unified coalition of residents and stakeholders who seek to annul the Approvals because, *inter alia*, the SEQRA Review for the Project failed to comply with the requirements of SEQRA (including the SEQRA regulations set forth at 6 N.Y.C.R.R. Part 617, and NYSDOT Procedures for Implementation of SEQRA at 17 N.Y.C.R.R. Part 15).

The Project would also conflict with the state policy to reduce greenhouse gases ("GHG"), in violation of the State Smart Growth Public Infrastructure Policy Act (ECL Article 6) ("Smart Growth Act") and CLCPA. The Approvals further violate the new "Green Amendment" set forth in the Bill of Rights at Section 19 of Article I of the New York Constitution by not protecting the impacted New Yorkers' right to clean air and water and a healthful environment.

Rather than restate the facts of this matter at length in this Memorandum, Petitioners refer to their Verified Petition, which details the relevant factual background at length. For the reasons detailed below, Petitioners request that the Court grant their Petition.

## LEGAL ARGUMENT

### LEGAL STANDARD

Under CPLR § 7803(3), the question presented in an Article 78 proceeding is "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." An action contrary to state or local law will be annulled as illegal. *See, e.g., Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149, 151, (4th Dep't 1992). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Board of Education of Union Free School District No. 1*, 34 N.Y.2d 222, 230 (1974). Decision-making by an administrative official must be "reasonable" and supported by "substantial evidence." *Chemical Specialties Manufacturers Association v. Jorling*, 85 N.Y.2d 382 (1995).

While an agency is afforded deference, that principle will not apply where it fails to make findings on the necessary issues, 2 Salkin, *New York Zoning Law and Practice* (4th ed.) § 28:30, or only makes conclusory findings. *Leibring v. Planning Board of the Town of Newfane*, 144 A.D.2d 903 (4th Dep't 1988). When the decision does not comply with relevant law, it should be annulled. *Jacobsen v. Brown*, 231 A.D.2d 636 (2d Dep't 1996). "The ultimate responsibility of interpreting the law is that of the court." *KMO-361 Associates v. Davies*, 204 A.D.2d 547, 547 (2d Dep't 1994).

## POINT ONE

## THE APPROVALS MUST BE ANNULLED DUE TO FAILURE TO COMPLY WITH SEQRA

### A. Literal SEQRA Compliance Was Required.

Under SEQRA, a lead agency must make a "determination of significance" by reviewing an Environmental Assessment Form (EAF), and decide whether the proposal "may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1). If so, a draft, and then a final Environmental Impact Statement must be prepared. ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.7(a)(1). The legislative intent is clear that "to the fullest extent possible the policies, statutes, regulations and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in [SEQRA]." ECL § 8-0103(6). Accordingly, "literal" or "strict compliance" with the SEQRA process has been mandated by the courts, and "substantial compliance" has been held insufficient. *King v. Saratoga Board of Supervisors*, 89 N.Y.2d 341 (1996); *Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958 (4th Dep't 1995); *Badura v. Guelli*, 94 A.D.2d 972, 973 (4th Dep't 1983). An agency must comply with both the letter and the spirit of SEQRA before it will be found to have discharged its responsibilities thereunder. *Schenectady Chemicals, Inc. v. Flacke*, 83 A.D.2d 460 (3d Dep't 1981). *See also City of Oswego v. Port of Oswego Authority*, Oswego Co. Index No. EFC-2021-1024 (Sup. Ct. Oswego Co. 2021) (in which Justice Gilbert annulled SEQRA review which did not assess all of the proposed development).

Accordingly, before an agency can make a "significant authorization" for an "action" subject to SEQRA, it must comply with SEQRA. 6 N.Y.C.R.R. § 617.3(a); *Devitt v. Heimbach*, 58 N.Y.2d 925 (1983). Otherwise, the action is invalid. *Tri-County Taxpayers Assoc. v. Town Bd. of Queensbury*, 55 N.Y.2d 41 (1982); *Taxpayers Opp. to Floodmart, Ltd.*, 212 A.D.2d at 958. The Project is a Type I action, since it involves the physical alteration of at least 10 acres, and also the acquisition of more than 100 acres, 6 N.Y.C.R.R. § 617.4(b), so coordinated SEQRA review was required, pursuant to which Part 1 of an Environmental Assessment Form must be circulated to all involved agencies, and they must designate a lead agency to conduct the SEQRA review, pursuant to 6 N.Y.C.R.R. § 617.4(b)(2)(i).[1]

**B. EIS Requirements.**

In order to effectuate the policy of balancing the value of activities against their potential effects on the environment, the legislature established in SEQRA a requirement that an EIS be prepared to provide the appropriate agency with sufficient information upon which to weigh all relevant factors prior to deciding whether or not to permit the proposed action. ECL § 8-0109. An EIS is intended to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action to form the basis for a decision whether or not to approve such action. ECL § 8-0109(2). While an EAF is used to determine the significance of actions, the purpose of an EIS is to examine identified, potentially significant impacts which may result from the project. *Merson v. McNally*, 90 N.Y.2d 742 (1997).

[1] Upon information and belief, and as will be revealed upon filing the Record, while NYSDOT acted as SEQRA lead agency pursuant to 17 NYCRR § 15.5, it did not properly classify the Project as a Type I action, or circulate an EAF to other involved agencies, including NYSDEC and the City of Syracuse, or seek their consent to acting as lead agency, so the SEQRA Review process was defective. *Ferrari*, 181 A.D.2d at 149.

In addition to having statutorily specified contents, an EIS should be clearly written in a concise manner capable of being read and understood by the public and should deal with the specific anticipated significant environmental impacts of an action. ECL § 8-0109(2). However, it must be apparent that the responsible agency made a "hard-look" analysis of the environmental impacts of the proposed action. *Akpan v. Koch*, 75 N.Y.2d 561 (1990); *Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137 (1988); *Save Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193 (1987); *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400 (1986); *Board of Co-op. Educational Services of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie*, 268 A.D.2d 838 (3d Dep't 2000).

Although the "hard look" analysis first arose in the context of reviewing determinations of significance, it has subsequently been adopted for review of the sufficiency of an EIS. *WEOK Broadcasting Corp. v. Planning Bd. of Lloyd*, 79 N.Y.2d 373 (1992). SEQRA requires that the lead agency describe and evaluate the range of reasonable alternatives. *Town of Dryden v. Tompkins Cnty. Bd. of Rep.*, 157 A.D.2d 316 (3d Dep't 1990) (*aff'd* 78 N.Y.2d 331 (1991)). When an agency decides to approve an action which is the subject of an EIS, it mst make an explicit finding that SEQRA has been complied with and that, consistent with social, economic, and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the EIS process are minimized or avoided. ECL § 8-0109(8). In approving an action, an agency must make a written finding that it has imposed whatever conditions are necessary to minimize or avoid all adverse environmental impacts revealed in the EIS. *Town of Henrietta v. NYSDEC*, 76 A.D.2d 215 (4th Dep't 1980). When, as here, a federal EIS is prepared under the National Environmental Policy Act, it can also serve the purpose of a SEQRA EIS, "provided that the Federal EIS is sufficient to make [SEQRA] findings." 6 N.Y.C.R.R. § 617.15(a).

**C. Respondents Failed to Address Significant Impacts in the EIS.**

Judicial intervention is appropriate where an agency renders a decision without having conducted a thorough review of all statements and relevant information. *See e.g. Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342 (4th Dep't 1999) (EIS would be set aside due to the board's failure to consider the clean-up of hazardous waste). *See also City of Glens Falls v. Board of Educ. of Glens Falls City School Dist.*, 88 A.D.2d 233 (3d Dep't 1982) (SEQRA determination properly annulled where agency failed to consider new construction); *Baker v. Village of Elmsford*, 70 A.D.3d 181 (2d Dep't 2009) (agency's review of potential adverse effects of discontinuance of village streets did not constitute a "hard look" where agency failed to assess their use during times of periodic flooding, and determination regarding adverse effects associated with existing traffic and flood patterns was conclusory).

Where a findings statement is unsupported by the evidence it should be annulled by the courts. *Falcon Group Limited Liability Co. v. Town/Village of Harrison Planning Bd.*, 131 A.D.3d 1237 (2d Dep't 2015) (annulling SEQRA determinations where agency based its conclusions, at least in part, on factual findings that were contradicted by scientific and technical analysis in the FEIS and which were not supported by empirical evidence, and where the board failed to give sufficient consideration to various alternative plans reviewed in the FEIS). In the case at bar, the EIS and SEQRA Findings contained in the ROD ignored or irrationally dismissed significant negative impacts.

**1. The FEIS Failed to Adequately Address Air Quality and GHG Impacts.**

The FEIS improperly ignored (and indeed erroneously disputed) the fact that the Project will result in an increase in GHG. The FEIS recognized that the Project will result in more miles travelled by cars. This, as well as independent traffic studies, support the conclusion that the Project will result in greater gas consumption and pollution. The Community Grid Alternative would result in additional truck miles, more truck emissions and more adverse impacts associated with freight movements on an annual basis, including:

- 1.76 million impacted truck trips
- 19.8 million additional truck miles traveled
- 3.04 million gallons of diesel fuel
- $32 million in trucking costs
- $500 thousand in monetized emission externalities from 20.5 million additional tons of hydrocarbons, $NO_X$ and fine particulate matter

*See* Pet. ¶ 72.

The ROD even acknowledges that visitors traveling from the south would travel five to six minutes longer, and there would be an overall addition of one to two minutes for every vehicle. Even if those delay estimates were not understated, it is not possible that air quality would improve, particularly given that traffic will increase over time. *See* ROD at 16.

Though the FEIS acknowledges that particulate matter would increase as a result of the Project, it failed to properly examine this issue or mitigate the many related adverse impacts, specifically declining to analyze or mitigate impacts related to increased traffic and therefore particulate matter in the Southside neighborhoods that are Environmental Justice communities with high minority populations and low incomes.[2] Nor was any quantitative air quality analysis

[2] Environmental Justice is the fair and meaningful treatment of all people, regardless of race, income, national origin, or color, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. *See* https://www.dec.ny.gov/public/333.html

performed for the impacts on the Southside neighborhood as a result of the 40,000 to 100,000 additional vehicles now driving at ground level on local City streets and idling and newly signalized intersections that previously drove on an elevated highway. Respondents also declined to perform a carbon monoxide study to assess CO impacts on neighborhood residents. These impacts are far too important to simply be hand waved away by NYSDOT. The concentration of this additional environmental harm in the Southside neighborhood also constitutes an environmental justice impact that the FEIS declined to review.

**2. The FEIS Failed to Adequately Address Traffic Impacts.**

Further, the traffic studies for the Project were entirely deficient. Initially, such studies only focused on impacts associated with north-south traffic as a result of the deletion of the 1.4 mile segment of I-81, but completely failed to evaluate the travel impacts and delays to the west, which will be forced to travel through towns such as Tully and Skaneateles. This would specifically impact, for instance, waste haulers bringing garbage from New York City to the Seneca Meadows landfill, which currently use I-81, and would result in those garbage trucks driving through local towns causing public nuisance issues not currently experienced since these trucks were confined to interstate highways. However, this impact was not considered in the FEIS.

The raw data used for the traffic analysis in the FEIS was also woefully out of date and therefore led to an arbitrary and erroneous conclusion by Respondents. The FEIS relied on old job statistics from 2009. Since 2009, the Syracuse area has experienced a large regional growth in the manufacturing, transportation and industrial warehousing sectors. Pet. ¶ 79. The FEIS therefore completely ignored the impact of numerous new developments, including the huge new Amazon development, which render the data used by Respondents completely inaccurate. Furthermore, it did not anticipate the newly announced multi-billion dollar Micron microchip plant planned for

the Town of Clay, which will result in "9,000 new high-paying Micron jobs with an average annual salary of over $100,000 and over 40,000 community jobs — and create thousands and thousands of prevailing wage construction jobs," resulting in huge changes in traffic patterns and volume in the Syracuse area.[3] NYSDOT also bewilderingly used an annual traffic growth projection of 0.3 percent based on 2013 base year data, eight years prior to release of the DEIS, and defended this assumption by simply assuming in conclusory fashion that there have not been significant traffic pattern changes in recent years. *See* DEIS at pages 5-18 to 5-19. However, actual data analyzed during the 19-year period between 1994 and 2013 on this segment of I-81 showed growth of over 51%, an average of 2.71 percent annually. Pet. ¶ 98.

Additionally, the traffic studies focused on morning and afternoon commuting hours, and did not evaluate excess traffic events such as concerts or Syracuse University football and basketball games at the JMA Wireless Dome, which already result in huge traffic and parking problems that would only be exacerbated and spread throughout neighborhoods by the Community Grid. Nor did they consider special events downtown like parades and festivals that close streets. Much like the flawed traffic analysis in the landmark Fourth Department SEQRA decision in *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222 (4th Dep't 1979), which also failed to properly consider environmental impacts related to the events at the Dome, the SEQRA Review by Respondents here was fundamentally flawed and must be annulled.

[3] *Hochul, Schumer, McMahon Announce: Micron is Coming to Onondaga County!*, available at https://www.governor.ny.gov/news/hochul-schumer-mcmahon-announce-micron-coming-onondaga-county-micron-will-invest-unprecedented. While the Micron project announcement post-dated the ROD, by a letter dated October 13, 2022, a copy of which is attached as Exhibit A, Petitioners requested that Respondents prepare a Supplemental EIS, as required when there is "a change in circumstances related to the project" that may result in "significant adverse environmental impacts not addressed or inadequately addressed in the EIS." 6 N.Y.C.R.R. § 617.9(a)(7)(i)(c). No response has yet been received from Respondents.

Further, where central aspects of a project are omitted in a DEIS, inclusion of those items in the FEIS does not remedy the defect. *Webster Associates v. Town of Webster*, 59 N.Y.2d 220 (1983). Here, the layout of the Project was drastically altered in the FEIS. North of Martin Luther King Jr. East ("MLK Jr. East"), the Project would pass beneath a new bridge that has to be constructed for the railroad, which would then return to street level at Van Buren Street where a roundabout would be installed. Residents of the Southside would be deprived of direct vehicular connection to the Hospital and academic facilities by the termination of MLK Jr. East, effectively replaced by the Project with only a pedestrian/bicycle path. This major reconfiguration of the Project was announced in the FEIS, without review in the DEIS and without public input or discussion of the resulting Environmental Justice and traffic impacts. No traffic information has been made available to support this highly questionable major aspect of the Project, which would have a major impact on the local Environmental Justice community.

**3. The FEIS Failed to Adequately Address Impacts to Ecology.**

NYSDOT selected the Community Grid Alternative, regardless of the fact that other alternatives, such as the Viaduct Alternative, pose much less risk to ecological resources such as threatened and endangered bat species. The Viaduct Alternative would only alter "305.0 acres of land for new transportation right-of-way, build noise barriers, and to provide sufficient area around the viaduct for construction. The majority of permanent land use change would occur adjacent to the I-81 and I-690 interchange." *See* FEIS at 6-465. In addition, a "total of 10.3 acres of tree removal would occur as part of the Viaduct Alternative." FEIS at 6-466. Furthermore, the Viaduct alternative poses no risk to the endangered Indiana bat, but only a risk to the threatened northern long-eared bat. *See* Table at FEIS 6-4-8-4. Upon information and belief, the Bridge Alternative would be similarly protective of ecological resources.

This is in stark contrast to the selected Community Grid Alternative, which the Respondents admit would "permanently affect 1,050 acres of ecological communities, comprising 771.4 acres of terrestrial cultural ecological communities, 69.4 acres of successional southern hardwood (including 5.7 acres in a roadcut cliff/slope community), 91.7 acres of successional old field, 42.9 acres of successional shrubland, 74.0 acres of floodplain forest, 0.89 acres of freshwater wetlands, [and] 0.07 acres of open surface waters." FEIS at 6-504; ROD at 18. In addition, a "total of 17.9 acres of permanent tree loss would result from the Community Grid Alternative." FEIS at 6-504. Most notably, the selected Project would impact the habitat of both the endangered Indiana bat and threatened Northern long-eared bat. *See* Table 6-4-8-6. If a private sector project were to cause all of these ecological impacts, it would be denied as environmentally harmful. However, this government-sponsored Project seems to get a "free pass" to adversely impact the habitat and ecological areas that serve as natural wetlands, prevent flooding and the destruction of trees and flora and fauna, which eliminate GHG, and take threatened and endangered species.

The Indiana bat is listed as Endangered at both the Federal and State levels. The northern long-eared bat is listed as Threatened at both the Federal and State levels.. In general, both species of bats hibernate in caves or mines in the winter and emerge in the spring to travel to a roosting location. In addition, both species of bats have been documented roosting under bridges. As part of the review for the Project, a wildlife biologist conducted surveys intermittently between 2016 and 2021. According to the wildlife surveys and literature review, the NYSDOT determined that the Indiana and northern long-eared bats, with two exceptions, have the potential to occur in the same study areas. Both species of bats have the potential to occur in the I-481 South Study Area because the woodland fragments bordering the east and west portions of the I-481 South Study Area represent suitable roosting habitat.

The I-481 East Study Area is the closest summer habitat that is most suitable for both bats is the woodland area east of I-481 and south of I-90, the New York State Thruway. Further, suitable roost trees are likely abundant in this area and two utility rights-of-way intersecting the woodland may provide foraging corridors and commuting routes for both the Indiana and northern long-eared bats. In addition, the wooded area around Butternut Creek northeast of the CSX rail line in the I-481 East Study Area also has the potential to support both species of bats. Northern long-eared are identified as having potential in the Central Study Area. Lastly, as both bats have been documented roosting under bridges, all work on the existing bridges in the I-481 South and I-481 East Areas poses a threat to those species. The Project as currently designed poses a significant threat to these important ecological resources, and should not be permitted to proceed in complete disregard for their preservation.

**4. The FEIS Failed to Adequately Address Additional Impacts.**

Numerous other oversights in the FIES are detailed in the Petition, which will not be restated at length herein, but are incorporated. Respondents also declined to analyze the environmental impacts of the expected community degradation that will be experienced as a result of the extreme economic harm expected to be borne by the surrounding communities such as the Town of Salina, for which I-81 has served for the past 50 years as the vital economic backbone. Pet. ¶ 63. The Approvals should be annulled as a result of these material omissions.

**D. The FEIS Failed to Adequately Consider Alternatives.**

The analysis of alternatives has been called the "driving spirit" of the SEQRA process. *Citizens For Preservation of Windsor Terrace v. Smith*, 130 Misc.2d 967 (Sup. Ct. Kings Co. 1986). The "range of alternatives must include the no-action alternative," and "may also include, as appropriate, alternative: (a) sites; (b) technology; (c) scale or magnitude; (d) design; (e) timing;

(f) use; and (g) types of action." 6 N.Y.C.R.R. § 617.9(b)(5)(v). Under the "rule of reason," an agency need only consider a "reasonable range of alternatives to the specific project." *Town of Dryden*, 78 N.Y.2d at 333-34.

It is improper to generate an EIS which does not give sufficient consideration to alternatives. *Falcon Group Limited Liability Co.*, 131 A.D.3d at 1237. *See also Webster Associates*, 59 N.Y.2d a 220 (EIS improperly failed to discuss alternative proposal of competing developer for shopping mall). Here, a major substantive deficiency in the SEQRA Review of the Project was the failure of Respondents to fully analyze a reasonable range of alternatives in order to avoid or minimize adverse environmental impacts. Only the "No Build Alternative," and two actual Project Alternatives - a new Viaduct Alternative, and the selected Community Grid Alternative, were fully analyzed and presented in the DEIS for public comment. *See* ROD at 20. Given the monumental impact the Project will have on the Syracuse community, and its price tag exceeding $2 billion, presenting a mere two alternatives for public comment was not reasonable.

The Harriet Tubman Memorial Freedom Bridge Alternative presented in August 2021 would create far fewer negative environmental impacts, but was not meaningfully analyzed. The Tubman Bridge could be narrower than the existing Viaduct, could be designed with a 45-mph limit rather than the 60-mph limit utilized to analyze alternatives in the EIS, would create fewer air quality impacts because it would be higher in elevation (and further away from the population), and would be a beautiful new amenity with urban parkland underneath. While the Project is projected to take six years to implement, the Bridge Alternative, would take less time to implement and cost less money, and would avoid the numerous environmental impacts which Respondents failed to analyze or mitigate. Exacerbating this deficient analysis is the fact that the original ROD does not even mention the Bridge Alternative, which was arbitrarily discounted in a supplement

to the ROD after an analysis of a hypothetical bridge alternative which was inconsistent with the with actual proposed Bridge alternative. This clearly evinces the fact that Respondents had made up their minds before performing a perfunctory analysis of the Bridge Alternative.

Other alternatives were briefly discussed in the EIS but summarily dismissed with little or no meaningful analysis. *Id*. Some alternatives, such as the Viaduct Alternative, were burdened with unnecessary features and physical configurations which were not placed on the Community Grid alternative that arbitrarily and needlessly made them less desirable. Alternatives were irrationally rejected out-of-hand by "fatal flaw" screening if they were inconsistent with any one of certain predetermined objectives ("Project Objectives," see FEIS S-4) or Project Needs that appear designed specifically to result in recommending the Community Grid Alternative. This failure to analyze a reasonable range of more economically, technically, and environmentally feasible alternatives violated SEQRA. Accordingly, the Approvals should be annulled and Respondents should be required to meaningfully consider reasonable alternatives.

**E. Respondents Failed to Comply with the Substantive Requirement to Avoid or Minimize Environmental Impacts.**

Alternatives were summarily dismissed without regard to whether the alternative best avoided or minimized environmental impacts, even if sensitivity analysis revealed they only resulted in minor deviations from those Project Needs or Objectives. This was a clear affront to the substantive requirement of SEQRA that the lead agency:

> certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental effects to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

6 N.Y.C.R.R. § 617.11(d); *see also* ECL § 8-0109(8). This is the "teeth" of SEQRA, and the only provision which clearly takes it beyond a mere environmental full disclosure procedure, and requires substantive results, including mitigation measures. *See Town of Henrietta*, 76 A.D.2d at 227.

However, Respondents have chosen an Alternative that will result in huge environmental impacts, including increased GHG emissions, air pollution and traffic congestion in an Environmental Justice community, and destruction of woodlands and threatened and endangered species. Further, by disqualifying potential reasonable alternatives due to minor inconsistencies with predetermined "Project Objectives" or "Project Needs," resulting in the failure to choose an alternative that minimizes or avoids impacts to the maximum extent practicable, Respondents violated the basic mandate of SEQRA as set forth in ECL § 8-0109(8). *See Falcon Group Limited Liability Co*, 131 A.D.3d at 1237. By failing to "minimize adverse environmental effects to the maximum extent practicable," Respondents have violated the basic substantive tenets of SEQRA.

**F. SEQRA Review Was Impermissibly Segmented.**

SEQRA review of the Project was unlawfully segmented from SEQRA review of the redevelopment of the former I-81 site, as well as from anticipated major developments in the Syracuse area. Similarly, the SEQRA review for the Project was totally segmented from review of impacts on and related to as many as 250 sites potentially contaminated by petroleum or hazardous wastes. This segmentation is directly contrary to the requirements of SEQRA. The SEQRA regulations recognize that "[a]ctions commonly consist of a set of activities or steps," and provide that "considering only a part or segment of an action is contrary to the intent of SEQR." 6 N.Y.C.R.R. § 617.3(g)(1). "Segmentation," refers to dividing environmental review of an action in such a way that the various segments thereof are addressed as though they were independent

and unrelated activities. 6 N.Y.C.R.R. § 617.2(ag). New York courts have explicitly applied this requirement to an EIS, and have annulled EISs as inadequate where they improperly segmented related actions. *See e.g. Village of Westbury v. Dep. of Transp.*, 75 N.Y.2d 62 (1989); *City of Buffalo v. New York State Dep't of Envtl. Conservation*, 184 Misc. 2d 243 (Sup. Ct. Erie Co. 2000).

Segmentation is arbitrary and capricious conduct which is contrary to the intent of SEQRA. *Id*. Segmentation is prohibited in order to prevent a project with potentially significant environmental effects from being split into smaller projects to avoid more comprehensive review. *United Refining Company of Pennsylvania v. Town of Amherst*, 173 A.D.3d 1810 (4th Dep't 2019). Where an authorization is given by an agency subject to SEQRA (such as Respondents) that consists of impermissible segmentation, the authorization will be annulled by the courts. *Saratoga Springs Preservation Foundation v. Boff*, 110 A.D.3d 1326 (3d Dep't 2013); *Sun Co., Inc. (R & M) v. City of Syracuse Indus. Development Agency*, 209 A.D.2d 34 (4th Dep't 1995).

Here, the SEQRA Review of the Project was illegally segmented from environmental review of the redevelopment of 10 to 12.5 acres of land that would allegedly be created as a result of the Project. Rather, analysis was deferred to a "working group" that would develop plans that would conform to a future Land Use and Development Plan 2040 and the future ReZone Syracuse Master Plan. ROD § 10-3 at 22. Deferral of this analysis was also improper delegation of the role of the lead agency. *Penfield Panorama Area Community, Inc.*, 253 A.D.2d at 342 (4th Dep't 1999); *Coca-Cola Bottling v. Bd. of Estimate*, 72 N.Y.2d 674 (1988).

It is also of no import that the further development plans are not yet concrete. *See Riverso v. Rockland Co. Solid Waste Mgmt. Auth.*, 96 A.D.3d 764, 765-66 (2d Dep't 2012) (finding improper segmentation where later development was not reviewed because respondent claimed to have no "concrete plans" for such development). Here, the SEQRA Review should have analyzed the impact of plans for affordable housing in the I-81 area, which Respondents suggest may include the surplus land that will result from the Project. Syracuse Housing Authority (SHA) has worked in concert with residents engaged in a multi-year visioning process to create the East Adams Street Neighborhood Transformation Plan, and then issued a Request for Proposals (RFP) to redevelop Pioneer Homes. Pet. ¶ 155. A developer was selected in 2019, but has failed to proceed with the approximately $500 million revitalization of the East Adams Street neighborhood, a 27-block, area that includes more than 1,037 units of public housing and several privately-owned properties next to the Viaduct. Though no Master Plan has been approved by the City of Syracuse to define the future uses of the land, the proposed redevelopment must be analyzed with the Project. Failing that, the Respondents clearly engaged in improper segmentation. *See e.g. MYC New York Marina, L.L.C. v. Town Bd. of East Hampton*, 17 Misc. 3d 751 (Sup. Ct. Suffolk Co. 2007) (where town board did not consider related application pending before planning board, SEQRA review of just the application before the town board involved unlawful segmentation and would be annulled).

Likewise, the segmentation of analysis of the contaminated sites was improper. These sites will first need to first be investigated before any demolition or excavation occurs, and then a remedial plan must be developed and approved by the New York State Department of Environmental Conservation ("NYSDEC") pursuant to ECL Article 27 governing hazardous wastes, or the Oil Spill Act (Navigation Law Article 12). The FEIS (at 5-565) recommends landfilling contaminated materials, but that is inconsistent with the Statewide Hazardous Waste

Management Practices Hierarchy under ECL § 27-0105, pursuant to which landfilling is the strategy of last resort, as well as the NYSDEC Green Remediation Policy (DER-31), and may also violate hazardous waste regulations that prohibit landfilling of certain wastes. None of this was discussed in the EIS. The EIS should have studied the contaminated sites, and proposed remedial measures, rather than punting the analysis to a later date and letting the lead agency defer its analysis to NYSDEC. In *Penfield Panorama Area Community, Inc.*, 253 A.D.2d at 342, the Fourth Department set aside an EIS when remediation of a contaminated portion of a development site was deferred for later review by NYSDEC. *See also Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678 (4th Dep't 2017). The same result should follow here.

**G. Respondents Failed to Assess Cumulative Impacts.**

Regulations implementing SEQRA require agencies to consider two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the governing regulatory criteria; and require the lead agency to consider reasonably related cumulative effects, including other simultaneous or subsequent actions which are included in any long-range plan of which the action under consideration is a part, likely to be undertaken as a result thereof, or dependent thereon. 6 NYCRR § 617.7(c)(1)-(c)(2). The lead agency must consider reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are (1) included in any long-range plan of which the action under consideration is part, (2) likely to be undertaken as a result thereof, or (3) dependent thereon. *Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven*, 80 N.Y.2d 500 (1992).

Here, Respondents failed to consider, *inter alia*, cumulative impacts of the Project related to the impact of the alleged "reconnection" of the Environmental Justice neighborhoods, impacts of redevelopment of the new land, and cumulative impacts of the economic, environmental, social and job equity impacts of the Project, growth-inducing impacts, as well as the new traffic patterns on the surrounding regional municipalities, the regional workforce, and interstate commerce. For example, the FEIS failed to assess the cumulative impacts of development likely to occur along the expanded I-481, including reconstructed interchanges where new development is likely to be induced.

Where there are other proposed or pending developments of a similar type before an agency, SEQRA requires analysis of the cumulative impact that other developments would have on the environment. *Cf. Schweichler v. Village of Caledonia*, 45 A.D.3d 1281 (4th Dep't 2007). A cumulative-impact study is mandated where there is an existing larger plan for the development of the area in question. *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359 (1986); *Iroquois Cent. School Dist. v. Zagata*, 241 A.D.2d 945 (4th Dep't 1997); *Teich v. Buchheit*, 221 A.D.2d 452 (2d Dep't 1995).

A similar situation was presented in *Village of Westbury*, 75 N.Y.2d at 62. There, NYSDOT was found to have violated SEQRA and its implementing regulations when it failed in its review of the reconstruction of an interchange and the widening of a parkway, to consider the environmental effects of both projects together, even though NYSDOT asserted that the two developments were intended to remedy different issues, since the purpose of both projects was broadly related to traffic congestion and the safety hazards resulting from it, and NYSDOT treated both projects in a unified fashion.

Further, it was error for Respondents to not consider other pending developments in the area when performing their traffic analysis. *See e.g. Save Pine Bush, Inc.*, 70 N.Y.2d at 193 (in granting application for zoning change to permit the development of a subsection of a city with special environmental significance, city failed to consider the potential cumulative environmental impact of other pending development projects, which constituted a violation of its obligations under SEQRA). It is immaterial that the various developments are being advanced by different entities. *Id.* (holding that cumulative impacts should have been analyzed despite the separate ownership of the various projects).

**POINT TWO**

**NYSDOT FAILED TO COMPLY WITH CLCPA § 7(2) AND PERFORM A PROPER GREENHOUSE GAS EMISSIONS AND MITIGATION ANALYSIS**

The Project will increase GHG by creating new adverse traffic-related impacts, including increased travel times, by forcing the majority of heavy vehicular traffic 12+ miles away onto I-481 to the east, and by increasing vehicle miles traveled ("VMT") by forcing more vehicles onto local roads traveling west and through the City of Syracuse and at slower speeds. The Respondents avoided a hard look at the GHG impacts of the Community Grid Alternative, which eliminates existing infrastructure that currently effectively moves vehicles by diverting large quantities of vehicles to City streets as well as suburban and rural roads, causing gridlock and increased fuel consumption resulting from extended travel times, which would result in increased GHG emissions, and thus conflicts with recently adopted Climate Leadership and Community Protection Act, which requires all state projects to reduce rather than increase GHG emissions.

Specifically, CLCPA § 7(2) requires that, in considering and issuing permits, licenses, and other administrative approvals and decisions, "all state agencies […] shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in Article 75 of the environmental conservation law," and where there are inconsistencies or interferences, the state agency shall "provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located." No such adequate justification was provided by NYSDOT with respect to CLCPA § 7(2) and no GHG mitigation measures were evaluated because NYSDOT inexplicably claimed there would be a reduction in GHG by speculating some vehicles will become electric while applying an outdated and exceedingly low future projected traffic growth rate. ROD at 17; FEIS at 6-4-5.

Given other conclusions in the SEQRA Review that there would be delays in the travel time for vehicles and fewer places to park downtown causing more environmental air quality and GHG exhaust impacts from slower traffic and vehicles idling (ROD at 10), it is not possible that GHG would be reduced because of the Project. Even if the speculative conclusion that there will be more electric vehicles to offset some of the GHG emission increases were taken at face value, the lack of analysis related to forcing trucks to travel traffic miles out of the way required a detailed analysis of these increase carbon costs, which was not performed. It should also be pointed out that using a future increase in the use of electric cars as a supposed mitigation measure is illogical. This shift in vehicle usage will either happen or not happen regardless of the development of the Project. To claim benefits associated with that shift as mitigation for the Project is disingenuous. If the State uses unrelated advances in environmental technology as support for environmentally unsustainable practices, the benefit of those technological advances will not actually be realized.

To justify their conclusion that the Community Grid in comparison to the No Build Alternative would decrease direct GHG emissions from 167,585 metric tons of $CO_2$ in 2026 to 123,402 metric tons of $CO_2$ in 2056, the Respondents rely on two competing factors: (1) there will be decreases in overall fleet-wide average emissions per vehicle-mile driven over time as engine technology and efficiency improve; (2) there will be minor increases in traffic volumes due to minimal growth in the area. This analysis purports that, "the Community Grid Alternative would shift some vehicles to different roadway types resulting in vehicle speed changes and would decrease overall VMT." *See* FEIS Section 6-4-5 (Energy and Climate Change Section) at 6-280.

This foundational premise, that pushing certain vehicles, likely high-volume tractor trailers, off current roads and adding additional mileage would lead to a decrease in GHG emissions is fundamentally flawed. Simply put, the Community Grid Alternative increases GHG emissions by tacking on mileage to the routes for "some vehicles," and an analysis of the additional miles that must be traveled was absent in GHG emissions calculation report.

In addition, as further analyzed below, the future projected traffic growth levels that were utilized in the GHG analysis was based on cherry-picked low growth rate data from the year 2013 instead of an analysis of available actual growth rate statistics and failing to take a hard look at the traffic increases that have been and will occur in this area as a result of recent new large industrial projects in the area.

Table 6-4-5-12
Operational GHG Emissions for the No Build and Community Grid Alternatives
(metric tons $CO_2e$ per year)

| Analysis Year | No Build Alternative | Community Grid Alternative | *Increment* |
|---|---|---|---|
| 2026 | 1,471,826 | 1,304,241 | *-167,585* |
| 2056 | 1,054,382 | 930,980 | *-123,402* |

When determining whether a government action has been decided in accordance with the CLCPA § 7(2), there are three primary evaluation criteria:

- First, the responsible agency must consider whether granting the permit, or action, will be inconsistent or interfere with the attainment of the Statewide GHG emission reduction goals established in ECL Article 75, and in making this determination the responsible agency cannot rely on speculative analysis unsupported by data. *Danskammer Energy LLC v. New York State Department of Environmental Conservation*, 208 Misc.3d 196 (Sup. Ct. Orange Co. 2022) (NYSDEC rejected new air permit based on speculative assumptions that renewable natural gas would be available in the future to replace fossil-fuel based natural gas). In order to be consistent and not interfere with the State's goals in ECL § 75-0107, the government action must work toward reducing GHGs statewide by 60% by 2030, and at least 85% by 2050.

- Second, if the government action may effectively increase Statewide GHG emission limits, the agency must provide a detailed statement of justification for the Project, notwithstanding the inconsistency. *Id* at 208.

- Third, in the event a sufficient justification has been provided, the agency must also identify alternatives or GHG mitigation measures for the Project. *Id.* at 208.

In *Danskammer,* the Supreme Court in Orange County held that NYSDEC had authority under CLCPA to deny a permit to expand a natural gas fired power energy plant when the permittee acknowledged an upfront carbon cost, but tried to justify it by speculating the total amount of carbon emissions could potentially be reduced by converting its fuel source in the future to a renewable natural gas. *Id* at 211. NYSDEC concluded that *Danskammer* had not established the feasibility of using renewable natural gas or hydrogen as a fuel. *Id.*

Similarly here, NYSDOT has failed to prove the feasibility of vehicle speed improvements as well as the supposed increase in engine efficiency to necessitate the report's carbon emission reduction analysis. Such speculative assumptions of carbon emissions reductions must be rejected when the SEQRA Review concluded there would be increased travel time for vehicles, which would cause more environmental air quality and GHG exhaust impacts. There is no data to support the presupposition that slower moving vehicles will reduce GHGs when they have to travel more miles to get to where they are going and stop a numerous new traffic lights idling in the process.

Second, the analysis in the FEIS and DEIS that GHG would be reduced is based on incorrect 2013 base year growth assumptions (DEIS at 5-18 to 5-19) using only an annual traffic growth rate of 0.3 percent even though the FEIS was completed 9 years later after the greater regional Syracuse area has experienced increased traffic growth. NYSDOT incorrectly claims that "the 2013 base year has been retained since the study area has not experienced significant travel pattern changes in recent years." NYSDOT intentionally ignores the substantial traffic growth occurring prior to its 2013 "base year" in the very segment of I-81 that it proposes to tear down.

Based on NYSDOT's own available on-line data, a 0.3 percent annual growth rate does not accurately represent either actual traffic growth rates in the two decades prior to 2013, or changes that have occurred more recently. The "Average Annual Daily Traffic" ("AADT") data available on-line from 1995, 1998, 2001, and 2014[4] for the I-81 Viaduct segment reveals that during the 19-year period between 1994 and 2014, traffic on this segment of I-81 grew over 51 percent, at an average of 2.71 percent annually not only 0.3 percent.

This already gathered and verifiable information runs directly contrary to statistics published in the DEIS. NYSDOT projects traffic at key locations in the study area through the year 2056 (43 years after its "base year") and inexplicitly states that there will be virtually a zero-growth rate per year - actually just 0.23 percent per year. *See* DEIS, Table 5-7. Applying simple mathematics to the NYSDOT data, the DEIS projects an increase in the PM Peak Hour traffic on the existing Viaduct in the "no-build" scenario over the next 30+ years of just 646 total vehicles, or just 6.8 percent over that time period. NYSDOT fails to explain why or how future growth would be just 1/12$^{th}$ of the actually experienced growth in recent years. Again, performing simple

[4] See https://www.dot.ny.gov/divisions/engineering/technical-services/highway-data-services/traffic-data

math utilizing the NYSDOT's own on-line AADT data, if the agency used the 2.7 percent per year figure instead of its artificially suppressed 0.3 percent number, I-81 traffic on the Viaduct would grow during that period to approximately 11,600 vehicles in the PM Peak Hour by 2056, for a total of 122.9 percent compared to 6.8 percent.

Respondents also failed to take current and relevant new large projects along the I-81 traffic corridor into consideration that will clearly impact future traffic growth projections. For example, a new Amazon warehouse facility recently opened, and there have been plans announced for an $85 million Syracuse Aquarium at the Syracuse Inner Harbor off l- 81, but none of these projects were considered in the EIS, and the Micron project was not yet analyzed. With these new projects, that must rely on I-81 for their employees commute and for their shipping needs, traffic growth will likely be even higher than 2.7 percent per year and certainly not only 0.23 or 0.3 percent as the DEIS and FEIS estimated. In sum, by utilizing exceedingly low traffic growth rates and a speculative assumption that a large number of vehicles will be electric in the future, NYSDOT manipulated the GHG analysis to show a reduction instead of an increase in GHG emissions.

Finally, in subsection "6-4-5.5.5 Environmental Consequences of the Community Grid Alternative" of the Energy and Climate Change section of the FEIS, the GHG analysis omitted a calculation of indirect emissions from producing and delivering fuel ("well to pump"), which also contribute to total GHG emissions, since these emissions were arbitrarily determined not to be relevant to the Project. (FEIS at 6-279). However, the report indicates that well-to-pump emissions are estimated to add 25% to the GHG emissions from gasoline and 27% to diesel. Table 6-4-5-13 (FEIS at 6-280).

Operational Energy Use for the No Build and Community Grid Alternatives
(million Btu per year)

| Analysis Year | No Build Alternative | Community Grid Alternative | *Increment* |
|---|---|---|---|
| 2026 | 19,306,030 | 17,122,861 | *-2,183,169* |
| 2056 | 12,808,948 | 12,205,516 | *-1,603,432* |

The Trucking Association of New York ("TANY") submitted comments on the DEIS and FEIS which expressed their "significant concerns" about the Community Grid stating this Alternative would result in additional truck miles, on the scale of an estimated 19.8 million miles of additional travel. *See* Letter from TANY to Respondent Frechette and FHWA dated October 14, 2021, at 4 (included at FEIS Appendix M-6, Letters S-SMTC through Z Part 7, at page 451). TANY concluded the Community Grid change will consume an additional 3.04 million gallons of diesel fuel and cost $500,000.00 in monetized emission externalities from 20.5 million additional tons of hydrocarbons, $NO_x$ and particulate matter. *Id*.

In addition to a flawed GHG reduction analysis, NYSDOT failed to properly analyze alternatives, such as the Harriett Tubman Bridge Alternative, that actually would reduce GHG emissions. Failure to evaluate a proper range of alternatives that would actually mitigate GHG emissions compare to the current I-81 related GHG emission is a violation of the agency's required obligations under CLCPA § 7(2). Upon review, NYSDOT must follow the factors set forth in determining whether a government action is properly in accordance with the CLCPA, particularly that it will not be inconsistent and not interfere with the State's goal of reducing GHG emissions.

Moreover, CLCPA § 8 requires NYSDOT to "promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law." To date, the same agency which failed to perform a proper GHG emissions analysis has illegally failed to promulgate regulations to contribute towards the required goals of achieving mandated emission reduction limits as required under CLCPA.

The Project is also in violation of CLCPA § 7(3) by placing a disproportionate burden on disadvantaged communities. Petitioner Charles Garland has in fact filed several Civil Rights complaints that the very disadvantaged inner-city communities this Project has been touted to benefit will be in fact be burdened by traffic-jammed streets with 13 to 20 new traffic lights, gridlock during rush hours while children are walking to or from school, increased air pollution from vehicle exhaust, brake and tire wear, increased noise, and increased vehicular, pedestrian and bicyclist injuries and deaths. Petition ¶ 163. These deficiencies warrant reversal of the Approvals.

## POINT THREE

## RESPONDENTS VIOLATED THE SMART GROWTH ACT

### A. Petitioner Towns Have a Right of Action Against NYSDOT Under the New York State Smart Growth Public Infrastructure Policy Act.

#### 1. Private Rights of Action Exclude Municipalities.

Petitioner Towns of Salina, DeWitt and Tully have a right of action under the Smart Growth Act. The use of the phrase "private action" illustrates the legislative intent not to address municipalities. The relevant provision of the Smart Growth Act is as follows:

> Nothing contained in this article or in the administration or application hereof shall be construed to create *any private right of action* on the part of any *person, firm or corporation* against the state of New York or any state infrastructure agency as defined in subdivision two of section 6-0103 of this article.

ECL § 6-0111 [emphasis added]. Obviously, the plain meaning of the words of the statute is not referring to municipalities, as municipalities are not "private" entities. Case law also supports this distinction in its interpretation of New York laws. In a case by a private citizen against several New York City entities under General Business Law § 349, the Kings County Supreme Court held that individual plaintiffs had:

> failed to plead a claim pursuant to a statute that gives them a private right of action against the City or the Mayor. General Business Law § 349 authorizes a claim for deceptive business practices only against a 'person, firm, corporation or association,' and does not apply to a municipality or its agents performing governmental functions, as here[.]

*Downing v. New York City Hous. Auth.*, 64 Misc. 3d 1218(A) (Sup. Ct. Kings Co. 2019) (internal citation removed). Although in *Downing*, the statute authorizes who a cause of action can be brought against, in contrast to the Smart Growth Act which limits who can bring an action, this case illustrates the private/public distinction between the Towns which are party to this proceeding and a typical private individual.

In addition, canons of statutory construction also support Petitioners' position that municipalities are not barred from bringing a claim under the statute. Where a statute is drafted such that certain private entities are barred from bringing an action, we must draw an inference that what entities were not included, were intended to be excluded. The maxim "*expressio unius est exclusio alterius"* is applied "so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." McKinney's *Statutes* § 240. Where a statute is drafted such that certain private entities are barred from bringing an action, we must draw an inference that what entities were not included, were intended to be excluded. Here, the drafters of the bill specifically included persons, corporations, and firms from bringing a private action. Therefore, the exclusion of municipalities or other governmental bodies was intentional. This is further supported by the plain language of the text.

**2. A CPLR Article 78 Proceeding is Still Permitted.**

Regardless of the above, Petitioners are still permitted to file this proceeding pursuant to CPLR Article 78 to review the consistency of the Project and the Approvals with the Smart Growth Act. This was specifically recognized by the Metropolitan Transit Authority when commenting on the proposed Smart Growth Act in July 2010, where it requested that the legislature amend the bill to not only exclude a private right of action, but also to clarify that the Smart Growth Act "does not authorize any special proceeding under CPLR Article 78." *See* New York Bill Jacket, 2010 A.B. 8011, Ch. 433 at 40-41. As the legislature declined to follow this recommendation, it stands to reason that an inconsistency with the Smart Growth Act may be fairly reviewed in a CPLR Article 78 proceeding.

**B. The Project Is Inconsistent with the Smart Growth Act's Criteria for a Public Infrastructure Project.**

Once it is established that Petitioners may bring a claim of whichever type to enforce the Smart Growth Act, it should then be concluded that NYSDOT's determination that the current version of the project is consistent with the Smart Growth Criteria is incorrect. The Smart Growth Act states:

> In addition to meeting other criteria and requirements of law governing approval, development, financing and state aid for the construction of new or expanded public infrastructure or the reconstruction thereof, no state infrastructure agency shall approve, undertake, support or finance a public infrastructure project, including providing grants, awards, loans or assistance programs, unless, to the extent practicable, it is consistent with the relevant criteria specified in subdivision two of this section.

ECL § 6-0107(1). Respondents violated the Smart Growth Act because the Project would be inconsistent with the state smart growth public infrastructure criteria set forth in ECL § 6-0107(2).

The Project is the antithesis of "Smart Growth." The Community Grid involves directing traffic to the suburbs by diverting it from the center of the City, encouraging development on the outskirts, contrary to ECL § 6-0107(2)(b), and creating traffic jams and air pollution in Environmental Justice communities while increasing GHG emissions. Further the Smart Growth findings were conclusory, and failed to fully evaluate the necessary criteria.

Smart Grown Act criteria (2)(a) directs NYSDOT to "advance projects for the use, maintenance or improvement of existing infrastructure." ECL § 6-0107(2)(a). The selected Community Grid project would not advance "the use, maintenance or improvement of existing infrastructure," but rather would demolish the Viaduct. However, there were unselected alternatives would not demolish the existing infrastructure, but would rather use, maintain, and improve upon the infrastructure, not just in the City, but also in the surrounding Towns.

Smart Grown Act criteria (2)(d) directs NYSDOT "to protect, preserve and enhance the state's resources, including agricultural land, forests, surface and groundwater, air quality, recreation and open space, scenic areas, and significant historic and archeological resources." ECL § 6-0107(2)(d). Petitioners Town of DeWitt and Town of Salina are subject to loss of forests/agricultural lands/open spaces subject to the proposed Project. Further ecological harm is detailed in Point One(C)(3) above. Therefore, the Project would be inconsistent with criteria (2)(d).

The Project would also fail to foster affordable housing, contrary to ECL § 6-0107(2)(e). Although the highway project is technically separated from the affordable housing goals and the reconstruction of Pioneer Homes, much of the support for the demolition is dependent on the promise of affordable housing to replace the Viaduct. No binding commitment to meet this goal has been made by any Respondent. Approval of demolition is not smart growth if there is no definite plan for the future. Additionally, the Project fails to foster reduction of GHG generated

in the Syracuse community, contrary to ECL § 6-0107(2)(j). As detailed in Point Two above, GHG will not be reduced by this Project, and Respondents' conclusory determination to the contrary is the definition of arbitrary and capricious conduct.

The Project would also be inconsistent with the criteria that public infrastructure projects should "coordinate between state and local government and intermunicipal and regional planning." ECL § 6-0107(2)(g). Here, the concerns of the Towns have been essentially entirely ignored by the Respondents. Based on the above considerations, the Town Petitioners request that the Court annul the Approvals for inconsistency with the Smart Growth Act.

## POINT FOUR

## THE RESPONDENTS VIOLATED THE GREEN AMENDMENT WHICH REQUIRES GOVERNMENTAL DECISIONS TO ACCOUNT FOR A HEALTHFUL ENVIRONMENT

The Legislature of New York and its citizens have, through careful deliberation, chosen to amend the State Constitution to enact a Green Amendment, and place it within the Bill of Rights, which now vests the State with the affirmative duty to ensure, "each person shall have a right to clean air and water, and a healthful environment." New York Constitution Art. 1 § 19. The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting). The Framers added the Bill of Rights to enshrine those constitutional guarantees which experience indicated were indispensable to a free society. *Id.* The same is true about the New York Bill of Rights. *SHAD All. v. Smith Haven Mall*, 66 N.Y.2d 496 (1985). The Green Amendment now endows an indispensable right owed to the People to clean air and a healthful environment. Respondents, however, in choosing the Community Grid and failing to properly analyze its substantial adverse environmental impacts, have violated the Green Amendment rights of Petitioners and of the Syracuse community.

The Green Amendment functions, in one fashion, to provide for heightened scrutiny of governmental decisionmaking. As Assemblymember Phara Forrest made clear during the Assembly debate on its passage, the Green Amendment

> sets the expectation for all citizens, corporations, government agencies, that the environment should be safe…The expectation and trust that everyone is held accountable, that the air is safe and clean, and that you should expect that the air that you're breathing will not trigger asthma, COPD or anything else.

*Assembly Debate on the Green Amendment* (2/8/2021, Page 65).

Nevertheless, the Respondents have admitted that they failed to perform any air quality impact analysis related to this monumental Project, which will place a project 44,000 additional vehicles on local City streets in an already disadvantaged Environmental Justice community. As a result of the new constitutional right to clean air, this Petition raises novel legal issues, as a matter of first impression for this Court. However, it should be obvious that for a project so significant in terms of its impact on air quality that proper analysis of increased vehicular traffic on local streets should have been performed. If the Green Amendment was found not to be self-executing, the provision would be a paper tiger with little, if any, independent legal force, and not worth the major effort it took to amend the Constitution, which involved approval by two successive Legislatures and an affirmative vote by over 70% of New York voters. *Tonis v. Bd. of Regents of Univ. of State of N.Y.*, 295 N.Y. 286, 293 (1946) ("It is one of the accepted canons of construction that statutes must be read so that each word will have a meaning, and not so read that one word will cancel out and render meaningless another"). By the plain meaning of its very simple terms, the Green Amendment allows the People of the State of New York the right to be free from unclean air and water and an unhealthful environment. Those rights would be meaningless if they could not seek redress for violations.

The Green Amendment has not created a new method for a private party to enter into the court system, because our judicial system already allowed citizens to sue when their constitutional rights, specifically rights embodied in the Bill of Rights, are infringed upon. *See Brown v. State*, 89 N.Y.2d 172 (1996). The Green Amendment merely created a new right: the right to clean air and a healthful environment. Respondents have no discretion on whether or not to comply with the State Constitution. *See D.J.C.V., v. USA*, 2022 WL 1912254, at *16 (S.D.N.Y. June 3, 2022) (the government '"lack discretion to violate the Constitution"') [citations omitted]; *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 655 (1969) (State agencies are obligated to conduct their activities in conformity with the Constitution).

Here, Respondents must ensure that the citizens being impacted by this Project have the right to clean air and a healthful environment. Because the decision on whether or not to comply with the Constitution is nondiscretionary, the Respondents must go back to the drawing board and perform the proper environmental air quality analysis to determine the actual environmental impacts that will occur by diverting 44,000 additional vehicles per day onto local streets that were previously traveling on an elevated highway.[5] Moreover, the lack of environmental impact analysis on the loss of wetlands, forested areas and other natural resources for over 1,000 acres in the suburbs of Syracuse, including the habitat of endangered and threatened bats, being eliminated as a result of this Project is also a violation of the Green Amendment for the citizens in those communities, which will not only experience a loss of habitat and natural resources, but increases in traffic and associated air quality impacts.

[5] Comments on why an air quality assessment is required are available at https://webapps.dot.ny.gov/system/files/documents/2022/06/i-81-fdrfeis-comment-submissions-nyclu.pdf.

Ultimately, these deficiencies reflect a lack of consideration for the environmental rights of the community. The Green Amendment, as a paradigm shift and recognition that the preservation of the environment has been heightened to a positive, constitutional guarantee necessitates a proper analysis and a decision, and therefore the ROD should be annulled, and Respondents instructed to provide an alternative that conforms with the Green Amendment by protecting and promoting a healthful environment.

## CONCLUSION

Based on the above, Petitioners respectfully request that this Court grant their Petition and grant such other and further relief as the Court deems just and proper.

Dated: Rochester, New York
October 24, 2022

s/Alan J. Knauf
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**WORD COUNT CERTIFICATION**

Pursuant to the Uniform Civil Rules for the Supreme Court & the County Court section 202.8-b(c), counsel hereby certifies that the word count for this Memorandum of Law, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, and signature block is **10,456**. In compliance with section 202.8-b(f), Petitioners have submitted a letter application for permission to exceed the limitations set forth in section 202.8-b(a).